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## Donald A. Giannella Memorial Lecture

CAN HUMAN RIGHTS SURVIVE SECULARIZATION?

NICHOLAS WOLTERSTORFF

THE question I want to discuss in this essay is whether the recognition of human rights can survive secularization.<sup>1</sup> By “secularization,” I do not mean anything subtle or complicated. On this occasion, I mean loss of belief in God. My question is whether the recognition of human rights can survive loss of belief in God.

There may be some readers who find my question seriously wrong-headed. We have all been told that the idea of human rights emerged from the Enlightenment and that the Enlightenment was a secular, anti-Christian movement. For those readers who believe this, the question is not whether the recognition of human rights can survive the *loss* of belief in God but whether it can survive the *endurance* of belief in God. I think that by the end of the essay it will be clear that the right question really is whether the recognition of human rights can survive secularization.

There is a good deal of disagreement and confusion concerning rights in general and human rights in particular. Let us begin by explaining how I understand those. A right is always a right of *X* to the good of being treated a certain way by *Y*. The good in question may be the good of *Y* extending to *X* a certain benefit, or it may be the good of *Y* refraining from interfering with *X*'s performance of some action. An example of a right to the former sort of good would be the right of a student to an “A” on her record if she has done top-notch work in her course. An example of a right to the latter sort of good would be one’s right not to be molested while walking in Central Park. Thus, rights are a special kind of normative social relationship.

There are several ways of verbalizing that special kind of relationship. For example, you have a right to the good of being treated a certain way when you have a *legitimate claim* to being treated that way. Another way of verbalizing it is that you have a right to the good of being treated a certain

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1. The substance of this essay was delivered as the Donald A. Giannella Memorial Lecture at Villanova University School of Law on April 1, 2009. It is the condensation of a line of thought whose parts are spread over several chapters in my book, *JUSTICE: RIGHTS AND WRONGS* 285-394 (2008).

way when being treated that way is *due* you. Yet another way of verbalizing it is that you have a right to the good of being treated a certain way when you *deserve* to be so treated.

The shadow side of having a right to the good of being treated a certain way is that you are wronged if you are not treated that way. A person is guilty if he fails to treat another as he ought to treat her. A person is wronged if the other does not treat her as she has a right to be treated.

Though a right is always to the good of being treated a certain way, the converse is not true: a way of being treated by another might be a good thing in one's life without one's having a right to it. For example, in the Rijksmuseum in Amsterdam there is a glorious painting by Rembrandt called *The Jewish Bride*. I think it would be a great good in my life if the Rijksmuseum donated that painting to me so I could hang it on my living room wall. Sad to say, I do not have a right to the good of the museum's doing that. A less fanciful example of the point is that if I have wronged someone, it would be a good in my life if they forgave me. Nonetheless, I do not have a right to that good because I am not wronged if they do not forgive me.

The biggest challenge facing anyone who wants to develop a theory of rights is to explain why it is that in certain cases one has a right to the good of being treated a certain way, whereas in other cases one has no such right—no such morally legitimate claim.<sup>2</sup> Rights are what respect for worth requires. On the one hand, human beings have worth. On the other hand, there are ways of treating one's fellow human beings that do not befit their worth. You have a right to the good of being treated a certain way by me in case I would not be treating you as befits your worth if I did not treat you that way. If you have done top-notch work as a student in a philosophy course that I am teaching, then the reason you have a right to the good of receiving an "A" for the course is that my giving you an "A" is what befits the worth you have acquired.

The dominant alternative to this view of rights, what respect for worth requires, is the view that holds that rights are protectors of autonomy. The main problem with this view is that though all human beings have rights, not all are capable of autonomous action. I shall address this point shortly *infra*.

That is enough about rights in general. Now, *human* rights. To possess a certain right, you must be of a certain sort. You have to have a certain *status*. To have a right to the prize designated for the winner of the New York City Marathon, you have to come in first and not have violated any of the rules of the contest. A human right is then a right such that the only status you have to possess to have the right is that of being a human being. To have a right to the prize designated for the winner of the New York Marathon you obviously have to be a particular kind of human being.

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2. Let me give my answer to this question without, on this occasion, defending it. I defend this answer at some length in JUSTICE, *supra* note 1, at 285-310.

It is not enough just to be a human being. Therefore, that is not a human right.

