# HUMAN RIGHTS FOR THE REAL WORLD

*Morgan Cloud*[*]

*No one is without Christianity, if we agree on what we mean by the word. It is every individual's individual code of behavior by means of which he makes himself a better human being than his nature wants him to be, if he followed his nature only. Whatever its symbol—cross or crescent or whatever—that symbol is man's reminder of his duty inside the human race.*

—William Faulkner[1]

## INTRODUCTION

At a time when some of our soldiers confess to torturing prisoners in their custody—and claim that they acted according to official policy[2]—Michael

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[*] Charles Howard Candler Professor of Law, Emory University. Thanks to Michael Perry, Ani Satz, Robert Schapiro, and Tim Terrell for their comments on an earlier draft of this Essay. Their generosity exemplifies the virtues of the wonderful faculty at the Emory University School of Law, a faculty that we celebrate in this Symposium. The errors in this Essay are mine.

[1] William Faulkner, *in* WRITERS AT WORK: THE PARIS REVIEW INTERVIEWS 132 (Malcolm Cowley ed., 1957).

[2] *See, e.g.*, *General: Some Abu Ghraib Abuse Was Torture; Latest Report Finds Ties to Military Intelligence Personnel*, CNN.COM, Aug. 26, 2004, *at* http://www.cnn.com/2004/US/08/25/abughraib.report/index.html. "There were some instances where torture was being used," Major General George Fay told reporters at a news conference about the investigation. *Id.* "We discovered serious misconduct and a loss of moral values," said General Paul Kern, in presenting an executive summary of the investigation report. *Id.*

More than a year after our military invasion of Iraq, it is uncontroverted that some members of the U.S. military violated international law and any meaningful definition of human rights by abusing prisoners in the Abu Ghraib prison. *See, e.g.*, John H. Cushman, Jr., *Outside Panel Faults Leaders of Pentagon for Prisoner Abuse*, N.Y. TIMES, Aug. 24, 2004, *available at* http://www.nytimes.com/2004/08/24/politics/24CND-ABUS.html?hp. Disputes persist, however, about whether this abuse resulted from official policy or from individual misconduct by rogue members of the military. *See, e.g.*, *Iraq Abuse "Before MP's Arrived"*, CNN.COM, Aug. 24, 2004, *at* http://www.cnn.com/2004/WORLD/europe/08/24/abughraib.germany/index.html:

> Baghdad's Abu Ghraib prison was "an environment of criminality and violations" of international law and army regulations before the military police officers charged in the prisoner abuse scandal arrived there, an attorney for one of the MPs said.
>
> Gary Meyer, Staff Sgt. Ivan "Chip" Frederick's attorney, told reporters after a hearing Tuesday that his client had agreed to plead guilty to some of the charges against him but added that it was clear the seven MPs currently facing courts-martial over the matter were not "rogue soldiers."

Perry's article[3] reminds us that human rights are not moral abstractions, they are the practical foundations of any decent society.[4] In his search for a nonreligious justification for the claim that every government should honor human rights, Perry ultimately addresses two of the most fundamental questions in legal theory—when and why do the rights of the individual trump the exercise of government power?[5]

The goal of justifying human rights is so important, the issues of legal theory are so fundamental, and the project is pursued with such rigor, that the reader inevitably roots for Perry to succeed. Unfortunately, the project founders on two of its essential elements.

The centerpiece of Perry's analysis is an idiosyncratic definition of "the idea of human rights."[6] Part I of this Essay examines two deficiencies in this definition that matter in the realm of the law. First, his definition is inconsistent with the terms of the fundamental international human rights documents upon which he purportedly relies. He encumbers the universal principle of the inherent dignity of every human being with an incoherent notion of the inviolability of this principle. This shortcoming produces the

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"What went on at Abu Ghraib was a complete breakdown of discipline and authority, and these are merely specific acts within a sea of a multitude of specific acts," Meyer said.

"And I think after today we will no longer hear that it was just seven rogue soldiers."

*Id.*

[3] Michael J. Perry, *The Morality of Human Rights: A Nonreligious Ground?*, 54 EMORY L.J. 97 (2005) [hereinafter Perry, *The Morality of Human Rights*]. In this Essay, I will frequently refer to Michael Perry as "Perry," a discomfiting if efficient way to refer to a friend. This Essay is based upon the advance copy of Perry's article that was provided to the author for use in preparing my Symposium comments. *See* Michael J. Perry, Draft, The Morality of Human Rights: A Nonreligious Ground? (2004) (unpublished manuscript on file with author) [hereinafter Perry, Draft]. Because of changes Perry has made to the published version of the article, occasionally references are made to the earlier draft.

[4] Perry, *The Morality of Human Rights*, *supra* note 3. These two examples are not intended to suggest that the United States is a unique, or even a paramount violator of human rights. They are intended to demonstrate that every country, even one like the United States, which often has been a leader in the international struggle for human rights, can commit acts that violate human rights and international legal norms. Egregious examples of violations of the most basic human rights are never in short supply. As I write this Essay, we are flooded with daily reports of genocide in Sudan, carnage between the Israelis and Palestinians, and mass murders by Islamic terrorists in Iraq, Russia, and elsewhere. *See also id.*, at 97–99 (recounting some of the atrocious examples of rights violations in the twentieth century).

[5] This emphasis was even more explicit in the Perry Draft, where Perry wrote that "I am mainly concerned . . . with human rights against government." Perry, Draft, *supra* note 3, at 7.

[6] *Id.* at 5–7. In the Perry draft, Perry relied upon the phrase: "the idea of human rights." In the published version of the article, Perry now frequently employs a different term, the "morality of human rights." It is unclear whether this signals a revision in his theory, or is simply a change in terminology.

second deficiency: Perry's definition is not useful in the "real world" where rights are violated and the struggle to protect them is waged.

