

Warsaw lecture

Human Rights Day (December 10), 2009

Human Rights in Judaeo-Christian Thought

Jeremy Waldron¹

1. Torture

I want to begin by reflecting upon the dark days of 2002-2006, when national security policy in the United States was characterized by a debate about the treatment and interrogation of detainees suspected of involvement with terrorism. It was a debate that the rest of the world watched with fascination and horror, as Americans publicly discussed whether they intended to remain part of the international human rights consensus that torture and other methods of inhuman and degrading treatment were absolutely and unconditionally forbidden as a matter of law. Among the voices that were raised in protest against the use of torture, there were military officers and Pentagon officials like Alberto Mora and David Brant,² there were politicians like John McCain and Barack Obama, there were human rights activists of course, and lawyers and some law professors and even the occasional moral philosopher. What was striking, however, was that for most of this period, the voices

¹ University Professor, New York University (Law School).

² See Jane Mayer, 'How an internal effort to ban the abuse and torture of detainees was thwarted,' *The New Yorker*, February 27, 2006. available at http://www.newyorker.com/archive/2006/02/27/060227fa_fact?currentPage=1#ixzz0Yx75YMMK

of Christian leaders—clergy and lay people—were silent. Those of us who were actively engaged in this debate listened for—yearned for and strained to hear—a contribution by the churches, and our impression (at least as late as 2006) was that interventions by church leaders in this debate were late and hesitant, at best. In November 2005, both the U.S. Conference of Catholic Bishops and the National Council of Churches applauded the lead given by the U.S. Senate (in the McCain Amendment), condemning any use of torture as unacceptable; but this was the Bishops’ Conference and the National Council of Churches following the lead of elected legislators, three years after the torture debate had begun, rather than giving any lead of their own. Finally a National Religious Campaign against Torture got underway in a conference at the Princeton Theological Seminary in January 2006.³ But again this was four years after the earliest torture memos emerged, eighteen months after the Abu Ghraib abuse was brought to public attention.

Why was the Christian response so late and so equivocal? A poll from October 2005 conducted by the Pew organization showed that American Christians (and Catholics in particular) exhibited remarkably strong support for the use of torture, while secular Americans more strongly opposed it. We have to remember too that, quite apart from its

³ An early version of some of these remarks was originally presented at the conference at Princeton Theological Seminary in 2006, which inaugurated that group. Since then other similar groups have emerged, notably ‘Evangelicals against Torture,’ under the leadership of David Gushee.

own history of involvement with torture in the medieval and early modern period, the Catholic hierarchy and clergy have played a critical role in modern times in supporting the use of torture by the French in Algeria and during the ‘dirty war’ in Argentina.⁴

I don’t want to go any further in this direction today. Instead I want to use these reflections on religious objections to torture—or until recently the lack of religious objections against torture—to consider a broader philosophical question. What is the role of religious belief in supporting and elaborating conceptions of human rights in general? Human rights have captured the imagination and support of people and peoples around the globe. But in the legal documents in which human rights guarantees are set out and in much of the jurisprudence that makes sense of those guarantees, they are conceived as largely secular ideals. The Preamble to the Universal Declaration of Human Rights does not make any mention of a religious foundation; it does not go even so far as the American Declaration of Independence which in 1776 spoke of all men as “*created equal*” and as having been “*endowed by their Creator with certain natural and inalienable rights.*” The closest the modern documents approach this is in their reference to human dignity, which is susceptible of a religious interpretation but which is also at home in

⁴ Cite to Jean Porter and Mark Osiel. Also see Lazreg, *Torture and the Twilight of Empire*, 173-212 and the review of that book in Waldron, ‘Review Article: Clean Torture by Modern Democracies.’

secular moral philosophy of a broadly Kantian kind.⁵ We know from the drafting history of the Universal Declaration that a proposal to include a reference to man's creation in the image of God was considered and rejected on the ground that this would undermine the Declaration's broader appeal.⁶ It is as though we relish the prospect of a more pragmatic and inclusive basis for our rights. As Princeton philosopher Anthony Appiah has observed, "[w]e do not need to agree that we are all created in the image of God ... [in order] to agree that we do not want to be tortured by government officials."⁷