A human right, to recapitulate, is such that the only status you must possess to have the right is that of being a human being. But you must be a human being. Being a human being is not only sufficient but also necessary for possessing a human right. An important point to notice and keep in mind here is that *human rights* are no more than a small subset of the rights *that human beings have*. Often this point is overlooked in the literature. Having a right to the prize designated for the winner of the marathon is a right that a human being has but it is not a human right.

A word must also be said about *natural* rights. Many of the rights we possess accrue to us on account of some human action—a piece of legislation passed, a promise made, a rule laid down, and so forth. Such rights are often called *positive* rights. A natural right is a non-positive right. It is a right that one does not possess on account of some human action, or does not possess *only* on account of some human action. If there should ever be an international government that legislatively confers on every human being certain rights, then there would be positive human rights. As of now, there is no such government. So our topic is, perforce, *natural* human rights.

Though some readers may never have read the various U.N. declarations on human rights, all should be aware of them. I regard these declarations as a great moral achievement. Paradoxically, the twentieth century was a century of both great moral horror and great moral achievement. The U.N. declarations are all dignity-based documents. All of them affirm that human rights accrue to human beings on account of some dignity that human beings possess, some worth. Given my account of rights, that is exactly what I think they should say.

Worth does not just settle down on things willy-nilly. Things have worth on account of something about them—some property, some capacity, some achievement, some relationship, or whatever. Their worth supervenes on something about them. You have the worth that merits an “A” in my course because of the high quality of the work that you did in the course. A striking feature of the U.N. documents is that though they affirm or assume that all human beings have dignity, they make no attempt to specify what it is about human beings that gives them that dignity. They make no attempt to specify the features of human beings on which the relevant worth supervenes. This has been a point of criticism by some Muslim writers. They see such silence as an indication that these documents emerged from a secularist mindset. From various histories of the origin of these documents, we know, however, that that is not the reason for the silence. The original authors discussed the basis of human dignity. Nonetheless, they found themselves disagreeing on the matter and decided to remain silent.

In the literature on human rights, there is a good deal of discussion about what *grounds* human rights. This means that which gives each human being worth, and hence the right to be treated in certain ways. And that is the question that I now consider. The U.N. documents assume that certain rights accrue to anybody who is a human being on account of some worth that he or she has—some dignity. What is it about human beings that accounts for that worth? On what features of human beings does that dignity supervene?

Let us be clear about the sort of feature we are looking for. It must be a feature that all human beings have. It must be a feature that non-human beings do not have. And it has to be a feature that gives to each human being a worth greater than that which any non-human animal has. No matter how far in the scale of excellence a human being may drop, she will still be of greater excellence than any animal. That is the idea.

To the best of my knowledge, all secular, non-theistic proposals concerning the ground of human rights that can be found in the literature are what one might call *capacity* accounts. All of them suggest that the worth in question supervenes on a certain capacity that human beings have.<sup>3</sup> There is a bit of variation as to the capacity proposed. Nonetheless, all of the proposals run into the same problems. Let us examine the capacity that is by far most often cited, namely the capacity for rational agency—the capacity to act for reasons and not just out of causes. The idea goes back to Immanuel Kant.

The capacity for rational agency is indeed extraordinary, and it gives worth deserving of great respect to those who possess it. But does this capacity do the work required for grounding human rights? I think not. Some of the higher mammals appear to possess this capacity. It is not unique to human beings. But we are looking for a feature that is not only shared by all human beings but also unique to human beings.

How might one get around this problem? One way would be to augment the capacity, so no animals have it. Some have suggested—in place of the mere capacity for rational agency—the more complex capacity to form, follow, and revise a plan of life. I think it safe to say that though porpoises and chimpanzees have some capacity for rational agency, they do not have this more complex capacity.

But now notice a difficulty from the opposite end: a good many human beings do not have the capacity to form, follow, and revise a plan of life. Alzheimer's patients do not have this capacity, nor do those suffering from severe brain injury, nor do those in a permanent coma. Is there a way to get around this difficulty?

Well, one way to bring these impaired human beings into the circle of human dignity would be to thin out the relation that must hold between the human being and the capacity. Instead of saying that a being must

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3. Alan Gewirth developed a capacities account that is not a dignity account. I discuss and critique his view in JUSTICE, *supra* note 1, at 325-40.