In Part II, I question Perry's claims that only a religious justification can support his "idea of human rights" and that secular justifications are inadequate. This critique does not question the importance of religious justifications, but rather Perry's rejection of secular justifications. Once again, Perry's analysis derives from his definition of rights that rests upon a notion of "inviolability." The discussion in Part II sketches possible secular justifications for human rights derived from the ideas of two influential philosophers and concludes that satisfactory secular justifications are readily available for, and perhaps preferable to, any justification grounded in a particular religion. In this section of the Essay, I also raise a far less substantive concern. The specific religious tradition in which Perry works offers such ready justifications for the concept of human rights that I question whether the effort that he devotes to the task is enlightening or necessary. The justification for human rights is so self-evident in the Christian tradition Perry applies that an elaborate exegesis of that justification detracts from the more important task—crafting analyses that will promote human rights "on the ground," where those rights are violated.

## I. A USEFUL DEFINITION OF HUMAN RIGHTS

Perry's endeavor to construct a religious justification for human rights ultimately rests upon the claim that each human being *has inherent dignity and is therefore inviolable.*[7] The first proposition, that every person has inherent dignity, is conventional doctrine in international human rights law. Each of the three fundamental international human rights documents—the Universal Declaration of Human Rights ("Universal Declaration"), the International Covenant on Civil and Political Rights ("Covenant on Civil and Political Rights"), and the International Covenant on Economic, Social, and Cultural

[7] This specific description of Perry's thesis was of necessity based upon the text of the Perry Draft. Perry has edited some of the text, but the fundamental thesis appears to remain unchanged. Consider the following passage from the advance version of his article:

> According to the idea of human rights, as it has emerged in the period since the end of World War II, each and every human being—each and every member of the species homo sapiens—is *inviolable*, because each and every human being has *inherent dignity*. (At least, each and every *born* human being, or each and every human being *beyond a certain stage of fetal development*, has inherent dignity and is therefore inviolable.)

Perry, Draft, *supra* note 3, at 5 (emphasis in original).

Rights ("Covenant on Economic and Social Rights")[8]—embraces this proposition.

For example, the Preamble to the Universal Declaration emphasizes "the inherent dignity . . . of all members of the human family,"[9] and Article I proclaims that "[a]ll human beings are born free and equal in dignity and rights . . . ."[10] Similarly, the texts of both of the International Covenants contain multiple references to the inherent dignity of every human.[11]

None of these documents, however, takes the leap of logic upon which Perry attempts to ground his analysis: that every human being has inherent dignity *and therefore is inviolable.* The two propositions are not inevitably linked. Indeed, Perry's reliance upon these fundamental texts only emphasizes that his stylized definition is inconsistent with the body of international law upon which he relies. When we consider common definitions of the word violate—"To break or disregard (a law or promise, for example) . . . . To do harm to (property or qualities considered sacred); desecrate or defile"[12]—it is easy to understand why international human rights law does not take the unnecessary definitional leap that is essential to Perry's analysis.[13] Instead, the fundamental documents of international human rights emphasize that rights are implemented by adherence to the rule of law and the practical pursuit of social, political, and economic justice.

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[8] The term "International Bill of Rights" refers to these three documents collectively. *See* Perry, *The Morality of Human Rights*, *supra* note 3, at 101 n.15 (citing the Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., Res., at 71, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, Mar. 23, 1976, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171; International Covenant on Economic, Social, and Cultural Rights, Jan. 3, 1976, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3); *see also infra* notes 9–10 and accompanying text.

[9] Universal Declaration of Human Rights, *supra* note 8, at 71.

[10] *Id.* at 72.

[11] International Covenant on Civil and Political Rights, *supra* note 8, at 52; International Covenant on Economic, Social, and Cultural Rights, *supra* note 8, at 49.

[12] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1350 (3d ed. 1992).

[13] Perry cited definitions taken from the Oxford English Dictionary: "To say that all human beings are inviolable is to say . . . that they are 'not to be violated; not liable or allowed to suffer violence; to be kept sacredly free from profanation, infraction, or assault.'" Perry, Draft, *supra* note 3, at 7 (internal citations omitted).

The Universal Declaration urges "that human rights should be protected by the rule of law."[14] The Covenant on Civil and Political Rights requires that its signatories "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy" and that a "person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy."[15]

The invocation of the rule of law suggests that, in practice, protection of fundamental rights cannot be measured against some unattainable and absolute standard of inviolability,[16] but instead must be tested against international and domestic norms of justice, which invariably differ in their procedures, substantive rules, and permissible sanctions.[17] According equal treatment to each person under the guidance of substantive and procedural justice is itself an ambitious goal that has yet to be universally achieved. The non-absolutist reliance upon the rule of law seems inevitable, in part because even the most rights-oriented systems of justice operating in the "real world" frequently "violate" rights declared as fundamental under international law.

No right is more fundamental than the right to life.[18] If a person has a right to life, surely that right has been violated—that is broken, harmed, or disregarded—if a nation executes him. If a person has a right to liberty,[19]

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[14] Universal Declaration of Human Rights, *supra* note 8, at 71.

[15] International Covenant on Civil and Political Rights, *supra* note 8, at 52.

[16] Perry's initial commitment to an apparently inflexible concept of human rights was emphasized by his repeated statements of his thesis:

> Again, the claim that every human being is inviolable is the claim that every human being is "not to be violated; not liable or allowed to suffer violence; to be kept sacredly free from profanation, infraction, or assault." As I said, this is equivalent to the claim that no one should either violate any human being or tolerate others doing so . . . .