I have to say that I am less confident than Appiah is about an entirely secular foundation. Appiah says that "[w]e do not need to agree that we are all created in the image of God ... to agree that *we* [ourselves] do not want to be tortured by government officials." But it is another thing whether we can agree on purely secular grounds that *others* [whom we can demonize as outsiders or enemies] should not be tortured by government officials, especially when such torture is thought to advantageous for *our* security. I am drawn to the thought that a religious foundation for the prohibition may be particularly important in

⁵ See Giovanni Pico della Mirandola, *Oration on the Dignity of Man*, available at <http://cscs.umich.edu/~crshalizi/Mirandola/> cited in James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008).

⁶ This is based on the Summary Records of Meetings of the Third Committee Sept. 21-Dec. 8, 1948, Official Records of the Third Session of the General Assembly, Part I, at 55, U.N. Doc. (A/C.3/SR.) 84-180 (1948), cited in Courtney W. Howland, "The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter," 35 *Columbia Journal of Transnational Law* 271 (1997) at 341.

⁷ K. Anthony Appiah, "Grounding Human Rights," in Michael Ignatieff, Anthony Appiah, and Amy Gutmann, *Human Rights as Politics and Idolatry* (Princeton University Press, 2003) 101, at p. 106.

circumstances where the prohibition is costly and is supposed to apply for the benefit of those—like suspects—that we think we have particular reason to regard as beyond the reach of any *pragmatically*-justified moral concern. I will come back to this a little later in my remarks.

And there are broader philosophical considerations too.⁸

Increasingly, moral philosophers are having difficulty articulating the notion of a moral absolute. In what have become known as “ticking bomb” hypotheticals (hypothetical examples), it has been suggested that terrorist suspects should be tortured when this is the only way of obtaining information that leads to the saving of large numbers of lives (e.g., when it would save the lives of those threatened in a terrorist attack like the attack that took place in Manhattan on September 11, 2001).⁹ How could anyone reasonably object to the use of torture to save thousands of lives in a case like this? To object one would have to be a moral absolutist (and not just an ordinary moral absolutist but one willing to maintain his absolutes even in the face of what Robert Nozick called “catastrophic moral horror.”)¹⁰ We say that torture is banned on account of an affront to human dignity, but we only need to imagine the

⁸ The paragraphs that follow are adapted from Jeremy Waldron, *What Can Christian Teaching Add to the Debate about Torture?* 63 THEOLOGY TODAY (2006) 330-43.

⁹ Alan Dershowitz, *Why Terrorism Works*, op. cit., p. 477, asks: “[W]hat if on September 11 law enforcement officials had “arrested terrorists boarding one of the planes and learned that other planes, then airborne, were heading towards unknown occupied buildings?” Would they not have been justified in torturing the terrorists in their custody – just enough to get the information that would allow the target buildings to be evacuated?”

¹⁰ Robert Nozick, *Anarchy, State, and Utopia*, p. 30n.: “The question of whether these side constraints are absolute, or whether they may be violated in order to avoid catastrophic moral horror, and if the latter, what the resulting structure might look like, is one I hope largely to avoid.”

consequences for human dignity of ten thousand people being blown up to see that this value pulls us in both directions.¹¹ By contrast, a prohibition based on divine command has credentials that transcend all such calculations. The religious understanding can make sense of an absolute prohibition—in ways that secular theory cannot—by appealing to conceptions of *the sacredness of the human person*. Christians and Jews do not see human dignity as *something we happen to be in favor of*, or as a goal to be maximized. They respond to it, as to the sacred, as to the holy presence of the image of God (*imago Dei*) in every human person. The idea of the sacred is not an easy notion for us to make sense of, as it defies the sort of counting and calculation that we usually associate with ‘our’ values. I am told that secular moral thought *can* make sense of the reality of value—secular moral philosophers can say that values are not relative to our desires or customs or cultures. That is reassuring. But the notion that the value accorded to a person might come from somewhere altogether beyond human life and imagining is a form of *radical* objectivity that goes far beyond common-or-garden moral objectivity. That is what we missed when we strained to listen for a religious contribution to the torture debates.