*possess* the property of having the capacity to form, follow, and revise a plan of life, one could say that it must possess the property of *having or having had* the capacity.

That gets people suffering from dementia into the circle of human dignity. But what about infants? They do not possess this property. They do not have the capacity to form, follow, and revise a plan of life. Furthermore, they did they have this capacity in the past. To get them in, we must thin out the property even farther. Thus, a human being must possess the property of having or having had the capacity to form, follow, and revise a plan of life, or of being such that if it matures it *will* have the capacity.

That gets both Alzheimer's patients and well-formed infants into the circle. But there are still some human beings who fall outside the circle of dignity, namely those who are severely impaired mentally from birth. How can we get them in? We have to thin out even further the relationship between a being and the capacity to form, follow, and revise a life-plan. Consider the following complicated property: the property of belonging to a species such that maturation of its properly formed members includes having the capacity to form, follow, and revise a life-plan.

Thus far, every human being does have this complicated property that thins out the relation of the being to the capacity for forming, following, and revising a life-plan, and no non-human being has this property. But now two comments are in order. First, the property we have wound up with is not a very impressive property. It is nowhere near as impressive as the property with which we began: that of actually possessing the capacity to form, follow, and revise a life-plan. Possessing this thinned-out property does not give those who possess it very much worth. And second, some of the higher animals possess a property that is considerably more impressive than this thinned-out property, namely the property of actually having the capacity to engage in rational agency.

My image of the problem here is that of a seesaw. We began by picking a certain admirable capacity of human beings and suggest that human rights are grounded in possessing that capacity. Then we noticed that certain of the higher animals possess that capacity. Therefore, we augmented the capacity until we were sure that no animals possess it. But then we noticed that some human beings also do not possess this augmented property. Then, rather than saying that human beings must *have* the capacity in order to possess the worth in question, we carefully crafted some complicated relation of human beings to the capacity such that every human being does stand in that relationship to the capacity. But then it occurred to us that the worth a human being possesses on account of having this complicated, thinned-out relation to the capacity really does not come to much. And we noticed that some of the higher animals possess a nobler property than that one. It is a seesaw.

It is easy to see that the seesaw fate of this particular capacity proposal will be the fate of every capacity proposal. No matter which capacity one

selects, there will be some human beings who do not actually have the capacity. If one then thins out the required relation of something to the capacity, so that every human being stands in that relation to the capacity, one is left with a property that does not give its possessor sufficient dignity to ground human rights, and with a property such that some animals have a more impressive property.

This leaves us with three basic options. One option is to give up on capacity accounts and find a new and different way of grounding human rights. A second option is to continue to insist that each human being has a dignity sufficient for grounding human rights while conceding that there are some human beings for whom one is at a loss to say what it is about them that gives them that dignity.

The third option is to give up on the idea of human rights. Under this option, one can then proceed in one of three ways. One can offer utilitarian reasons for maintaining human rights *practices* while denying that there really are any human rights. This was the position of Richard Rorty, though it has to be said that Rorty was remarkably vague as to what exactly is the social good that human rights practices effect.<sup>4</sup> Alternatively, one can propose that we not only give up on the idea of human rights but also give up on human rights practices while continuing to recognize the rights of those human beings who are capable of functioning as full-fledged persons. Or one can scrap the idea of rights in general and say goodbye to human rights practices.

Let me say something about the first of the main options, that of offering a non-capacity grounding for human rights. Notice that no matter how impaired a human being may be, she retains human nature. Indeed, the idea of an *impaired* human being presupposes the idea of human nature. It is by virtue of possessing human nature that one can be properly formed or malformed in some respect—that one can function properly or improperly. Alzheimer's patients who have lost all capacity for rational agency are, on that account, malformed. They nonetheless retain human nature. So might it be that, no matter how malformed a human being may be, simply possessing human nature gives him or her a worth sufficient for grounding human rights? I am not aware of this proposal having been put forward in the literature on human rights, but I think it is worth considering. Of course, there are many writers nowadays who reject the idea of a fixed human nature. For them, this proposal would be a non-starter.

A good way to think about the issue is to regard our human nature as our design-plan, and then to consider what we would say about other cases of well-formed and malformed exemplifications of a design-plan. Suppose that my two neighbors own examples of the same model of automobile.