Perry, Draft, *supra* note 3, at 8.

[17] Even when Perry attempted to incorporate flexibility into his absolutist definition, the result offered little guidance for decision making or for action:

> We should do *what we can, all things considered*, to prevent others from violating any human being. By declining to do *what we can, all things considered*, to keep her "sacredly free from profanation, infraction, or assault," we fail to respect her inviolability—her "not-to-be-violatedness"—and thereby become complicit in violating her.

*Id.* at 7 (emphasis added).

[18] *See, e.g.*, Universal Declaration of Human Rights, *supra* note 8, at 71 ("Everyone has the right to life, liberty and security of person.").

[19] *Id.*

surely that right is violated if a nation imprisons him—especially for lengthy periods of time and under harsh conditions. Yet many nations execute some people convicted of crimes, and every modern nation state imprisons criminals. The concept of human rights does not demand that the right to liberty never can be transgressed. It demands instead that the rule of law be followed before punishment is imposed. If the accused receives substantive and procedural justice, then these "violations" comport with the concept of human rights embodied in international law.[20]

The "rule of law" standard is essential for practical reasons. It simply would be impossible for nations to enforce their laws, particularly those criminalizing antisocial conduct, if they faced an absolute bar to punishments that broke or harmed the individual's right to life and liberty.

The impracticality of Perry's "inviolability" standard is apparent when we consider the recent debate in this country about a disturbing category of human rights violations: torture. Under international law, torture is treated as a particularly abhorrent violation of human rights. Not surprisingly, torture is expressly prohibited by the fundamental human rights documents.[21]

Nonetheless, some people who support human rights can imagine situations in which they would condone the use of torture without complying with the most basic concepts of the rule of law, concepts that we demand be enforced before we impose even minor legal punishments.[22] Indeed, the idea that governments can employ torture seems to defy the very essence of the concept of the rule of law. Yet, in the wake of the September 11, 2001, terrorist murders in this country, some (including high ranking officials of our government[23]) have concluded that torture is an acceptable technique to be used in the "war on terror."[24]

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[20] This does not suggest universal agreement about the substance of rights. Some human rights supporters oppose the imposition of the death penalty in any circumstance. Others oppose the length of prison sentences (for example, lengthy terms imposed for drug offenses in some jurisdictions in the United States).

[21] *See, e.g.*, Universal Declaration of Human Rights, *supra* note 8, at 73; International Covenant on Civil and Political Rights, *supra* note 8, at 52. The more recent Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 (1988), U.N.T.S. 85, which has been ratified by more than 120 nations, expressly prohibits torture.

[22] *See, e.g.*, Sanford Levinson, *"Precommitment" and "Postcommitment": The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013, 2016 (2003) (concluding that if these principles of international law were translated into "American constitutional discourse, not even the most compelling state interest can justify [torture]").

[23] The torture of wartime prisoners by our soldiers in the Abu Ghraib prison is a scandal of international proportions in part because it violates international laws, including the Geneva Conventions, which prohibit

A possible scenario: A terrorist group is prepared to detonate a nuclear bomb in a crowded city. The explosion will cause thousands, perhaps millions, of casualties. Authorities take into custody a man they suspect is a member of the terrorist group. Use of conventional interrogation techniques fails to produce a quick confession, which investigators believe is necessary because they fear the bombing is imminent.[25] Does the perceived emergency justify torturing the suspect to obtain the information needed to stop the murders?[26]

It is easy to imagine that even supporters of a strict human rights regime might conclude that torture is justified in these circumstances, and that this is a decision that could be made by executive branch or military officials involved directly in the investigation. In other words, torture could be committed without requiring an authorizing statute, a judicial hearing, formal charges, judicial review, or other common elements of a system bound by the rule of law. If government agents torture the suspect, surely his human rights are

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such mistreatment of prisoners of war. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135. Some of the efforts by members of the U.S. government to justify extreme methods of interrogation appear to be compatible with arguments in favor of using torture to prevent at least some acts of terrorism. *See, e.g.*, Memorandum from Jay S. Bybee, Assistant Attorney General, U.S. Department of Justice, Office of Legal Counsel, to Albert R. Gonzales, Counsel for the President (Aug. 1, 2002) (regarding the standards of interrogation under 18 U.S.C. § 2340–40A); David Johnston & James Risen, *Aides Say Memo Backed Coercion for Qaeda Cases*, N. Y. TIMES, June 27, 2004, at 1 ("An August 2002 memo by the Justice Department that concluded interrogators could use extreme techniques on detainees in the war on terror helped provide an after-the-fact legal basis for harsh procedures used by the C.I.A. on high-level leaders of Al Qaeda, according to current and former government officials."); *see also* Memorandum from John Yoo, Deputy Assistant General, and Robert J. Delahunty, U.S. Department of Justice, Office of Legal Counsel, to William J. Haynes II, General Counsel, Department of Defense (Jan. 9, 2002) (regarding the application of treaties and laws to al Qaeda and Taliban detainees).

[24] *See, e.g.*, Levinson, *supra* note 22, at 2020.

> [T]here is now, in the wake of the events of September 11, a serious discussion taking place in the United States and elsewhere—among both members of the general public and of the professional legal community—about the propriety of torture as a means of ferreting out information about terrorism.

*Id.*; *see also* Richard A. Posner, *The Best Offense*, NEW REPUBLIC, Sept. 2, 2002, at 30 (asserting that "if the stakes are high enough, torture is permissible").

[25] The hypothetical obviously omits critical information. It fails to describe, for example, the facts the authorities already possess that establish that the terrorist group has a nuclear bomb, is prepared to use it, is capable of using it, that the attack is imminent, that the suspect is a member of the terrorist group, and that he actually possesses information that will permit law enforcers to prevent it.

