What are Human Rights? Grounding Human Rights in Dignity, Worth or Sacredness

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The jurisprudence of human rights is deeply troubled. This article explores how consensus on even some basic jurisprudential points remains elusive, and how this, in turn, undermines the entire enterprise — stultifying progress, reducing effectiveness, and generating trenchant scepticism. It will suggest that human rights ought not to be jettisoned, but rather refined with their conceptual maladies remedied. It then seeks to lay some basic foundations for doing so. In particular, it suggests that human rights cannot be grounded in collective consensus, nor in any capacity that humans are said to universally possess. More broadly, it argues that strictly secular accounts appear to inevitably lack the conceptual resources necessary to ground human rights; that such an endeavour may yet be possible within a theistic framework; and that Richard Rorty's call to abandon conceptually grounding human rights — and instead pursue an explicitly ethnocentric, European agenda — should be thoroughly rejected.

I INTRODUCTION

> In total, during the first eighty-eight years of [the twentieth] century, almost 170 million men, women, and children were shot, beaten, tortured, knifed, burned, starved, frozen, crushed, or worked to death; buried alive, drowned, hanged, bombed, or killed in any other of the myriad ways governments have inflicted death on unarmed, helpless citizens and foreigners. Depending on whether one uses high or more conservative estimates, the dead could conceivably be nearly 360 million people. It is as though our species has been devastated by a modern Black Plague.
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> — RJ Rummel[1]

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1 RJ Rummel "Power Kills, Absolute Power Kills Absolutely" in Israel W Charny (ed) *Encyclopedia of Genocide* (ABC-CLIO, Santa Barbara (CA), 1999) vol 1 at 28 as cited in in Michael J Perry *Toward a Theory of Human Rights: Religion, Law, Courts* (Cambridge University Press, New York, 2007) at 4.

> Notwithstanding their European origins, … [i]n Asia, Africa, and South America, [human rights now] constitute the only language in which the opponents and victims of murderous regimes and civil wars can raise their voices against violence, repression, and persecution, against injuries to their human dignity.
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> — Jürgen Habermas[2]

The last century was the bloodiest in human history. This is true with respect to both the total number of deaths and the fraction of the world's population killed.[3] Genocide was "so frequent, the number of victims so extensive, and serious attempts to prevent it so few, that many scholars have described the 20th century as 'the age of genocide'".[4] However, amidst the horrors of the last century, there lies an encouraging story: an increased embracing of human rights.[5] This development makes "the moral landscape of the twentieth century a touch less bleak".[6]

This article explores modern human rights theory. In Part II, I examine the definition of human rights. I conclude there is a lack of consensus in the field and this is damaging to the human rights enterprise. In Part III, I consider the problems that plague human rights and how they may be remedied. Next, in Part IV, I discuss generally accepted principles within human rights discourse. At this intermediary point, I conclude, in Part V, that human rights theory is lacking in key respects and that the job of contemporary jurisprudents is to remedy the conceptual maladies.

In the second half of the article, I seek to lay foundations for remedying these conceptual maladies. In exploring the jurisprudential foundations of human rights, I analyse whether we can coherently assert that: (a) human beings have dignity, worth or sacredness; and (b) that human rights can be grounded in that dignity, worth or sacredness.[7] My central thesis is that one can rationally assert both propositions, but only within certain parameters. I begin, in Part VI, by assessing whether a coherent secular grounding of human rights can be established. I then examine, in Part VII, a theistic account of human rights. In doing so, I will use high-profile accounts (such as those proposed by Nicholas Wolterstorff and others) as exemplars. In Part VIII, I consider calls by Richard Rorty and the moral anti-realist constructivists to abandon attempts at grounding human rights while simultaneously maintaining the human rights enterprise. Ultimately, I argue

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2 Jürgen Habermas "A Conversation About God and the World" in Eduardo Mendieta (ed) *Religion and Rationality: Essays on Reason, God, and Modernity* (Polity Press, Cambridge, 2002) 147 at 153 as cited in Perry, above n 1, at 3.

3 See Kim A McDonald "Anthropologists Debate Whether War is Inevitable among Humans" *The Chronicle of Higher Education* (online ed, Chicago, 20 November 1999) as cited in Perry, above n 1, at 3.

4 Roger W Smith "American Self-Interest and the Response to Genocide" *The Chronicle of Higher Education* (online ed, Washington, 30 July 2004) as cited in Perry, above n 1, at 146.

5 Perry, above n 1, at 4.

6 At 5.

7 This sort of approach is taken by the likes of Michael Perry and Nicholas Wolterstorff (whom I follow in doing so) and, indeed, most proposed accounts generally (in one way or another).

that a good jurisprudential foundation for human rights does not appear possible within a secular framework. I further conclude that the moral anti-realist constructivist approach to human rights — even if coherent — fundamentally undermines the human rights enterprise.

II DEFINING HUMAN RIGHTS

> … we [do not] have a clear theory of human rights. On the contrary … the necessary work is just beginning.
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> — John R Searle[8]
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> … it is overwhelmingly clear that the danger of confusion is especially great when the same term or phrase is constantly used to express two or more distinct ideas.
>
> — Wesley N Hohfeld[9]

Human rights are in their heyday. Yet much of the rhetoric is unclear. The term *rights* represents a vague notion — there is "more enthusiasm than precision".[10] So, what are human rights? Currently, no uniform definition can be given. Despite the popularity of human rights and widespread rights talk, there is no consensus on many key issues underlying the concept.[11] Commentators have, thus, lamented the lack of clarity surrounding human rights:[12]

> The term 'human right' is nearly criterionless. There are unusually few criteria for determining when the term is used correctly and when incorrectly — and not just among politicians, but among philosophers, political theorists, and jurisprudents as well. The language of human rights has, in this way, become debased.

It is widely accepted that most conceptions of human rights are incomplete in some respect and that more explanation is required before rights claims can have the normative force in practice that they purport to have in theory.[13] Most conceptions are not just broad; they lack workable criteria as to what

8 John R Searle "Social Ontology and Free Speech" (2004) 6(3) The Hedgehog Review 55 at 66 as cited in Perry, above n 1, at 141.

9 Wesley N Hohfeld "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26 Yale LJ 710 at 715.

10 Raymond Wacks *Understanding Jurisprudence: An Introduction to Legal Theory* (3rd ed, Oxford University Press, New York, 2012) at 233.

11 See generally Burns H Weston "Defining Human Rights" Encyclopædia Britannica <www.britannica.com> (accessed 4 September 2017); Burns H Weston "Historical Development" Encyclopædia Britannica <www.britannica.com> (accessed 4 September 2017); and Burns H Weston "The nature of human rights: commonly accepted postulates" Encyclopædia Britannica <www.britannica.com> (accessed 4 September 2017).

12 James Griffin *On Human Rights* (Oxford University Press, New York, 2008) at 14–15 as cited in Wacks, above n 10, at 240.