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4. See RICHARD RORTY, *Human Rights, Rationality, and Sentimentality*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES* 111, 111-34 (Stephen Shute and Susa Hurley eds., 1993).

The example that my neighbor to the east owns is well-formed in all respects, and I admire it enormously. The example that my neighbor to the west owns is a "lemon," and the mechanics all tell him that to get it to run properly would require such extensive replacement of parts that it is best to scrap it.

Would I advise the latter neighbor to reject this advice and instead to hold onto his automobile as something of great worth? Would I tell him that the mechanics, in advising him to scrap it, are ignoring the fact that his automobile is an example of the very same model whose well-formed example is so admirable? Would I tell him that the automobile in his garage is truly admirable on account of its design-plan, even though nobody can get it to run?

My guess is that readers would divide in how they answer this question. Suppose that, in spite of the fact that my neighbor's automobile is inoperative, you would advise him to treat his automobile as something of great worth on account of its design-plan. By analogy, you would then also say that merely having human nature is sufficient to give a human being worth. So suppose that is true. So far as I can see, the worth a human being has on account of possessing human nature is less than the worth of one of the higher animals on account of actually being able to engage in some bit of rational action. So once again, we have a seesaw.

Consider this analogy: the inoperative car has some worth on account of being an exemplar of a noble design-plan. But does not a car that runs well but whose design plan is less noble have more worth? I know which of the two I would choose if I were offered a choice; I would choose a well-running Ford over an inoperative BMW. I myself would not give an affirmative answer to the question posed above. Emphasizing the distinction between that abstract thing which is the design-plan, and this particular concrete exemplar of the plan, I would insist that no matter how noble the design-plan, this particular exemplar deserves nothing better than being junked.

Thus, whichever answer one gives to the question about the worth of having human nature, conclude, by analogy, that appealing to human nature instead of human capacities also does not yield an adequate secular grounding of human rights. There is adequate secular grounding for the rights of those human beings who have the capacity to form, follow, and revise a life-plan, but not for those who are so severely impaired as to lack the capacity for doing that. Of course, from the fact that there is at present no adequate secular grounding of human rights it does not follow that there will never be one. It may seem unlikely that there ever will be. But the history of philosophy is filled with strokes of genius.

I quite deliberately formulated the topic of my discussion—"Can human rights survive secularization?"—so that it would carry two suggestions. The formulation was intended to suggest, in the first place, that the origin of the recognition of human rights is not to be located in the pro-

cess of secularization. We have all heard the story I alluded to earlier, that the recognition of human rights first emerged in the European Enlightenment of the seventeenth and eighteenth centuries and that the Enlightenment was a secular, anti-Christian movement. To what extent the Enlightenment was in fact secular remains a matter of controversy. I myself believe that it was considerably less secular and less anti-Christian than is commonly supposed. In any case, what recent research quite clearly shows is that it is not true that the recognition of human rights first emerged in the Enlightenment.

The legal historian, John Witte, has shown that the early Protestant Reformers employed the idea of human rights almost with abandon.<sup>5</sup> Two legal historians of the medieval period, Brian Tierney and Charles Reid, have shown that the canon lawyers of the twelfth century did so as well.<sup>6</sup> My own view is that if we ask, in turn, whether writers before the twelfth century might have recognized the existence of human rights without explicitly conceptualizing them, what we discover is that human rights were recognized by the Church Fathers, and back behind them, by the writers of the Hebrew and Christian Scriptures.<sup>7</sup> I hold that the recognition of human rights is one of the great gifts of the Hebrew and Christian Scriptures to humanity.<sup>8</sup>

My formulation was intended to suggest, in the second place, that there is available a non-secular, theistic grounding of human rights. Let me briefly describe such a grounding.<sup>9</sup> It has to be based on some relation to God that does not presuppose any particular set of capacities. Of course, to point out that theism of a certain sort has the resources for grounding human rights is not to establish the truth of that or any other version of theism, just as pointing out that Kantianism has the resources for grounding the rights of those human beings who are capable of functioning as persons is not to establish the truth of Kantianism.