[26] *See* ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 132–40 (2002) (discussing a similar hypothetical scenario). Dershowitz proposes a chilling twist on the notion of the rule of law, by proffering the idea that torture could be authorized by a "torture warrant" issued by a judge. *Id.* at 159–61.

violated, and they are violated in ways that defy norms of substantive and procedural justice.

If we conclude that torture of the one is justified to protect the lives of the many, we are rejecting the claim that each human being *has inherent dignity and is therefore inviolable*,[27] because we are accepting the violation of a fundamental human right.[28] And if I am correct in asserting that many would accept—no matter how reluctantly—torture in these circumstances, we must question the relevance of a standard that fails not only in such an extreme situation but also in the context of disputes commonly resolved under the framework of the rule of law.[29]

## II. SECULAR JUSTIFICATIONS

### A. *Can Secular Justifications Exist?*

Perry sets out "to sketch a religious defense of—a religious ground for—the claim that every human being has inherent dignity,"[30] and again he bases his analysis upon his confusing definition of "the idea of human rights": "In particular, I want to sketch a religious ground for [the] morality of human rights, which holds that every human being has inherent dignity and is therefore inviolable . . . ."[31] His frame of reference for this undertaking is specific.

Although readily acknowledging that other traditions (specifically Jewish and Islamic "materials") could supply a religious ground for his idea of human

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[27] *See, e.g.*, Levinson, *supra* note 22, at 2031–34 (rejecting absolutist prohibition against torture even in catastrophic circumstances and citing scholars ranging from Weber to Walzer in support of this argument).

[28] Supporters of this idea could also point to the concept underlying the defense of necessity, in which a defendant faced with a choice of evils can defend against charges that he broke the law by pointing to a greater harm avoided as a result. The necessity defense has been unavailable when the charge was homicide, which would seemingly not preclude its use for lesser crimes of violence, like torture. On the other hand, the traditional application of the defense would not seem to permit its use to justify torture. The defense traditionally has been accepted only when the source of the necessity was a force of nature, and has been spectacularly unsuccessful in United States' courts when the claim is one of "political" necessity. *See, e.g.*, United States v. Schoon, 971 F.2d 193 (9th Cir. 1991); WAYNE R. LAFAVE, CRIMINAL LAW § 10.1 (4th ed. 2003).

[29] Perry might counter that even if absolute rules must be broken in times of dire necessity, it is important "to express the absolutism, because of the value instantiated . . . ." Levinson, *supra* note 22, at 2042.

[30] Perry, *The Morality of Human Rights*, *supra* note 3, at 105.

[31] *Id.*

rights,[32] Perry limits his inquiry to the exposition of a Christian justification,[33] apparently because it is "the religious ground with which I am most familiar."[34] Fair enough. Christianity is one of the world's major religions. Many of the current threats to human rights arise in the context of Islamist terrorism that is being waged against nonbelievers, including Christians. The value of deploying this religious tradition to craft a justification for human rights in times of war, terror, and torture seems self-evident—if perhaps not too challenging.

Perry also undertakes the more controversial task of trying to demonstrate that a secular justification for his idea does not exist. Once again Perry's analysis rests upon his definition of "the idea of human rights." Perry initially frames the issue in a pair of questions. In Part I, I criticized the substance of his first question: "Can any nonreligious ground bear the weight of the claim, made by both Sarah and the International Bill of Rights, that every human being—even the Other—has inherent dignity and is therefore inviolable?"[35] I have already argued that the international documents of human rights law do not support this notion of inviolability, and I will spend no more time with the claim here, other than to re-assert that the definition is so flawed there is no reason to craft a nonreligious ground to bear the weight of this claim. As we shall see, this does not mean Perry is correct in asserting that a secular justification is unattainable.

His second question frames the issue in slightly different terms that do warrant additional discussion. Perry asks: "[I]s there anything one who is not a religious believer can say that is functionally equivalent to 'the unashamedly anthropomorphic' . . . claim that we are sacred because God loves us, his children." I believe that the answer to the question is obviously "yes," at least if we are sincere in approaching the issue in purely secular terms (i.e., without

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[32] *Id.* Perry asserts that the issue of human rights is essentially a moral question, then expands upon this notion: "[P]erhaps the most basic of all moral questions [is]: Which human beings are inviolable—all, some, or none?" *Id.* at 103. He then concedes that "the proposition that every human being has the same moral status is axiomatic for so many secular moralities that many secular moral philosophers have come to speak of 'the moral point of view' as the point of view according to which 'every person [has] some sort of equal status.'" *Id.* (alteration in original).

[33] The focus upon a Christian justification is apparent throughout the text. *See, e.g., id.* at 106 (quoting various passages from the *First Letter of John* as translated in the *New Jerusalem Bible*).

[34] *Id.* at 105.