¹¹ See Dershowitz, *Why Terrorism Works*, pp. 142-3.

2. “Political Liberalism”

The idea of grounding the dignity and the rights of man on religious foundations may have broad appeal among believers. But some liberal philosophers oppose the very idea of a religious grounding for public commitments such as human rights. The best-known position is that of John Rawls, in his book *Political Liberalism*. “In discussing constitutional essentials,” says Rawls, “we are not to appeal to comprehensive religious or philosophical doctrines.”¹² He said that any such appeal would problematize the legitimacy of individual rights in the eyes of many citizens: their legitimacy is much better secured if it rests on “plain truths now widely accepted, and available, to citizens generally.”¹³ If religious considerations are introduced into public discourse, Rawls said, it must be on the strict understanding that the force of the reasons they embody can be translated into secular language accessible to all.

It is a matter of civility. In public reason, we must engage with one another in a way that is mutually respectful. When I offer something as a contribution in public debate, I must offer it as something for others to grasp, consider, and engage with. But when I talk about men being created in the image of God or when I say torture is the sin

¹² “[W]e are not to appeal to comprehensive religious or philosophical discussions – to what we as individuals or members of associations see as the whole truth.... As far as possible, the knowledge and ways of reasoning that ground our affirming the principles of justice and their application to constitutional essentials and basic justice are to rest on the plain truths now widely accepted, and available, to citizens generally.” (John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) pp. 224-5)

¹³ Ibid.

against the Holy Ghost,¹⁴ the secular individuals I am addressing, with whom I am bound together in common citizenship, may not be able to make any sense of what I say. So, if my view prevails in the torture debates, it will not be because the others are convinced or even had a real opportunity to be convinced. And if I am conscious of this, then I am being uncivil in putting forward reasons of this sort.

I personally think that the Rawlsian line of argument exaggerates the unfamiliarity of religious arguments to nonbelievers. The Rawlsian argument treats such considerations as though they were utterly alien to the culture in which nonbelievers have been raised. But like all of us, nonbelievers have been raised in a culture whose art, literature, history, are saturated in religious ideas, religious stories, and religious imagery. That nonbelievers have been able to repudiate this pervasive heritage may be a tribute to their intellectual resolution, but let us not pretend it is a matter of repudiating something unfamiliar to them or something utterly incommensurate with the mainstream of our culture.¹⁵

¹⁴ Cf. the claim made by a U.K. delegate in the *travaux préparatoires* for the European Convention on Human Rights in 1949: "I say that to take the straight beautiful bodies of men and women and to maim and mutilate them by torture is a crime against high heaven and the holy spirit of man. I say it is a sin against the Holy Ghost for which there is no forgiveness." --The Council of Europe, Collected Edition of the "*Travaux Préparatoires*" of the European Convention on Human Rights, Vol. II (August-November 1949) (Martinus Nijhoff, 1975), pp. 36-40. I quoted this in Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House," 105 *Columbia Law Review* (2005), 1681-1750.

¹⁵ In any case, The Rawlsian approach underestimates people's ability to grapple with unfamiliar views that start out with no foothold in their own mentality or motivational set. The Rawlsian argument assumes that people can understand or grapple with a doctrine only if in some sense they already share it or share the conceptual framework that it presupposes. [I have argued against that elsewhere. See Jeremy Waldron, "Tribalism and the Myth of the Framework," in Philip Catton and Graham Macdonald (eds.) *Karl Popper: Critical Appraisals* (London: Routledge, 2004), and "Cultural Identity and Civic Responsibility," in Will Kymlicka and Wayne Norman (eds.) *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000).] The difficulties of inter-cultural or religious-secular