13 At 15.

should and should not be considered a right.[14] There is also trenchant and widespread disagreement about the practical application of codified rights. This is not merely an academic point — such uncertainty threatens to undermine the entire human rights project:[15]

> When the currency of a concept, especially one as fashionable and significant as 'human rights', is degraded by wanton excess, it not only reduces its utility, but creates a risk that it will generate derision for the idea itself … the danger remains that their amplitude and ambiguity drains human rights of real meaning and hence undermines the very protection such declarations seek to secure. This is particularly worrying in view of the cynicism which the discourse of human rights increasingly attracts, for there is no shortage of detractors and sceptics.

III A REMEDY FOR HUMAN RIGHTS DISCOURSE?

Similar ambiguities to those identified above were present in natural rights discourse during the 17th and 18th centuries. They were of less concern, however, as there was still wide agreement regarding practical application.[16] However, this began to change by the 20th century. Today the differences concerning practical application are greater than ever.

So, what can be done? Some have suggested a radical solution: jettison human rights talk altogether.[17] But this is undesirable for two reasons. First, human rights are too important to be abandoned for want of clarity. The concept, and even the term itself, has facilitated justice for the disadvantaged:[18]

> I was told recently of a woman in Senegal whose husband had left her and taken the children, which he was legally entitled to do, and the land they lived on, which she had brought into marriage. The term 'human rights' had entered their language only a few years before, but the woman was spurred by its possession to complain forcefully and publicly: she had a right, she said, to some of the land and to see her children. She had no hope that the elders would help her, but they were eventually moved by the confidence and persistence of her complaints to allow that, despite their customs, she had a case.

Secondly, to jettison rights talk entirely — considering how entrenched and popular it is — would prove a rather ambitious task. Even a political dictator could find the undertaking well beyond them. Abandoning human rights talk is neither desirable nor practical. Instead, we must remedy the maladies surrounding human rights theory and rhetoric. As James Griffin notes, our only option "is to influence it, to develop it, to complete it".[19] Accordingly,

14 At 17.
15 Wacks, above n 10, at 240.
16 Griffin, above n 12, at 17.
17 At 18.
18 At 19 (footnote omitted).
19 At 19.

"[t]he job of philosophers and jurisprudents and political theorists in our time is to remedy the indeterminateness".[20] He further argues:[21]

> We need an account of 'human rights' with at least enough content to tell us, for any such proposed right, difficult borderline cases aside, whether it really is one and to what it is a right.

We should instead pursue informed discourse on human rights and examine competing theories for systemic coherency and plausibility. Those theories that fail to be systemically coherent should be jettisoned because they cannot be rationally affirmed. Many theories may prove to be coherent, but, surely, not equally plausible.

IV SOME PRINCIPLES GENERALLY AGREED UPON

Despite the overwhelming lack of consensus on human rights, there exist some key principles that are widely accepted, although not wholly uncontroversial. I discuss five of these. First, human rights are universal and equally possessed by all human beings.[22] Secondly, human rights are grounded in the fact that human beings have a certain dignity, worth, or sacredness.[23] Thirdly, human rights generally refer to essential claims.[24] Fourthly, irrespective of grounding, human rights tend to be perceived as naturally giving rise to legal rights (though not always).[25] Fifthly, in practice the majority of human rights legal claims are qualified and restricted, to the extent necessary, to secure the rights of others or the common good generally.[26] Therefore, human rights are not absolute in their application.[27] Whilst these broad propositions are helpful, they will still prove controversial in some quarters.

In modern legal discourse, the bulk of jurisprudents affirm that all individuals possess at least some elementary rights.[28] But significant obstacles to the human rights enterprise remain. Many states are yet to ratify international human rights conventions — and even where ratified, the conventions are often not properly reflected in domestic laws.[29] It is key to

20 At 18.
21 At 20.
22 Weston "The nature of human rights", above n 11.
23 Nicholas Wolterstorff *Justice: Rights and Wrongs* (Princeton University Press, New Jersey, 2008) at 325.
24 Weston "The nature of human rights", above n 11.
25 Weston "Defining Human Rights", above n 11. I do not just mean *claim* rights. See Hohfeld's famous quadripartite analysis (of rights generally) in Hohfeld, above n 9. Hohfeld outlines four different species: (claim) rights, privileges (sometimes called liberties), powers and immunities.
26 Weston "The nature of human rights", above n 11.
27 Weston "The nature of human rights".
28 Burns H Weston "The persistence of the notion" Encyclopædia Britannica <www.britannica.com> (accessed 4 September 2017).
29 Burns H Weston "Human Rights in the Early 21st Century" Encyclopædia Britannica <www.britannica.com> (accessed 4 September 2017).

the continued advancement of human rights that the problems underlying human rights theory are resolved.

V INTERMEDIARY CONCLUSIONS

From our examination of the issues surrounding human rights, we can now reach five broad conclusions. First, there is no widespread agreement as to what human rights are. Secondly, this ambiguity is a worrying impediment for the entire human rights enterprise. Thirdly, the maladies surrounding the concept of human rights must be remedied, not jettisoned. Fourthly, the modern-day jurisprudent ought to pursue this end by seeking to provide or defend a systemically coherent account of human rights. Fifthly, the most desirable outcome is a well-defined and substantiated account of human rights against which we can assess future proposed rights.[30]

Human rights are a promising, hope-giving development in modern society and legal practice. Yet the claim that human beings have a certain dignity, worth or sacredness remains controversial. Even more controversial are attempts to ground human rights in that dignity, worth or sacredness. I now seek to lay the foundation for remedying the conceptual maladies facing the human rights enterprise. Specifically, in exploring the jurisprudential foundations of human rights, I analyse whether we can rationally assert that: (a) human beings have dignity, worth or sacredness; and (b) human rights can be grounded in that dignity, worth or sacredness.[31] I will now discuss whether human rights can be given a coherent secular grounding.

VI IS THERE A COHERENT SECULAR FOUNDATION FOR HUMAN RIGHTS?

> The secular philosophical tradition speaks of inalienable rights, inalienable dignity and of persons as ends in themselves. These are, I believe, ways of whistling in the dark, ways of trying to make secure to reason what reason cannot finally underwrite. Religious traditions speak of the sacredness of each human being, but I doubt that sanctity is a concept that has a secure home outside those traditions.
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> — Raimond Gaita[32]

> "so the mob blinks—'There are no superior humans, we are equal, the human is human; before God—are we all equal!'
>
> Before God!—But now this God has died."
>
> — Friedrich Nietzsche[33]

30 Griffin, above n 12, at 18–20.
31 See above n 7.
32 Raimond Gaita *A Common Humanity: Thinking About Love and Truth and Justice* (Routledge, London, 2000) at 5 as cited in Perry, above n 1, at 17.