[35] *Id.* at 125. Sarah is Perry's archetypal exponent of his thesis in this article.

reference to or reliance upon "God" and without limiting the inquiry to religious definitions of "love").[36]

Perry commences this discussion by asserting that only a religious believer can believe that people are "sacred." To support this claim, Perry quotes from the works of various writers. He begins by turning to the conclusions reached by an atheist:[37]

> "If we are not religious, we will often search for one of the inadequate expressions which are available to us to say what we hope will be a secular equivalent of [the religious articulation that all human beings, as beloved children of God, are sacred]." Examples of the hoped-for secular equivalent are that: "We may say that all human beings are inestimably precious, that they are ends in themselves, that they are owed unconditional respect, that they possess inalienable rights, and, of course, that they possess inalienable dignity." In Gaita's reluctant judgment, "these are ways of trying to say what we feel a need to say when we are estranged from the conceptual [i.e., religious] resources we need to say it."[38]

With all due respect, this writer's subjective conclusion need not be shared by anyone, whether a believer or nonbeliever in God. My own subjective conclusion is that what Perry offers as a laundry list of allegedly inadequate *secular* equivalents to religious claims about the sacredness of the human being—"that all human beings are inestimably precious, that they are ends in themselves, that they are owed unconditional respect, that they possess inalienable rights, and, of course, that they possess inalienable dignity"—are *secular* ideas that can be as deeply held and as compelling as any religious belief. Indeed this list of secular justifications is itself a powerful rebuttal to the claim that a religious view is necessarily more potent. One need not believe that God created people to believe that they are sacrosanct in precisely the *secular* terms Perry offers.

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[36] This is the approach taken, I think, by William Faulkner in the quotation that begins this Essay.

[37] Perry apparently means to suggest that we should give extra weight to "pro-religious" conclusions reached by an atheist. This type of argument by affiliation is not uncommon. For example, during the 2004 presidential campaign, Republican supporters of President George W. Bush asserted that statements made by Senator Zell Miller criticizing Democratic Party nominee John Kerry and supporting President Bush were particularly persuasive because Miller was a lifelong Democrat. *See, e.g.*, Carl Hulse, *Senator Who Crossed Party Line Is a Polarizing Figure After His Speech*, N.Y. TIMES, Sept. 3, 2004, at 10; Sheryl Gay Stolberg, *Disaffected Democrat Who Is Now a G.O.P. Dream*, N.Y. TIMES, Sept. 1, 2004, at 9.

[38] Perry, *The Morality of Human Rights*, *supra* note 3, at 125 (quoting RAIMOND GAITA, A COMMON HUMANITY: THINKING ABOUT LOVE AND TRUTH AND JUSTICE 23–24 (2000)) (alterations in original).

If pressed, I think Perry might agree with my subjective claims. This is not, of course, near the core of his argument, but at the margins, his text suggests this possibility. Perry offers quotes from various writers to support his conclusion that no secular justification exists for his theory of human rights.[39] Yet he also acknowledges that "[t]here is no single morality; there are many moralities in the world." Although some contend that morality cannot exist without religion,[40] I do not think Perry subscribes to this restrictive notion. He rejects, for example, the idea "that one cannot be good unless one believes in God. Many people who do not believe in God are good, even saintly, just as many people who believe in God . . . are not good."[41]

The reader certainly might ask what beliefs produce a *saintly* nonbeliever. Might it be that she believes that each person is sacred? And if she does not believe in God, yet believes each person is sacred, what is the source of the latter belief? Might the source be the *secular* laundry list that asserts "that all human beings are inestimably precious, that they are ends in themselves, that they are owed unconditional respect, that they possess inalienable rights, and, of course, that they possess inalienable dignity"?[42] I suggest that the question is the answer.

If I am correct, then Perry's own examples demonstrate the existence of secular beliefs that can lead a nonbeliever in God or religion to cherish the value of each human as profoundly as can the faithful of any religion. This does not diminish the value of, or the need for, religion-based justifications for

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[39] For example: "We cannot give up the Christian God—and the transcendence given other names in other faiths—and go on as before. We must give up Christian morality too. If the God-man is nothing more than an illusion, the same thing is true of the idea that every individual possesses incalculable worth." Perry, *The Morality of Human Rights*, *supra* note 3, at 125–26 (rearranging quoted passages from Glenn Tinder, *Can We Be Good Without God?: On the Political Meaning of Christianity*, ATLANTIC, Dec. 1989, at 69, 80) This is, of course, not a new thesis. *See, e.g.*, PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965). It is interesting that, despite Tinder's unequivocal position on the point, Perry immediately reinterprets the text in a way that apparently contradicts Tinder's meaning. Perry posits: "The point here is not that morality cannot survive the death of God." Perry, *The Morality of Human Rights*, *supra* note 3, at 126.

[40] *See generally* DEVLIN, *supra* note 39. Such a utilitarian view of the role of religion itself suggests the possibility that the writer's religious beliefs might be grounded less in religious faith than in a pragmatic concern about personal and social behavior. Consider the following statement: "This religion will be a powerful regulator of our actions, give us peace and tranquility within our own minds, and render us benevolent, useful and beneficial to others." WALTER ISAACSON, BENJAMIN FRANKLIN, AN AMERICAN LIFE 87–88 (2003) (quoting letter from Benjamin Franklin to John Franklin, May 1975); *see also id.* at 85–88 (discussing Franklin's version of deism and concluding that "[a]bove all, Franklin's beliefs were driven by pragmatism").

[41] Perry, *The Morality of Human Rights*, *supra* note 3, at 126.

[42] *Id.* at 125 (quoting GAITA, *supra* note 38, at 23–24).

"the idea of human rights." Rather it demonstrates the futility of the effort to exclude the possibility of a secular justification—even for a definition like Perry's that seems divorced from the realities of the secular world.[43]

William Faulkner's nonsectarian conception of Christianity, presented in the quotation that begins this Essay, is particularly apt. Faulkner described Christianity as each "individual's code of behavior by means of which he makes himself a better human being than his nature wants him to be, if he followed his nature only. Whatever its symbol—cross or crescent or whatever—that symbol is man's reminder of his duty inside the human race."[44] I agree. That symbol need not be religious in nature, and to posit that it must be strikes me not merely as hopelessly narrow but also as futile.