A salutary moment in liberal debates on these matters came in 2006 when Jürgen Habermas insisted that any requirement that religious considerations be translated into language accessible to non-believers “must be conceived as a cooperative task in which the non-religious citizens must likewise participate, if their religious fellow citizens are not to be encumbered with an asymmetrical burden. .. [S]ecular citizens must open their minds to the possible truth content of those presentations and enter into dialogues from which religious reasons then might well emerge in the transformed guise of generally accessible arguments.”¹⁶

I think this is tremendously important. But it needs to be coupled with another observation that Habermas has made. When a non-religious person tries to grasp the content of a religious intervention in public affairs, it is important that this translation process should not be conceived simply as the attempt to find something equivalent in conventional secular wisdom on the topic. For it may be the purpose of the religious intervention to challenge conventional wisdom, by conceiving of some social obligation in a radical and challenging way. Suppose the public decision we are all considering is a proposal to abolish almost all welfare assistance for the poor. A Christian may want

dialogue are often exaggerated, when we talk about the incommensurability of cultural frameworks and the impossibility of conversation without a common conceptual scheme. In fact conversation between members of different cultural and religious communities is seldom a dialogue of the deaf, though of course there is inevitable tension and misunderstanding. Humans are enormously curious about each other’s ideas and reasons, and, when they want to be, they are resourceful in listening to and trying to learn from one another across what appear to be insurmountable barriers of cultural comprehensibility, often far beyond what philosophers and theorists of culture give them credit for. We philosophers tend to think that deliberation requires a framework of common concepts and understandings; we are less embarrassed than we ought to be when, time and again, ordinary people prove us wrong.

¹⁶ Jürgen Habermas, Religion in the Public Sphere, 14 EUR. J. PHIL. 1 (2006)

to say that neglecting to help the poor is a way of turning one's back on the Son of God.¹⁷ He may accept the view of social justice expressed by the American Catholic Bishops in their pastoral letter of 1986: "In the Last Judgment, so dramatically described in St. Matthew's Gospel, we are told that we will be judged according to how we respond to the hungry, the thirsty, the naked, the stranger"—"Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me."¹⁸ The task of translation is to strain to grasp what is new and challenging here, and the basis of its force, even if the terms in which the basis of its force are expressed are disconcerting or unfamiliar.

¹⁷ See Matthew 25: 31-46. See also National Conference of Catholic Bishops, *Economic Justice for All* (1986), available online at <http://www.osjspm.org/cst/eja.htm>, §16:

All members of society have a special obligation to the poor and vulnerable. From the Scriptures and church teaching, we learn that the justice of a society is tested by the treatment of the poor. ... In the Last Judgment, so dramatically described in St. Matthew's Gospel, we are told that we will be judged according to how we respond to the hungry, the thirsty, the naked, the stranger. As followers of Christ, we are challenged to make a fundamental 'option for the poor' – to speak for the voiceless, to defend the defenseless, to assess life styles, policies, and social institutions in terms of their impact on the poor.

See also the discussion in Jeremy Waldron, "Religious Contributions to Political Deliberation," *San Diego Law Review*, 30 (1993), 817-48.

¹⁸ Matthew 25: 31-46 -- "When the Son of man shall come in his glory, and all the holy angels with him, then shall he sit upon the throne of his glory: And before him shall be gathered all nations: and he shall separate them one from another, as a shepherd divideth his sheep from the goats: And he shall set the sheep on his right hand, but the goats on the left. Then shall the King say unto them on his right hand, Come, ye blessed of my Father, inherit the kingdom prepared for you from the foundation of the world: For I was an hungred, and ye gave me meat: I was thirsty, and ye gave me drink: I was a stranger, and ye took me in: Naked, and ye clothed me: I was sick, and ye visited me: I was in prison, and ye came unto me. Then shall the righteous answer him, saying, Lord, when saw we thee an hungred, and fed thee? or thirsty, and gave thee drink? When saw we thee a stranger, and took thee in? or naked, and clothed thee? Or when saw we thee sick, or in prison, and came unto thee? And the King shall answer and say unto them, Verily I say unto you, Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me. Then shall he say also unto them on the left hand, Depart from me, ye cursed, into everlasting fire, prepared for the devil and his angels: For I was an hungred, and ye gave me no meat: I was thirsty, and ye gave me no drink: I was a stranger, and ye took me not in: naked, and ye clothed me not: sick, and in prison, and ye visited me not. Then shall they also answer him, saying, Lord, when saw we thee an hungred, or athirst, or a stranger, or naked, or sick, or in prison, and did not minister unto thee? Then shall he answer them, saying, Verily I say unto you, Inasmuch as ye did it not to one of the least of these, ye did it not to me. And these shall go away into everlasting punishment: but the righteous into life eternal."