One topic of great interest in contemporary human rights jurisprudence is whether there is — or can be — a coherent and adequate secular grounding of human rights.[34] Wolterstorff summarises the question: can we show there is something particular to humans — without relying on theistic premises — that confers a certain dignity in which human rights may be grounded?[35] In answering this question, I will examine five secular accounts of human rights: those of Immanuel Kant, Alan Gewirth, James Griffin, Ronald Dworkin and Martha Nussbaum.[36] The most commonly proposed grounding of human rights is *human dignity*,[37] and the majority of these proposals pursue a *capacities* approach.[38] The central thesis of a capacities approach is that human beings possess certain capacities; dignity supervenes on these capacities; and, owing to this dignity, human beings have certain inherent rights.[39] Accounts differ as to which capacities are *the* capacities of key importance. Kant's account remains the archetype of this approach — I turn to his proposed grounding first.[40]

Immanuel Kant

1 Kant's Proposed Grounding

Kant[41] contends that humans have three key predispositions: animality, personality and humanity.[42] Animality "belongs to us merely as living beings, and it is the basis for our fundamental instinctual drives aiming at self-preservation … propagation of the species … and community".[43] These instincts operate subconsciously; thus, they are not directly part of our

33 Friedrich Nietzsche *Also sprach Zarathustra: Ein Buch für Alle und Keinen* (Ernst Schmeitzner, Germany, 1883–1891) (translated ed: Graham Parkes (translator) Friedrich Nietzsche *Thus Spoke Zarathustra: A Book for Everyone and Nobody* (Oxford University Press, Oxford, 2005)) at 249–250 as cited in Perry, above n 1, at 14.

34 As will become obvious, I am much indebted to the work of Michael Perry and Nicholas Wolterstorff in answering this question. Wolterstorff's critique of a Kantian account — and its extension to Gewirth, Dworkin (in a way) and capacities accounts generally — is a particularly impressive feat that forms an indispensable part of this section. Perry addresses Dworkin, Nussbaum and Rorty in his work; his critique of the former two (appearing here only in summary fashion) no doubt helped to inspire my own critiques of these accounts and consensus-based accounts generally.

35 Wolterstorff, above n 23, at 324.

36 I only examine Gewirth's and Griffin's accounts in a summary fashion. This is owing to the need for brevity and because their accounts present the same core defect as Kant's account (which I examine in detail).

37 This is true with respect to both accounts generally and secular accounts particularly.

38 Wolterstorff, above n 23, at 325.

39 At 325.

40 At 325.

41 Here I follow Wolterstorff in relying on Allen W Wood's work *Kant's Ethical Thought*. This is for two reasons. First, Kant's technical writing (not unfairly) has the reputation of being a veritable labyrinth. Secondly, the aid of a Kantian scholar greatly facilitates understanding both *Groundwork for the Metaphysics of Morals* and Kant's overall system of thought (as evidenced across his writings). See Immanuel Kant *Grundlegung zur Metaphysik de Sitten* (Meiner Verlag, Hamburg, 1999) (translated ed: Allen W Wood (translator) *Groundwork for the Metaphysics of Morals: Immanuel Kant* (Yale University, New York, 2002)).

42 Allen W Wood *Kant's Ethical Thought* (Cambridge University Press, Cambridge, 1999) at 118.

43 At 118.

rational deliberations.[44] A human being's predisposition to personality is "the rational capacity to respect the moral law and to act having duty or the moral law as a sole sufficient motive of the will".[45] Finally, a human being's predisposition to humanity is his or her's "capacity to set ends through reason".[46] It "lies in between the predisposition to animality and personality" and includes "all our rational capacities having no specific reference to morality".[47] Humanity comprises two aspects: the technical and the pragmatic.[48] The technical aspect "includes our conscious, rational capacities to manipulate things as means to our arbitrary ends, including all learned skills … and deliberate abilities".[49] The pragmatic is the "higher aspect of our humanity", which "enables us not only to set ends but to compare the ends we set and organize them into a system".[50] This includes an ability to "form the idea of our happiness or well-being as a whole".[51] Kant argues that this "humanity" or "rational nature" is the reason why human beings ought to be treated as ends in themselves.[52] He further says this rational nature has a certain dignity[53] and is "the supreme value and the ground of whatever value anything else might possess".[54] That would impliedly include any human rights that supervene on this rational nature or dignity. Therefore, the crux of a Kantian account is as follows: (a) human beings possess a certain capacity for rational agency; (b) possessing this property gives human beings a certain dignity or worth, such that human beings ought to be treated as ends in themselves; and (c) human rights can be grounded in this dignity.

2 Appraisal

Kant's impressive account was later dealt a severe blow by Wolterstorff. In his critique, Wolterstorff begins: if the foregoing propositions (a) and (b) are true, then, surely, a person who possesses a greater capacity for rational agency would have greater worth?[55] Some human beings have a greater capacity for rational agency — that is, the capacity "to manipulate things as means to … arbitrary ends … [and] compare the ends we set and organize them into a system".[56] So greater exercise of this capacity might conceivably mean greater worth. However, Wolterstorff suggests these issues may be

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44 At 118.
45 At 118.
46 At 119.
47 At 118.
48 At 119.
49 At 119.
50 At 119.
51 At 119.
52 Wood, above n 42, at 119. It is not clear whether Kant chooses personality or humanity as the ground for human obligations and human rights. See Wolterstorff, above n 23, at 326. Wood argues Kant chooses humanity. Wood, above n 42, at 120–121. I adopt this position here.
53 At 122.
54 At 121.
55 Wolterstorff, above n 23, at 326–327.
56 Wood, above n 42, at 119 as cited in Wolterstorff, above n 23, at 331 (citations omitted). Note that Wood himself is interpreting Kant.

avoided if we are charitable towards Kant's doctrine and alter it slightly.[57] Perhaps we can simply say that a human being's pure capacity for rational agency is all that matters with respect to grounding human rights — the extent to which one possesses that capacity is irrelevant, as is how well one utilises it.[58]

Indeed, this would seem to avoid these issues. If mere possession of the capacity is sufficient for dignity, and dignity is a sufficient grounding for human rights, then greater possession of the capacity becomes irrelevant.

Assuming pure possession of the capacity for rational agency is all that matters in terms of grounding human rights, Wolterstorff goes on to clarify the two key issues at stake.[59] First, do all human beings — and only human beings — possess this capacity for rational agency?[60] Secondly, does possession of this capacity bestow worth both greater than that of other animals and adequate to ground human rights?[61]

Wolterstorff notes that not all human beings have the capacity for rational agency.[62] Examples include infants and sufferers of severe mental disability. Yet Kant holds that one's rational capacity is what makes one human; and respecting that capacity is the same as respecting the human being. Wolterstorff identifies this as a problem with Kant's account. Pursuing Kant's account to its logical conclusion, infants and the mentally disabled (who lack rational capacity) do not deserve respect, nor do they have worth (since that flows from the capacity).[63] Both assertions are "absurd".[64] Kant only considers regular, healthy adult human beings.[65]

Yet we should be charitable to Kant's account. Perhaps the "circle of dignity", as Wolterstorff calls it, can be broadened whilst maintaining the essence of Kant's account.[66] For example, we could refine the circle of dignity to include past possession of the capacity for rational agency.[67] However, this alteration would be insufficient as it still excludes some human beings, such as infants and those neurologically disabled from birth.[68] Alternatively, we could refine the circle to include any being that has ever possessed or — given time and development — will eventually possess the capacity for rational agency.[69] This now includes infants, but still excludes those neurologically disabled from birth.[70] Let us try still: being the sort of creature that, given normal development for those creatures, will come to possess the capacity for rational agency.[71] Such refinement would allow for

57 At 331–332.
58 At 329.
59 At 329.
60 At 329.
61 At 329.
62 At 330–331.
63 At 330.
64 At 330.
65 This echoes an observation by Wolterstorff. At 334.
66 At 330.
67 At 330.
68 At 330.
69 At 330.
70 At 331.
71 At 331.

actual possession, future possession or a mere relation to others who have actual possession.[72] But is it sufficient?