No intellectual exercise is easier than poking holes in another scholar's effort to construct a complex theory—particularly one asserting unprovable theological and philosophical concepts. It is one thing to criticize Perry's claim that no secular justification for his idea of human rights exists, it is another to try to construct such a justification. The final section of this Essay, presents very brief sketches of two possible sources of a secular justification for a meaningful definition of human rights.[45]

### *B. Secular Theories*

#### *1. An International Original Position*

John Rawls's theory of justice is the starting point.[46] The thesis is simple. Although Rawls developed a theory of *domestic* justice, its principal ideas can be extended to the international sphere. Others have reached the same conclusion.[47] Although Rawls himself has resisted the effort,[48] his interpreters have the better of the debate.

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[43] This is all the more striking because Perry's definition of "the idea of human rights"—inherent dignity . . . therefore inviolable—appears to be crafted to require a religious justification and to exclude any secular justification.

[44] Faulkner, *supra* note 1, at 132.

[45] Space limitations imposed upon this Symposium paper preclude a lengthy exploration of these arguments. This should not matter. Because my claim is that at least some of my conclusions are self-evident, lengthy exegesis should not be necessary. The reader will judge for herself whether these conclusions are, in fact, self-evident, or even persuasive.

[46] JOHN RAWLS, A THEORY OF JUSTICE 266–67 (rev. ed. 1999).

[47] *See, e.g.*, CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS (1999); THOMAS POGGE, WORLD POVERTY AND HUMAN RIGHTS (2002).

[48] JOHN RAWLS, THE LAW OF PEOPLES (1999).

Rawls's rejection of attempts to extrapolate from his domestic theory of justice rests, in part, upon the claim that international justice applies not to individuals but to "peoples," whose social, political, and civil principles may differ in some key respects from those espoused in liberal Western democracies.[49] To apply Rawls's theory of justice to these peoples, therefore, would diminish political diversity and impose our political and cultural values on peoples with different ideas about what constitutes a good society. A society can be decent and well-ordered yet adhere to values that diverge in important ways from the ideology of liberal Western democracies.[50] Therefore, the elements of Rawls's theory of liberal justice should not be extended to such societies.[51]

The leading proponents of expanding Rawls's theory of domestic justice into the realm of international human rights reach a different conclusion. They have

> generalized and extended the individualistic and egalitarian premises of liberal justice worked out in the domestic context—based on the interests of individual persons understood as free and equal—to offer "liberal cosmopolitan" accounts of international justice which generalize the sorts of individual rights claims and entitlements justified within societies such as the United States.[52]

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[49] *See* Stephen Macedo, *What Self-Governing Peoples Owe to One Another: Universalism, Diversity, and the Law of Peoples*, 72 FORDHAM L. REV. 1721, 1723–24 (2004).

[50] *See generally* RAWLS, *supra* note 48.

[51] Thomas Pogge offers a succinct, if critical, description of Rawls's position:

> Suppose a majority of the world's people wanted to design the global institutional order according to the criterion of social justice Rawls proposes for the domestic case, aiming for the global order that comes closest to fulfilling this criterion. Why should it be wrong for them to do this? This would be wrong, Rawls suggests, because it would impose a global order designed according to a liberal criterion of social justice upon decent peoples which may reject the normative individualism of this criterion as well as its emphasis on basic liberties. Rawls's own international theory is superior in this regard because, rejecting normative individualism, it accommodates decent peoples who are to be tolerated by liberals and welcomed as equal "members in good standing of the Society of Peoples."

Thomas W. Pogge, *The Incoherence Between Rawls's Theories of Justice*, 72 FORDHAM L. REV. 1739, 1756 (2004) (internal citations omitted).

[52] *See* Macedo, *supra* note 49, at 1723–24.

It is not difficult to construct a plausible extension of Rawls's theory of domestic justice to justify international human rights.[53] First, we can discard the thesis that extending Rawlsian theory somehow would derogate the rights of "peoples." Regardless of the political, economic, cultural, social, and religious values of a particular society, it is the individuals within that society who are the victims if human rights violations occur. In some situations—genocidal attacks on an identifiable group is the most obvious example—these harms are directed at individuals because of their group identity.[54] But it is the individuals, nonetheless, who are the direct victims. Whatever a particular society's dominant collective values may be,[55] individuals and minority groups within the society's political jurisdiction deserve to have these rights honored.[56] This idea is not peculiar to liberal Western democracies.

Second, with just a little tinkering, Rawls's well-known analytical fictions seem readily adaptable to the idea that all societies must recognize fundamental human rights. Rawls begins with a fictional "original position," in which theoretical rational actors, or "parties," must agree on the appropriate criterion of justice to be applied to the individual members of the society. These actors also must protect their clients' interests, but they are limited by a "veil of ignorance" that prevents them from knowing their clients' particular attributes, gifts, and liabilities.[57] Because they cannot know if their clients will be blessed or cursed in the social mix, these decisionmakers will opt for a society in which the most disadvantaged will be protected. Logically this leads

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[53] *See, e.g.*, Martha Nussbaum, *Women and the Law of Peoples*, 1 POL. PHIL. & ECON. 283, 286 (2002) ("[T]here are no obstacles to justifying the same norms, in the area of basic entitlements, for all the world's people.").

[54] Obvious problems arise when we try to apply Rawls's notion of "peoples" to real world situations. The ethnic conflicts in the former Yugoslavia during the late twentieth century illustrate these difficulties. We might ask, how can the notion of a people accommodate divergent and conflicting groups? For example, in the 1990s, how was one to incorporate Serbs, Croats, Albanians, Gypsies, and others within the definition of the Yugoslav people? We might also wonder about the geographic scope of the definition of a people. How are we to define the parameters of which individuals are encompassed by the concept of any "people"? For example, did the Serb people include those who lived in Croatia? Kosovo? Bosnia-Herzegovina? Chicago? The scope of these problems is apparent in the charges made by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia in the Indictments of Slobodan Milosevic and others. *See* United Nations, The Trial of Slobodan Milosevic (IT-02-54), Information for Representatives of the Media, *at* http://www.un.org/icty/milosevic/ (last visited Feb. 25, 2005).