The point is that religious conceptions are inherently transformative. And this may affect the contribution they make to the philosophy of human rights. Wittgenstein observed that philosophy leaves everything as it is; everything in science and everyday language games. But the choice of a specific religious foundation cannot be expected to leave *everything as it is* so far as human rights are concerned. Indeed our very reason for soliciting a religious contribution is that we want to drive the debate in a different direction than the secular theorist is comfortable with.

Our talk of overlapping consensus sometimes obscures this. We imagine that the same political position may be justified from the perspective of a variety of ethical and religious views. So there will be the Kantian foundation for the prohibition on torture, the rule-utilitarian foundation, the Christian foundation, the Jewish foundation and so on. And they are all supposed to converge on the same conclusion, which can be expressed in the neutral language of policy and law. If I am right in what I am saying now, however, this idea of a perfect overlap is a non-starter. Foundations make a difference. Where you start makes a difference to where you end up. And so there may not be much overlap—for difficult cases—between an interpretation of Article 5 of the UDHR motivated by rule-utilitarian reason and an interpretation of that article motivated by a Judaeo-Christian foundation.

3. Imago Dei as the Basis of Rights¹⁹

I would like to illustrate these remarks with some discussion of a doctrine that I have already mentioned once or twice—the doctrine of *imago dei*—the doctrine from Genesis 1:26-27 that men and women are created in the image of God.

The doctrine that humans are created in the image of God is, at first sight, enormously attractive for those of us who are open to the idea of religious foundations for human rights. It offers a powerful account of the sanctity of the human person and it seems to give theological substance to a conviction that ought to inform all foundational thinking about human rights—that there is something about our sheer humanity that commands respect and is to be treated as inviolable, irrespective of or prior to any positive law or social convention.²⁰

¹⁹ This section of the lecture is based on Jeremy Waldron, “The Image of God: Rights, Reason, and Order,” forthcoming in *Cambridge Companion to Christianity and Human Rights* ed. John Witte and Frank Alexander.

²⁰ Accordingly, references to it are found throughout the human rights literature. See e.g., Jerome J. Shestack, “The Philosophic Foundations of Human Rights,” *Human Rights Quarterly*, 20 (1998), 201 at pp. 205-6: “Theology presents the basis for a human rights theory stemming from a law higher than that of the state and whose source is the Supreme Being. If one accepts the premise of the Old Testament that Adam was created in the ‘image of God,’ this implies that the divine stamp gives human beings a high value of worth. ... In a religious context every human being is considered sacred. ... When human beings are not visualized in God’s image then their basic rights may well lose their metaphysical *raison d’être*. On the other hand, the concept of human beings created in the image of God certainly endows men and women with a worth and dignity from which the components of a comprehensive human rights system can flow logically.”