Wolterstorff argues it is unsatisfactory for three reasons. First, given all the refinements (which we have seen are necessary), the capacity for rational agency now seems a very unimpressive property. Does it really bestow the sort of worth necessary to ground human rights?[73] What Kant was really concerned with was the actual possession of the capacity for rational agency — not merely having membership to a species of which the *average member* (given *time* and *normal development*) possesses the capacity for rational agency.[74] Why would one member's mere species-relation to others who have Kant's worth-bestowing property bestow upon him equal worth?[75]

Secondly, possession of the capacity for rational agency now seems very arbitrary. Why should possession of *this* property lead us to the conclusion that human beings have a certain dignity that entails certain rights?[76] It seems a "cobbled together" explanation that has "no other rationale than to achieve the pre-ordained goal of finding a relation to the capacity that all and only human beings have; why draw the lines this way"?[77]

Thirdly, some other higher animals, such as dolphins, possess the capacity for rational agency.[78] If the capacity for rational agency imparts worth, it would follow that the worth of actual possession of that capacity is greater than that of having membership to a species that normally possesses the capacity.[79] Is it really plausible to say that dolphins have more worth than people born with severe mental disability?[80]

Wolterstorff's refinements to Kant's proposed grounding are necessary — without them, certain groups of humans would be excluded. Yet the end result is a particularly underwhelming capacity relation upon which we are supposed to ground the whole of human rights. That is an implausible suggestion — and one which is further compounded by its distinct arbitrariness. The underlying defect is this: in asserting that the "capacity for rational agency" imparts worth to all who possess it, what is really being grounded is not *human* rights, but the rights of those — human or not — who possess that capacity.[81] This fundamental defect is common to all capacities approaches: no matter what capacity is selected, it is inevitable that some human beings *do not* possess it.[82] It also appears to be an irresolvable defect, since a post facto redrawing of the lines (such as

72 At 331.
73 At 331.
74 At 331.
75 At 332.
76 At 332.
77 At 333.
78 At 331–333. Wolterstorff suggests Alasdair MacIntyre *Dependent Rational Animals: Why Human Beings Need the Virtues* (Duckworth, London, 1999) on this point.
79 At 332–333.
80 At 333.
81 At 333.
82 At 333.

Wolterstorff charitably undertook) only serves to completely undermine the whole point of the exercise in the first place. I now briefly cover two modern capacities accounts which, as we will see, suffer the same core defect.

Alan Gewirth

Gewirth provides a modern account that appeals to the capacity for rational agency without appealing to any corresponding worth.[83] Gewirth's argument is usually comprised of 13 steps, but for present purposes the following summary is sufficient:[84]

> First, every agent holds that the purposes for which he acts are good on whatever criterion (not necessarily a moral one) enters into his purposes. Second, every actual or prospective agent logically must therefore hold or accept that freedom and well-being are necessary goods for him because they are the necessary conditions of his acting for any of his purposes; hence, he holds that he *must* have them. Third, he logically must therefore hold or accept that he has rights to freedom and well-being; for, if he were to deny this, he would have to accept that other persons may remove or interfere with his freedom and well-being, so that he *may not* have them; but this would contradict his belief that he *must* have them. Fourth, the sufficient reason on the basis of which each agent must claim these rights is that he is a prospective purposive agent, so that he logically must accept the conclusion that all prospective purposive agents, equally and as such, have [human] rights to freedom and well-being.

Again, this will not remove the fundamental defect found in all capacities approaches — they, at best, establish human rights for a particular subset of human beings (those capable of rational agency), rather than for each and every human being.[85] In his book, Wolterstorff rightly extends his critique to Gewirth, whose account presents problems additional to those found in Kant's.[86]

James Griffin

Griffin's book, *On Human Rights*, provides an example of a constructivist capacities approach — he points to the capacity for "normative agency".[87] This is the "capacity to choose and … pursue our conception of a worthwhile life".[88] But what of those who do not have the capacity to choose and pursue

83 Wolterstorff, above n 23, at 335.

84 Alan Gewirth *Human Rights: Essays on Justification and Applications* (University of Chicago Press, Chicago, 1982) at 20 as cited in Wolterstorff, above n 23, at 335 (emphasis in original).

85 Wolterstorff, above n 23, at 340.

86 Since I believe that all capacities accounts ultimately possess the same fatal defect, I do not develop this point. However, for a discussion, see Wolterstorff, above n 23, at 335–340.

87 Griffin, above n 12, at 149 as cited in R George Wright "Review Essay: The Disintegration of the Idea of Human Rights" (2010) 43 Ind L Rev 423 at 432.

88 Griffin, above n 12, at 45 as cited in Wright, above n 87, at 432–433.

their conception of a worthwhile life (for example, infants)?[89] Do they have no human rights? The same conceptual maladies found in Kant's account (and all capacities accounts) are present here — and then some.

Ronald Dworkin

The vast majority of secular accounts on the grounding of human rights centre on human dignity. And most of these adopt the capacities approach, which suffers the foregoing fundamental defect. What follows is an appraisal of Dworkin's account which attempts to ground human rights in dignity without taking a capacities approach.[90] Dworkin asserts that "the inarticulate assumption behind much of our experience and conviction, [is] that human life in all its forms is *sacred*".[91] Sacredness, he says:[92]

> … lies in the value we attach to a process or enterprise or project rather than to its results considered independently from how they were produced. We are horrified at the idea of the deliberate destruction of a work of art not just because we lose the art but because destroying it seems to demean a creative process we consider very important.

Belief in this sacredness is for some a religious belief and for others a "secular but deep philosophical belief".[93] Dworkin comments that "there is a secular as well as a religious interpretation of the idea that human life is sacred."[94] Thus, to analyse whether entity X is sacred, we ought not just examine entity X per se, but entity X against the backdrop of how it came to be — that is, its genesis.[95] For humans, specifically, there are two aspects about our genesis that provide a secular basis for sacredness.[96] First, each and every human being is:[97]

> … the highest product of natural creation. … [T]he idea that human beings are special among natural creations is offered to explain why it is horrible that even a single human individual life should be extinguished.

Secondly, "each developed human being is the product not just of natural creation, but also of the kind of deliberative human creative force that we honor in honoring art".[98] Therefore:[99]

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89 Wolterstorff, above n 23, at 330.

90 At 333. I am indebted to Wolterstorff for pointing me towards this account. His own critique (which directly precedes the discussion of Gewirth in his book) is more impressive than the nutshell summary I give here. Wolterstorff discusses many of Dworkin's points that I discuss in this section. See Wolterstorff, above n 23, at 333–334.

91 Ronald Dworkin "Life is Sacred: That's the Easy Part" *The New York Times Magazine* (New York, 16 May 1993) at 36 as cited in Perry, above n 1, at 20 (emphasis in Perry).