[55] It is worth noting here that it can be difficult, in fact impossible, to lump everyone in a complex society into a simple notion of the "people." Ethnic and religious minorities may, in fact, need protection from the dominant value system. The conflicts among the Shiite, Sunni, and Kurdish "peoples" in Iraq are an illuminating example of great contemporary significance.

[56] Rawls surely would have agreed. *See* RAWLS, *supra* note 48, at 4.

[57] RAWLS, *supra* note 46, at 266–67.

us to a conception of distributive justice that extends economic and social benefits to the most disadvantaged.

This fictional construct can be adapted to justify a regime of international human rights. In an original position, limited by the veil of ignorance, we cannot know which societies, or which individuals or groups within a particular society, will become the victims of future atrocities. Therefore, any rational decisionmaker would opt for a regime of human rights to protect his client—whether it is a state or an individual—from such possible future harms.[58]

Rawls's rejection of such an approach is interesting but not binding upon those who would appropriate his theory of domestic justice for uses he does not embrace.[59] As Thomas Pogge has demonstrated, Rawls's domestic and international theories of justice are intellectually inconsistent. Pogge points out that:

> Rawls endorses normative individualism domestically but rejects it internationally. (Normative individualism is the view that, in settling moral questions, only the interests of individual human beings should count.) This is an asymmetry insofar as, in Rawls's domestic theory, the interests of collectives (e.g., associations) are given *no* independent weight—are considered only insofar as individuals choose and identify with them. In Rawls's international theory, by contrast, peoples are recognized as ultimate units of moral concern, that is, as collectives with interests that are *not* reducible to interests of individual persons . . . . Just as liberal societies are said to be concerned for "the well-being of their citizens," so decent

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[58] Rawls's own claims about these rational decision makers are designed to universalize his concepts, and seem to beg for extrapolation beyond the boundaries of domestic systems. He argues that

> when persons act on these principles [of justice] they are acting in accordance with principles that they would choose as rational and independent persons in an original position of equality. The principles of their actions do not depend upon social or natural contingencies, nor do they reflect the bias of the particulars of their plan of life or the aspirations that motivate them.

*Id.* at 252.

[59] The writer cannot demand, of course, that his readers will understand—or even agree with him—about the meaning of his work. Some writers accept the fact that they lose control of the ideas they deposit in the public domain. Others decry the reader's "misinterpretation" of the text or their failure to understand the author's intentions. *See, e.g.*, Faulkner, *supra* note 1, at 134:

> *Interviewer*: Some people say they can't understand your writing, even after they read it two or three times. What approach would you suggest for them?
>
> *Faulkner*: Read it four times.

> hierarchical societies are said to be committed to a common good idea of justice that involves a concern for "the human rights and the good of the people they represent." If both types of domestic regime manifest a concern for the interests of individuals, then why doesn't the international original position incorporate a concern for at least the jointly recognized individual interests . . . ?[60]

These jointly recognized individual interests unquestionably include the rights to life and liberty, the right to be free from torture, and other fundamental human rights. These are rights that transcend national borders and the peculiarities of domestic political systems. And one need not be a Christian—or a believer in any religion—to accept this claim. Anyone working from the "original position" would understand the universality and undeniability of this claim of rights. Despite himself, Rawls has offered a powerful basis for a secular justification for any international theory of human rights.

### 2. *The Golden Rule*

I will take even more liberties with Kant's theories and will extract only a handful of statements from his work.[61] Each of these passages contains elements that can be developed into a secular justification for human rights. The first is the categorical imperative to "act as if the maxim of our action were to become by our will a universal law of nature."[62] This categorical imperative is an inherent moral command residing in the human conscience. Of some relevance here, Rawls incorporates elements of Kantian philosophy into his theory of justice.[63] Rawls notes, for example, that "[t]he principles of justice are also categorical imperatives in Kant's sense. For by a categorical imperative Kant understands a principle of conduct that applies to a person in virtue of his nature as a free and equal rational being."[64]

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[60] *See, e.g.*, Pogge, *supra* note 51, at 1744–45 (emphasis in original) (citations omitted).

[61] The scope and complexity of Kant's work readily permit us to shop for discrete ideas. "You can buy from him [Kant] anything you want—freedom of the will and captivity of the will, idealism and a refutation of idealism, atheism and the good Lord." Paul Ree, *in* SCIENCE AND REVOLUTION 81 (Ernest Untermann ed., 1905), *quoted in* WILL DURANT, THE STORY OF PHILOSOPHY 315 (1933).

[62] IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 39 (Thomas Kingsmill Abbott trans., Longmans, Green & Co. 1927) (1873).

[63] *See* RAWLS, *supra* note 46, at 251–57.

[64] *Id.* at 253.