And references to it are also found (occasionally) in legal doctrine.) In the United States, see, e.g., *Jones v. Kemp*, 706 F.Supp. 1534, N.D.Ga. (1989), at 1560. See also below, pp. 17-18. For non-death-penalty uses, see also *Smyly v. U.S.*, 287 F.2d 760, C.A.5 (Tex.), (1961) at 771, and *Watson v. Branch County Bank* 380 F.Supp. 945 D.C.Mich. 1974, at 968. For some British cases, see *Portsmouth NHS Trust v Wyatt*, [2004] EWHC 2247 (Fam), where Hedley J said at §21: “This case evokes some of the fundamental principles that undergird our humanity. They are not to be found in Acts of Parliament or decisions of the courts but in the deep recesses of the common psyche of humanity whether they be attributed to humanity being created in the image of God or whether it be simply a self-defining ethic of a generally acknowledged humanism.” See also *Boughton and another v Knight and others* [1861-73] All ER Rep 40 at 46. I am grateful to Nick Grief for these references.

The importance of this doctrine for religious social and political thought is perhaps best known from Roman Catholic teaching. But it is not peculiarly Catholic. American evangelical Protestants, white and black, invoke the doctrine, and of course, on account of its scriptural provenance, it extends beyond Christianity. The doctrine that man is created in the image of God and that this makes a difference to how it is permissible to treat us is first stated in the Torah and it is a mainstay of Jewish as well as Christian social thought.

I want to take a few moments to illustrate its use in human rights jurisprudence and philosophy and then say something about the difficulties that attend its use.

Imago dei is a doctrine pertaining to our ontological status (our relation to God and the particular nature of our creation). Like any difficult theological doctrine, it can be interpreted in a variety of ways. Human rights of course is also a multifaceted idea: the UDHR embraces articles of various different kinds (e.g. rights differentiated by subject-matter such as liberty rights, procedural rights, political rights, socioeconomic rights, and so on) as well as moral and legal claims made at various different levels (fundamental claims about dignity or autonomy versus quite specific claims about the need for particular protections). And human rights are surrounded by almost as much controversy as *imago dei*; so there is a further question about the ways in

which its association with human rights will bear upon those controversies. So we have to map a complicated and controversial theological doctrine on to a complicated and controversial body of human rights propositions.

Probably if *imago dei* is relevant to human rights, it is relevant at a foundational level. It might be seen as the basis of our dignity, the special rank that we hold in creation. And it contributes also to a sense of our equality as the bearers of that status. This is particularly important when it is asserted of those who historically have been treated as inferiors. So, for example, in his dissent in the great case of *Dred Scot v. Sanford* (1856), Justice Mclean thought it necessary and appropriate to remind his colleagues on the U.S. Supreme Court that “[a] slave is not a mere chattel. He bears the impress of his Maker, and ... he is destined to an endless existence.”²¹

More recently, in a 2005 decision of the Supreme Court of Israel, considered the Israeli government’s policy of preventative strikes aimed at killing members of terrorist organizations in the West Bank and the Gaza Strip even when they were not immediately engaged in terrorist activities, President (Emeritus) Aharon Barak prefaced his opinion with this observation:

Needless to say, unlawful combatants are not beyond the law.

They are not “outlaws.” God created them as well in his image;

²¹ Mclean J., dissenting in *Dred Scot v. Sanford*, 60 U.S. 393, at 550 (1856).

their human dignity as well is to be honored; they as well enjoy and are entitled to protection ... by customary international law.²²

The reference here to the image of God was intended to pull us up short and remind us that, although we are dealing with someone who will kill and maim scores of innocent people given the opportunity and one who is justly liable through his actions and intentions to deadly force, still we are not just talking about a wild beast or something that may be killed as though its life did not matter. The unlawful combatant is also *man-created-in-the-image-of-God* and the status associated with that characterization imposes radical limits on how lightly we treat the question of what is to be done with him.

The foundational work that *imago dei* does for dignity is, in my view, indispensable for overriding the temptation to demonize or bestialize our enemies in the war against terrorism. This temptation is so natural that it can only be answered by something that goes beyond our attitudes, something commanded from the depths of the pre-political and pre-social foundation of the being of those we are tempted to treat in this way. *Imago dei* presents the respect that humans as such are entitled to as something grounded, not in what we happen to care about or in what we happen to have committed ourselves to, but in facts about what humans are actually like—like unto their Creator and by virtue of that likeness sacred and inviolable. We are not just clever animals, and the

²² *The Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v. The Government of Israel and others* (HCJ 769/02) December 11 2005, §25.

evil-doers among us are not just good animals gone bad: our dignity is associated with a specifically high rank in creation and our status even as wrongdoers is to be understood in relation to this.