92 Ronald Dworkin *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (Knopf, New York, 1993) at 78.

93 Dworkin "Life is Sacred", above n 91, at 36 as cited in Perry, above n 1, at 20.

94 Dworkin *Life's Dominion*, above n 92, at 195.

95 Wolterstorff, above n 23, at 334.

96 At 334.

97 Dworkin *Life's Dominion*, above n 92, at 82.

98 Dworkin *Life's Dominion*, above n 92, at 82.

99 Dworkin *Life's Dominion*, above n 92, at 83 (emphasis in original).

> The idea that each individual human life is inviolable is therefore rooted, like our concern for the survival of our species as a whole, in two combined and intersecting bases of the sacred: natural and human creation. Any human creature … is a triumph of divine or evolutionary creation, which produces a complex, reasoning being …

Dworkin continues:[100]

> The life of a single human organism commands respect and protection, then, no matter in what form or shape, because of the complex creative investment it represents and because of our wonder at the divine or evolutionary processes that produce new lives from old ones, at the processes of nation and community and language through which a human being will come to absorb and continue hundreds of generations of cultures and forms of life and value, and, finally, when mental life has begun and flourishes, at the process of internal personal creation and judgment by which a person will make and remake himself, a mysterious, inescapable process in which we each participate, and which is therefore the most powerful and inevitable source of empathy and communion we have with every other creature who faces the same frightening challenge. The horror we feel in the wilful destruction of a human life reflects our shared inarticulate sense of the intrinsic importance of each of these dimensions of investment.

Dworkin's account appears to depend upon human beings being masterpieces of self-creation and natural creation — it is this notion that grounds the belief that humans are sacred or possess dignity.[101] And it is this dignity (or sacredness) that grounds human rights.[102] Dworkin's account does not employ a capacities approach, but it does fall prey to a similar sort of defect present in capacities approaches. Dworkin — like Kant — appears only to consider fully formed adult human beings rather than the full spectrum of human beings.[103] Perhaps such fully formed adults are "creative masterpieces of natural creation and self-creation".[104] But what about human beings born severely mentally or neurologically disabled? Are they masterpieces of self-creation? In Dworkin's conception it would seem not as self-creation depends upon mental life not only beginning but also flourishing and thriving.[105] Yet surely Dworkin would still regard such human beings as sacred. As Wolterstorff puts it "[a]re they nonetheless masterpieces of natural creation—greater, say, than roaring lions, soaring eagles, affectionate chimpanzees, or playful dolphins?"[106]

Dworkin's account presents an even more fundamental flaw: it wholly depends upon human agents (the "we") holding a particular view of (attaching strong value to) other human agents.[107] Dworkin asserts that

100 At 84.
101 At 82–83.
102 At 84.
103 Wolterstorff, above n 23, at 334.
104 At 334.
105 Dworkin *Life's Dominion*, above n 92, at 84.
106 Wolterstorff, above n 23, at 334.
107 Dworkin *Life's Dominion*, above n 92, at 82–84.

humans are "the highest product of natural creation" and "special among natural creations".[108] Accordingly, humans possess a kind of sacredness owing to "the value we attach" to humans in light of these two propositions.[109] The logical implication of this is that, without the attachment of strong value, human agents cease to have this sacredness or dignity. This is, surely, an inadequate account of sacredness or dignity. Take the following illustration. Suppose that the Allied Forces lost World War II; the Third Reich successfully promoted the Aryan Race, established the New Order and killed anyone who disagreed with its (inter-alia) anti-Semitic ideology.[110] Would this New World's refusal to attach strong value to Jews and regard them as "special among natural creations" mean that Jews cease to have sacredness or dignity? According to Dworkin's account, they would — possessing sacredness is contingent upon "the value we attach" to entity X, considered in light of entity X's genesis.[111] Yet the "we" in Dworkin's statement can now only mean the Nazis and those they brainwashed. Is this really a plausible account of sacredness or dignity? Of course, Dworkin could remedy his account of sacredness by ontologically grounding it in something beyond the collective minds of finite personal agents. But in doing this he would be very hard pressed to provide a non-theistic account — which is exactly what he is at pains to do. Dworkin's inability to ground sacredness with any plausibility is fatal to his secular account of human rights. In trying to give a purely secular account, Dworkin is logically forced into a kind of relativistic account of sacredness that falls apart on close examination.

Michael Perry points out that Dworkin's source of normativity is deeply flawed in yet another way:[112]

> The conspicuous problem with Dworkin's specification of the source of normativity — and therefore with his secular argument — is that Dworkin assumes a consensus among human agents that does not exist and has never existed: Many people do not value every human being — or even most human beings — intrinsically. Dworkin's non-religious specification of the source of normativity — his reliance on what "we" value — is a kind of whistling in the dark.

Martha Nussbaum

Nussbaum's account shares much in common with Dworkin's in that her source of normativity is largely the same.[113] She writes:[114]

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108 At 82.
109 At 78.
110 William Lane Craig and Walter Sinnott-Armstong "God and Objective Morality: A Debate" in Russ Shafer-Landau (ed) *Ethical Theory: An Anthology* (Blackwell Publishing, Oxford, 2007) at 248.
111 At 78.
112 Perry, above n 1, at 21.
113 At 22.
114 Martha C Nussbaum "Skepticism about Practical Reason in Literature and the Law" (1994) 107 Harv L Rev 714 at 718. See Perry, above n 1, at 22.

> … the good of other human beings is an end worth pursuing in its own right, apart from its effect on [one's] own pleasure or happiness … [t]hrough these commitments ... [one should interpret] the world.

Why should one interpret the world through these commitments? Nussbaum notes "how deeply skepticism cuts into humanity, even while claiming that it follows the ordinary practices of life".[115] She ends her article by suggesting:[116]

> …it seems to be a mark of the human being to care for others and feel disturbance when bad things happen to them. Perhaps that more richly human and appropriately disturbed use of practical reasoning is what we can't do without — in personal life, in politics, and even in the law.

What is the root of this basic feeling of care? It is "the basic social emotion" of "compassion" that we possess.[117] That feeling of care suggests that "the good of other human beings is an end worth pursuing in its own right"; and this is the source of normativity.[118] However, this presents the same flaw as Dworkin's account — Nussbaum's account wholly depends upon an emotional consensus among human agents. Again, the logical implication is that, without this caring and feeling of disturbance — without this compassion — whole races and entire groups of human beings may cease to be "an end worth pursuing in [their] own right".[119]

I submit that this same fatal defect besets all accounts that attempt to ground human rights in a consensus among finite moral agents. No matter what the supposed consensus is to which the account appeals, it inevitably forces one into a precarious relativistic position.

Furthermore, it is doubtful whether an account can appeal to a consensus that actually exists (and, moreover, will continue to exist). As Perry points out, "[w]ho is this *we*"?[120] Did the Nazis care about the Jews during the Holocaust, or the Serbians care about their Muslim minority during the Bosnian genocide?[121] Did the Turks care about the Armenians during the Armenian genocide, or the Hutu care about the Tutsi during the Rwandan genocide?[122] Perry remarks:[123]

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115 Nussbaum, above n 114, at 744.