Rawls then explains that the "description of the original position is an attempt to interpret" Kant's conception that "moral legislation is to be agreed to under conditions that characterize men as free and equal rational beings."[65] Yet these Kantian rational beings would seem to be the ideal candidates for an international theory of human rights unbounded by national borders. Kant's principles were intended to be universal. "For Kant, the essence of *ius cosmopoliticum* was the thesis that all moral persons were members of a world-society in which they could potentially interact with one another."[66]

Kant also addressed the imperative to act morally in his jurisprudential writing. His list of juridical duties included:

> 1. HONESTE VIVE. "Live rightly." Juridical Rectitude, or Honour (*Honestas juridica*), consists in maintaining one's own worth as a man in relation to others. This Duty may be rendered by the proposition, "Do not make thyself a mere Means for the use of others, but be to them likewise an End." This duty will be explained in the next Formula as an Obligation arising out of the *Right* of Humanity in our own Person (*Lex justi*).
>
> 2. NEMINEM LAEDE. "Do Wrong to no one." This Formula may be rendered so as to mean, "Do no Wrong to any one, even if thou shouldst be under the necessity, in observing this Duty, to cease from all connection with others and to avoid all Society" (*Lex juridica*).[67]

One can embrace these commands without a belief in the Christian God—or any other God. Cleaved from a religious source, they embody perhaps the simplest yet clearest statement of a secular justification for human rights. As has been frequently noted, Kant articulates a sophisticated version of the Golden Rule. This is a statement of universal values that is relevant in all times, in all places, and in all political systems. No religious faith is required to recognize the power of these statements or to accept them as guiding principles of moral conduct. They express a core justification for human rights that defies the claim that a secular justification is unavailable.

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[65] *Id.* at 252; *see also id.* at 256 ("The original position may be viewed, then, as a procedural interpretation of Kant's conception of autonomy and the categorical imperative.").

[66] Seyla Benhabib, *The Law of Peoples, Distributive Justice, and Migrations*, 72 FORDHAM L. REV. 1761, 1763 (2004).

[67] IMMANUEL KANT, THE PHILOSOPHY OF LAW (W. Hastie trans., 1887), *reprinted in* READINGS IN JURISPRUDENCE 130 (Jerome Hall ed., Bobbs-Merrill Company, Inc. 1938).

### 3. *What Kind of Christian Would Oppose Human Rights?*

The reference to the Golden Rule brings me to my final point. As noted earlier, I believe that Perry's extensive development of a Christian justification for his idea of human rights deflects him from the more important task of developing human rights doctrines with utility in the real world. I reach this conclusion in part because such an elaborate intellectual exercise seems so unnecessary. It takes little effort to find these justifications in the fundamental Christian text. In the Gospel According to Matthew, for example, we find:

> When the Pharisees heard that he had silenced the Sadducees, they gathered together, and one of them [a scholar of the law] tested him by asking, "Teacher, which commandment in the law is the greatest?" He said to him, "You shall love the Lord, your God, with all your heart, with all your soul, and with all your mind. This is the greatest and the first commandment. The second is like it: You shall love your neighbor as yourself. The whole law and the Prophets depend on these two commandments."[68]

We need not worry that the reader of the New Testament is likely to miss this lesson, because it is repeated in other Gospels. Almost the identical story is found in the Gospel According to Mark:

> One of the scribes, when he came forward and heard them disputing and saw how well he had answered them, asked him, "Which is the first of all the commandments?" Jesus replied, "The first is this: 'Hear, O Israel! The Lord our God is Lord alone! You shall love the Lord your God with all your heart, with all your soul, with all your mind, and with all your strength.'" "The second is this: 'You shall love your neighbor as yourself.' There is no other commandment greater than these."[69]

The Gospel According to Luke offers a more succinct version of the universal admonition: "Do to others as you would have them to you."[70] By my lights, these three passages not only are consistent with the secular justifications discussed above, but they also are just about all that is needed to establish a Christian justification for human rights. I do not mean to be flippant about the value of an exegesis of a Christian justification for the notion of human rights. But Perry devotes about one-third of his lengthy paper to the

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[68] *Matthew* 23:34–40 (New American Bible 1995).

[69] *Mark* 12:28–31 (New American Bible 1995).

[70] *Luke* 6:31 (New American Bible 1995).

task of constructing a compassionate Christian justification for his idea of human rights.[71] I suggest that the effort could be better spent on other tasks.

Perry might respond that I should critique what he has done, rather than ask him to pursue a different project. He might be correct; perhaps a lengthy explanation of why Christianity and human rights fit together is needed. After all, over the centuries, some of the most wretched examples of human rights violations have been carried out under the banners of Islam, Christianity, and other religions. Perhaps we need a detailed explanation of why a compassionate Christian would embrace human rights. But I think not.

There is a more important point, one which is linked to Perry's definition of the "idea of human rights." We must remember that ultimately we rely on legal rules, legal systems, and the effort to enforce the rule of law to protect the rights of people throughout the world. Threats to rights occur in all nations, whatever their religious or secular value systems might be. Thus it is important that we not limit our ideas about human rights to a single moral or religious tradition. An advocate of human rights seemingly would be eager to embrace heterogeneous justifications for the idea that each human being has inherent worth that deserves protection. Of course, justifications grounded in religions—especially the world's major religions—are valuable. But secular justifications are necessary, and not only because many people believe in no religion. The conflict among believers of different faiths requires that if we are to achieve anything approaching a universal commitment to human rights, our theories must not be bound within the contents of any single system of belief. A Christian explanation is valuable. It is simply not enough.

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[71] The Christian tradition is so rich in ideas consistent with the contemporary idea of human rights that other ready sources are available. *See, e.g.*, LESZEK KOLAKOWSKI, MODERNITY ON ENDLESS TRIAL 214 (1990), *quoted in* Perry, *The Morality of Human Rights*, *supra* note 3, at 100 n.12 (positing that the contemporary concept of human rights arguably is "a modern version of natural law theory, whose origins we can trace back . . . to the Judaic and Christian sources of European Culture . . . . [T]he notion of the immutable rights of individuals goes back to the Christian belief in the autonomous status and irreplaceable value of the human personality.").