Theologians often say that our shared and ineradicable dignity as human beings supervenes on our bearing the image of God, the *imago dei*. To decide whether this answer is correct, we must know what is understood by the *imago dei*. Some writers understand the *imago* as consisting of resembling God with respect to certain capacities. Others understand it as consisting of resembling God with respect to a certain role in creation that the capacities enable—the role of “having dominion,” for example.<sup>10</sup>

5. See JOHN WITTE, JR., *THE REFORMATION OF RIGHTS* (2007).

6. See CHARLES J. REID, JR., *POWER OVER THE BODY, EQUALITY IN THE FAMILY* (2004); BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS* (1997).

7. I defend this thesis in *JUSTICE*, *supra* note 1, at 59-131.

8. I defend this thesis in chapters three through five of *JUSTICE*, *supra* note 1, at 65-131.

9. I develop the theistic account much more fully than I do here in *JUSTICE*, *supra* note 1, at 342-61.

10. For a more extensive discussion of the *imago dei*, see generally JAMES BARR, *BIBLICAL FAITH AND NATURAL THEOLOGY: THE GIFFORD LECTURES FOR 1991 DELIVERED IN THE UNIVERSITY OF EDINBURGH* (1993).

The points already made concerning secular attempts to ground human rights apply here as well. Thus, whatever capacities a theologian might single out as the basis for the *imago dei*, some human beings do not have those capacities. Some do not yet have them, some no longer have them, and some never will have them. But if a given human being does not possess those capacities, then of course she does not resemble God with respect to possessing them. And if she does not possess them, then also she does not resemble God with respect to the role in creation that those capacities enable. If the *imago dei* is understood in such a way as to consist of resembling God with respect to certain capacities or with respect to some role that requires certain capacities, then there are human beings who lack the *imago dei*. Most Christian theologians would find the conclusion that some human beings lack the *imago dei* unacceptable.

The only way to avoid it is to make the same sort of move that I made when winding up my discussion of secular accounts of human rights. Thus, we must move from thinking of the *imago dei* as consisting of resembling God with respect to certain capacities or some role that requires certain capacities, to thinking of it as resembling God on account of one's human nature. No matter how seriously impaired a human being may be, she nonetheless possesses human nature. The resemblance will have to be somewhat roundabout: resembling God in having a nature such that those in whom it is properly functioning possess those God-like capacities that traditional accounts of the *imago dei* highlighted.

The skepticism that I expressed earlier, concerning whether merely possessing human nature gives one the worth that grounds human rights, is obviously appropriate here as well. Thus, a theistic account of human rights, to be adequate, cannot merely appeal to the resemblance to God that possessing human nature provides. It will have to appeal to some additional relationship to God possessed by all those who bear the *imago dei* thus understood—a relationship that imparts to them the requisite dignity without presupposing any capacities on their part.

What might such a relationship be? One candidate is the relationship to God of being redemptively loved by God permanently and equally with all other human beings. Severely impaired human beings can stand in this relationship along with those who are not impaired. And a creature that stands in this relationship to God does, on that account, have great worth.

I have argued that there is no adequate secular grounding of human rights in general. And let me say one last time that by "human rights in general" I mean not only the rights of those human beings who have the capacities necessary for forming, following, and revising a life-plan but also the rights of those who do not have such capacities. I have also presented the outlines of a theistic grounding of human rights that seems to me adequate. When one puts these two theses together, I think it is almost impossible not to ask oneself the question, can the recognition of human

rights in general survive secularization? That is, can it survive erosion of belief in God?

A thesis prominent in twentieth century sociology has been that modernization leads to secularization. I am told that most sociologists have now given up on the thesis. Though the United States is as highly modernized a society as any, evidence suggests that belief in God is at least as prominent among Americans now as it was two centuries ago. But suppose that secularization does happen; suppose that belief in God does erode. Would the recognition of the rights-grounding dignity of those human beings who are severely impaired survive? Affirming the dignity of each human being is compatible with not being able to account for their dignity. But what should we expect to happen, not immediately but over the long haul, if a sizable proportion of our citizenry have no way of accounting for their dignity? I am not a prophet and do not know. But I do think it is appropriate to worry about moral erosion at this point.

Given that we live in a participatory democracy, it would be highly desirable to have an adequate grounding of human rights that all of us could embrace, no matter what our religious or non-religious orientation. Second best would be one or more adequate groundings such that everybody could accept at least one of these. So far as I can see, neither of these is our situation. Our situation is that whereas there is available a theistic account that grounds the rights of all human beings, a comparable secular account is not available. I do not find this situation appealing—not at all. But I have come to think that it is in fact our situation.