116 At 744. See Perry, above n 1, at 22.

117 Perry, above n 1, at 22. See Martha C Nussbaum "Compassion: The Basic Social Emotion" (1996) 13 Soc Phil & Poly 27.

118 Nussbaum, above n 114, at 718. See Perry, above n 1, at 22.

119 At 718. See Perry, above n 1, at 22. A possible response to this is that compassion need only be felt towards some human beings, rather than all (although, this is somewhat difficult to align with the rest of the account). The failure to care or "feel disturbance when bad things happen to" particular groups of people would not stop those groups being an end in themselves. That we have compassion towards some human beings teaches us that we ought to have compassion towards all human beings. But another conclusion seems equally open (and, unfortunately, to many it may seem to accord better with self-interest): our compassion towards some human beings teaches us that we ought to have compassion *towards those human beings*. It is they for whom we care and for whom we would feel disturbed should they suffer misfortune.

120 Perry, above n 1, at 22 (emphasis in original).

121 At 22.

122 At 22.

> It is certainly a mark of the normal human being to care for *some* other human beings — for example, and especially, the members of one's own family or clan or tribe. But it is certainly not a mark of all (normal) human beings — it is not a mark of "the human being" as such — to care for *all* other human beings and to feel disturbance when bad things happen to them.

Perry identifies that the anthropologist Claude Lévi-Strauss solemnly concurs:[124]

> … the concept of an all inclusive humanity, which makes no distinction between races or cultures, appeared very late in the history of mankind and did not spread very widely across the face of the globe. … For the majority of the human species, and for tens of thousands of years, the idea that humanity includes every human being on the face of the earth does not exist at all. The designation stops at the border of each tribe, or linguistic group, sometimes even at the edge of a village. So common is the practice that many of the peoples we call primitive call themselves by a name which means "men" (or sometimes … "the good ones," the "excellent ones," the "fully complete ones"), thus implying that the other tribes, groups, and villages do not partake in human virtue or even human nature, but are, for the most part, "bad people," "nasty people," "land monkeys," or "lice eggs." They often go so far as to deprive the stranger of any connection to the real world at all by making him a "ghost" or an "apparition." Thus curious situations arise in which each interlocutor rejects the other as cruelly as he himself is rejected.

It seems, then, that the supposed consensus, or shared sentiment, that Nussbaum relies upon in order to generate a source of normativity is in fact a mirage. She, like Dworkin, "assumes a consensus among human agents that does not exist and has never existed".[125]

As we have seen, each proposed secular grounding suffers from seemingly irreparable conceptual maladies or incoherencies. The underlying issue, I believe, is well spotted by human rights sceptic R George Wright:[126]

> The ultimate problem is that what is advertised as a secular human rights theory may turn out to be dependent — "parasitic" would be the more pejorative term — on a gradually abandoned theistic culture, however much theism may itself be responsible for human rights violations.

Raimond Gaita (himself an atheist) elaborates:[127]

> Only someone who is religious can speak seriously of the sacred, but such talk informs the thoughts of most of us whether or not we are religious,

123 At 22.

124 Claude Lévi-Strauss *Anthropologie structurale* (translated ed: M Layton (translator) Claude Lévi-Strauss *Structural Anthropology* (Penguin, London, 1993)) vol 2 at 329 as cited in Perry, above n 1, 22–23.

125 Perry, above n 1, at 21.

126 Wright, above n 87, at 432.

127 Gaita, above n 32, at 23. Perry also refers to Gaita's discussion. See Perry, above n 1, at 7.

> for it shapes our thoughts about the way in which human beings limit our will as does nothing else in nature. 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 it. 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 … [yet these are really] ways of trying to say what we feel a need to say when we are estranged from the [religious] conceptual resources we need to say it.

Nor do any of the proposed secular equivalents, Gaita says, have "the simple power of the religious ways of speaking".[128] He asks:[129]

> Where does that power come from? Not, I am quite sure, from esoteric theological or philosophical elaborations of what it means for something to be sacred. It derives from the unashamedly anthropomorphic character of the claim that we are sacred because God loves us, his children.

Perhaps, then, there is no coherent secular account that can ground human rights. But what of a coherent theistic account?

VII IS THERE A COHERENT THEISTIC GROUNDING OF HUMAN RIGHTS?

In *Justice: Rights and Wrongs*, Wolterstorff presents his theistic account of human rights. His approach is not a capacities approach. Rather, he seeks to ground human rights in the worth of human beings, which has a dual foundation: God having made humans in His image and God loving humans in the "mode of attachment".[130]

Wolterstorff says that God made human beings in His image in the "nature-resemblance" sense.[131] That is, humans possess a nature "such that the mature and properly formed possessors of that nature resemble God with respect to their capacities for exercising dominion".[132] He continues:[133]

> To bear the image of God is to have that sort of nature. … Something may have gone awry with human nature in one's own case, so that one lacks those capacities; but one does not, on that account, lack human nature.

On this account, infants and sufferers of mental or neurological disability would not lack human nature — they would be within the "circle of dignity".[134] But does possession of such a nature bestow sufficient worth to

128 At 23.
129 At 23–24.
130 Wolterstorff, above n 23, at 360.
131 At 350.
132 At 350.
133 At 350.
134 At 330.

ground human rights? Perhaps not. Wolterstorff says that possessing such a nature "does not, as such, give its bearers a very exalted status;" and this is particularly so in cases where human nature might be said to be deformed in one way or another.[135] What we really need, he argues, "is some worth-imparting relation of human beings to God".[136] He goes on to say "that being loved by God is such a relation; being loved by God gives a human being great worth".[137] Why does it give great worth? Because "[b]eing loved by God is an example of … *bestowed* worth."[138]

Bestowed worth has less to do with the inherent worth of the individual upon whom worth is bestowed and more to do with the worth of the bestower — here, God, whose worth is infinite.[139] Since God loves all human beings, all human beings are bestowed with worth.[140] Wolterstorff uses the example of a teddy bear and Nathan, a child.[141] The teddy bear may be old and worn but Nathan loves it all the same — his love for it bestows upon it a kind of worth it would not otherwise have. In throwing this teddy bear out, we may not wrong the teddy bear itself, but we will certainly wrong Nathan.[142] Let us now substitute the teddy bear with human beings, and Nathan with God. To treat human beings in a way that fails to recognise their bestowed worth is to wrong God, the bestower.[143] That being the case, we have a duty to respect the worth of all human beings. Wolterstorff's account thus amounts to the following conditional claim:[144]

> … if God loves, in the mode of attachment, each and every human being equally and permanently, then natural human rights inhere in the worth bestowed on human beings by that love. Natural human rights are what respect for that worth requires.

It is hard to fault Wolterstorff's conditional claim.[145] The conclusion logically follows from his premises. On this account, all human beings are within the "circle of dignity".[146] Furthermore, Wolterstorff appears to have identified a sufficient basis upon which to ground human rights.[147] However, the account presents at least one oddity: it seems that, in violating the human rights of another, we wrong God and violate human rights, but perhaps do not actually always wrong the human being — in the sense of a specific

135 At 352.
136 At 352.
137 At 352.
138 At 353 (emphasis in original).
139 At 357–358
140 At 360.
141 At 359.
142 Wright, above n 87, at 425–426.
143 At 425.
144 Wolterstorff, above n 23, at 360.
145 Perry gives another account with the same central claims. See Wolterstorff, above n 23, at 353. See generally Perry, above n 1.
146 Wolterstorff, above n 23, at 330.
147 The basis is the worth of human beings that are created in God's image and loved by God. At 360.

human rights violation against *them* — though we may wrong them in other moral senses.[148]

So perhaps it is not possible to successfully ground human rights outside of a religious (or at least theistic) framework. Perhaps, given the hypothetical that theism is in fact false, there is no ground for human rights, and no warrant for claiming that human beings have dignity or are sacred.[149] Does this matter? I think it does.[150] But others, such as Rorty, do not.[151] He suggests that we should jettison "human rights foundationalism"[152] altogether and construct a "human rights culture" for ourselves.[153] I consider his proposal now.

VIII THE ABANDONMENT OF HUMAN RIGHTS FOUNDATIONALISM: A MORAL ANTI-REALIST APPROACH TO CONSTRUCTING A HUMAN RIGHTS CULTURE

> Richard Rorty, the leading postmodern liberal theorist, … concedes that liberalism, once so jealous of its autonomy from Biblical faith, is in fact parasitic upon it. In his essay "Postmodern Bourgeois Liberalism," he describes secularist liberals like himself as "freeloading atheists." They continue to rely on the Judeo-Christian legacy of concern with human dignity despite their rejection of the revealed truth that alone could support this concern. … For Rorty, God is dead but secularized Christian morality continues. This is precisely one of the scenarios envisaged by Nietzsche in *The Gay Science*: "God is dead, but given the way men are there may still be caves for thousands of years in which his shadow will be shown." True, only 125 of those years have now passed, but on the evidence of Rorty's thought, it's hard to believe that [this] sort of shadow play still has centuries to run.
>
> — Clifford Orwin[154]

Rorty, a postmodern pragmatist, provides a good example of an approach that denies that human rights objectively exist and — rather than jettisoning the entire human rights enterprise — takes a kind of constructivist approach to them.[155] Rorty's approach we may call a kind of *moral anti-realist*

148 Wright, above n 87, at 426.

149 Perry, above n 1, at 26.

150 I have two reasons for thinking so. In short: first, I do not want to waste my life; and, secondly, I believe that to answer practical, surface-level questions, we must answer the deeper questions first.

151 At 26.

152 Richard Rorty "Human Rights, Rationality, and Sentimentality" in Aakash Singh Rathore and Alex Cistelecan (eds) *Wronging Rights?: Philosophical Challenges for Human Rights* (Routledge, Abingdon (UK), 2011) at 124. Perry refers to many of Rorty's points that I also refer to in this final part of the article. See Perry, above n 1, at 27.

153 See 111–118.

154 Clifford Orwin "The unraveling of Christianity in America" (2004) 155 The Public Interest 20 at 31–32 as cited in Perry, above n 1, at 1.

155 Broadly and briefly, orthodox (or foundationalist) accounts seek to discover the already existing bases for human rights. See, for example, Wolterstorff, above n 23, at 325, n 4 (emphasis in original): "On occasion I will speak of the theorist as grounding rights, when what I always mean,

constructivist approach.[156] The task is to "[make] our own culture — the human rights culture — more self-conscious and more powerful, rather than [to demonstrate] its superiority to other cultures by an appeal to something transcultural".[157] We can draw others to our Eurocentric sentiments and human rights culture by "manipulating sentiments … [through] sentimental education",[158] which involves the use of "sad and sentimental stories".[159] Rorty argues:[160]

> … the rhetoric we Westerners use in trying to get everyone to be more like us would be improved if we were more frankly ethnocentric, and less professedly universalist. It would be better to say: Here is what we in the West look like as a result of ceasing to hold slaves, beginning to educate women, separating church and state, and so on. Here is what happened after we started treating certain distinctions between people as arbitrary rather than fraught with moral significance. If you would try treating them that way, you might like the results.

But what happens when the non-Western culture responds — as many non-Western cultures have[161] — that it does not want to embrace so-called human rights culture or "frankly ethnocentric" European sentiments *because* of the results that follow?[162] What if it does not want to legislate for changes — for instance, educating women, abolishing slavery and protecting freedom of speech — because it finds the results of human rights laws undesirable?[163] Is it not the whole power and point of human rights that they instruct workers of injustice to treat all people rightly, irrespective of what their idiosyncratic or culturally-influenced sentiments might suggest? Many East Asian leaders have asserted that their countries require different models of

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strictly speaking, is the theorist *revealing* the ground of the rights in question." In contrast, constructivist accounts tend to accept that human rights do not objectively exist — human beings are not "endowed by their Creator with certain unalienable Rights", as the Declaration of Independence, para 2 (US, 1776) says. Still, such approaches attempt, in one way or another, to prop up human rights as a sort of ideal or political doctrine. Within constructivism there seems to be disagreement about the reality of objective moral values and duties. See generally Paul Alexander Hayman "Constructivism and Human Rights: Locating Values in a Divided Approach" (PhD Thesis, Durham University, 2008).

156 Moral anti-realism (the opposite of moral realism) holds that objective moral values and duties do not really exist. See Richard Joyce "Moral Anti-Realism" (11 February 2015) The Stanford Encyclopedia of Philosophy <http://plato.stanford.edu>.

157 Rorty, above n 152, at 112.

158 At 118.

159 At 185.

160 Richard Rorty "Justice as a Larger Loyalty" in Ron Bontekoe and Marietta Stepaniants (eds) *Justice and Democracy: Cross-Cultural Perspectives* (University of Hawai'i Press, Honolulu, 1997) 9 at 19–20.

161 While there are too many examples to list concisely, a notable example is China: "From mid-2013, the Chinese government and the ruling Chinese Communist Party (CCP) have issued directives insisting on *correct* ideology among party members, university lecturers, students, researchers, and journalists. These documents warn against the perils of *universal values* and human rights, and assert the importance of a pro-government and pro-CCP stance … Activists increasingly face arbitrary detention, imprisonment, commitment to psychiatric facilities, or house arrest. Physical abuse, harassment, and intimidation are routine." Human Rights Watch "World Report 2015: China" (2015) <www.hrw.org> (accessed 4 September 2017).

162 Rorty, above n 160, at 19.

163 See Takashi Inoguchi and Edward Newman "'Asian Values' and Democracy in Asia" (paper presented to Shizuoka Asia-Pacific Forum, Shizuoka, Japan, 28 March 1997).

treatment for their citizens due to "different practical [and cultural] needs".[164] They do not view Western human rights culture[165] as superior by virtue of its results:[166]

> … advocates of "Asian values" celebrate the community over individualism, the family as the basis of society, frugality, respect for learning, hard work, public duty, teamwork … contrasting these with the breakdown of the family, decadence, hedonism, excessive individualism, lack of teamwork, fecklessness, and ill discipline in the West … the dynamism and cohesion of East Asia is contrasted with the West's "moral degeneration" and its imminent social collapse, no less.

The rejection of Western sentiments also reflects "an element of indignation at a perceived Western cultural and racial superiority".[167] Responding to such leaders through a *sentimental education* — an education that suggests they ought to treat their citizens differently in light of superior Western results — is going to be entirely unconvincing since it is precisely those results that generate disdain.

Rorty's account must answer another critical question: according to what standard is Western human rights culture superior? Rorty's anti-moral objectivist position rejects the claim that his human rights culture is transculturally superior. Rather, he suggests, "you might like the results".[168] This amounts to either one of two claims: the results are morally superior and you might realise this; or the results are not morally superior but they might please you anyway. If Rorty's suggestion amounts to the second claim, the obvious and — from what we have seen — most likely response is: we acknowledge the results, but we do not like them at all. Indeed, if subjective or cultural preferences are all there is in the world, we do not have any other motivation or reason to make any changes. And this response would be quite right. There is nothing with which Rorty could rationally respond, and he admits as much:[169]

> [W]hen the secret police come, when the torturers violate the innocent, there is *nothing* to be said to them of the form "There is something within you which you are betraying. Though you embody the practices of a totalitarian society which will endure forever, there is something beyond those practices which condemns you."

164 Inoguchi and Newman, above n 163.

165 One might also ask Rorty: which human rights culture? There does not seem to be one; rather, there are a plurality of claims. Which is to be preferred? And how is Rorty to claim (from a moral anti-realist perspective) that one is superior to all the others?

166 Inoguchi and Newman, above n 163.

167 Inoguchi and Newman, above n 163. Rorty acknowledges that "if we hand our hopes … over to sentiment, we are in effect handing them over to *condescension*". Rorty, above n 152, at 125 (emphasis in original).

168 Rorty, above n 160, at 20.

169 Richard Rorty *Consequences of Pragmatism: Essays, 1972–1980* (University of Minnesota Press, Minnesota, 1982) at xliii (emphasis added).

So it all plays right into their hands. Professor Fang Lizhi's chilling speech "The Terror That Has Filled Beijing" makes this all too clear:[170]

> … I am filled with sorrow, to see that in this land of my birth, human dignity has once again been trampled upon … fond dreams have been shattered by a harsh reality. … Some of those who were responsible for this repression have recently attempted to defend their behavior by declaring that "China has its own standard of human rights," and have completely rejected the world's censure by refusing to acknowledge the universal nature of human rights. They appear to think that by simply labelling something a "household affair" to be dealt with internally, they can ignore the laws of human decency and do as they please …

If we accept the second claim, it would effectively prevent human rights movements in countries with different cultural preferences. But the alternative — accepting the first claim — is worse. If Rorty's suggestion amounts to the claim that the results are morally superior — and this must be the case or the claim is really the second claim — he presupposes some transcultural moral standard against which to judge the results. And since this logically entails moral realism, rather than moral anti-realism, Rorty's account necessarily collapses under the weight of systemic incoherence. Since the first claim leads to a logical contradiction, and the second claim fundamentally undermines the human rights enterprise, appealing to the results of a human rights culture ultimately proves a fruitless exercise. Timothy Keller pulls no punches in pointing this out:[171]

> Many argue that it is in the interests of societies to create human rights because honoring individual dignity means that in the long run everyone in the community is better off. However, what if a majority decides it is *not* in their interest to grant human rights? … If human rights are created by majorities, of what use are they? Their value lies in that they can be used to insist that majorities honor the dignity of minorities and individuals despite their conception of their "greater good". Rights cannot be created — they must be *discovered,* or they are of no value.

Furthermore, Dworkin observes:[172]

> It is no answer to say that if individuals have these rights, then the community will be better off in the long run as a whole. This idea — that individual rights may lead to overall utility — may or may not be true, but it is irrelevant to the defence of rights as such, because when we say that someone has a right to speak his mind freely, in the relevant political sense, we mean that he is entitled to do so even if this would not be in the general interest. If we want to defend individual rights in the sense in which we claim them, then we must try to discover something beyond utility that argues for these rights.

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170 Suzanne McIntire *Speeches in World History* (Facts on File, New York, 2009) at 520.

171 Timothy Keller *The Reason for God: Belief in an Age of Skepticism* (Penguin Group, New York, 2008) at 151.

172 Ronald Dworkin *Taking Rights Seriously* (Duckworth, London, 1977) at 271. See Keller, above n 171, at 151.

Of course, Rorty (and other moral anti-realist constructivists) cannot appeal to principle. He cannot say that human rights ought to be respected and enshrined in law — not by virtue of results or some sort of overall utility but by virtue of our categorical moral obligation to treat other human beings with dignity. To acknowledge this principle is to cease to be a moral anti-realist constructivist altogether.[173]

Another conspicuous problem with the moral anti-realist constructivist approach to human rights is this: why should anyone bother? If, as Rorty asserts, there is nothing beyond ethnocentric preferences, no objective right or wrong — our intuitive moral abhorrence of rape and genocide only a delusory apprehension — what on Earth are you fighting for? If nothing but Eurocentric sensibilities are being offended, why put yourself in the firing line and fight for the rights of the oppressed? One wonders how powerful a motivating force these sensibilities will prove to be when "the secret police come".[174]

IX CONCLUSION

This article has explored the jurisprudential foundations of human rights. Having surveyed modern human rights jurisprudence, I reached five broad conclusions. First, there is simply no widespread agreement as to what human rights are. Secondly, this is a worrying constraint for the whole human rights enterprise that threatens seriously to undermine goals and reduce effectiveness. Thirdly, we must remedy the conceptual maladies plaguing human rights rather than jettison human rights talk altogether. Fourthly, jurisprudents should pursue this end by seeking to provide or defend a systemically coherent account of human rights that has enough substance to remedy the above-mentioned conceptual maladies. Fifthly, the most desirable outcome is to resolve uncertainty and provide an account with a sufficient definition of human rights such that one can easily determine whether a proposed right really is a human right or not.

I then contended that, although one can coherently assert that human beings have dignity, worth or sacredness sufficient to form a foundation for human rights, there are certain parameters to this. First, I argued that capacities approaches to human rights all suffer the same fatal defect: no matter what capacity one selects, it is inevitable that not all human beings possess it and a post facto redrawing of the lines only serves to completely undermine the entire project. Secondly, I found that a coherent secular (or

173 Given Rorty's premises, it is also difficult to avoid the conclusion that the theory of Third World Approaches to International Law [TWAIL] is correct: that human rights are nothing more than the new arm of Western imperialism. They flow from the irrational, delusory and emotive belief that Western culture is superior per se to all other cultures and, therefore, that Western cultural ideals ought to be enforced on other cultures. For the TWAIL view of human rights see José-Manuel Barreto "Introduction: Decolonial Strategies and Dialogue in the Human Rights Field" in José-Manuel Barreto (ed) *Human Rights from a Third World Perspective: Critique, History and International Law* (Cambridge Scholars Publishing, Newcastle upon Tyne, 2013) at 5–7.

174 Rorty, above n 169, at 20.

non-theistic) grounding of human rights cannot be sustained, due to the lack of conceptual resources that results sans theism. Thirdly, I argued that a theistic framework possesses the conceptual resources necessary for grounding human rights, using Wolterstorff's account as an example. Finally, I contended that Rorty and the moral anti-realist constructivists' approach to human rights either collapses under systemic incoherence or fundamentally undermines the human rights enterprise.