Besides this vital work in regard to human dignity in general, *imago dei* may also be used in connection with certain particular rights or particular kinds of rights. I want to briefly summarize three such uses.

The first and most obvious relation between *imago dei* and particular human rights derives from the doctrine's use in the Noachide law to express the basic right to life—the sacredness of human life—and the seriousness with which the taboo on killing must be taken. “Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man.”²³ No doubt, modern human rights advocates will be uneasy with the connection intimated in this passage to capital punishment.²⁴ (This may indicate a further reason for saying that when we go looking for a religious foundation for our rights, we should be careful what we wish for.)

Secondly, the doctrine has a use in regard to rights not to be subject to degrading treatment. There is an old Talmudic story, known as “The Parable of the Twins,” used to illuminate Deuteronomy 21:23.

²³ Genesis 9: 8.

²⁴ Maybe this can be explained away by various interpretive contortions. For an interpretation of *imago dei* that is severely restrictive of capital punishment, see Yair Lorberbaum, “Blood and the Image of God: On the Sanctity of Life in Biblical and Early Rabbinic Law, Myth and Ritual” in Kretzmer and Klein (eds.) *The Concept of Human Dignity in Human Rights Discourse* 55, at 58 and 82.

Two twin brothers dwelt in one city. One was appointed king and the other took to banditry. The king gave an order and they hanged the bandit. But all who saw the bandit said: “The king is hanged!” So the king gave an order and they took his twin down.²⁵

The implication of the parable—indeed the implication of *imago dei* is that when we treat humans in certain ways, for example when we torture them or mutilate their bodies, we present God to human view in a certain ugly light. We do so not only in our own self-presentation of how we think it is appropriate for beings like us to behave, but also in the presentation of the tortured body of our victim.

Thirdly: it can have an influence on how we understand political rights—particularly in those religious conceptions that identify *imago dei* with man’s being given dominion over the earth.²⁶ The award of dominion makes man in effect “God’s vice-regent, who rules over nature as God’s representative.”²⁷ Catholic social teaching does not particularly emphasize this aspect,²⁸ but in modern American Protestant thought, *imago dei* has been associated with participation in politics. The National Association of Evangelicals affirms, in its statement on civic responsibility that

²⁵ Babylonian Talmud, Sanhedrin 46b. I am grateful to Moshe Halbertal for this reference.

²⁶ Genesis 1: 26 –“And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.”

²⁷ Anthony A. Hoekema, *Created in God’s Image* (Eerdmann’s, 1994), pp. 85 and 78-9. See also Westermann, *Genesis* 1-11, at p. 151.

²⁸ See Ruston, *Human Rights and the Image of God*, p. 54.

We engage in public life because God created our first parents in his image and gave them dominion over the earth (Gen. 1:27-28).
... Just governance is part of our calling in creation.²⁹

One immediate consequence is a connection between our accounts of what humans are like (in light of *imago dei*) and human rights of conscience and association: “In order to carry out these responsibilities, human beings need the freedom to form associations, formulate and express beliefs, and act on conscientiously held commitments.”³⁰

Human rights are not just rights against government, born of what Judith Shklar called a “liberalism of fear,” a panic about the worst that governments can do.³¹ They make government possible by empowering the governed to participate in forging the very order they will live by.

Those are some of the uses that the doctrine may have in regard to specific human rights, and with them we already see that this religious conception, introduced as a philosophical foundation, does not necessarily “leave everything as it is.”

²⁹ National Association of Evangelicals (NAE), *For the Health of the Nation: An Evangelical Call to Civic Responsibility* (available at http://www.nae.net/images/civic_responsibility.pdf), p. 2. See also David P. Gushee, “Evangelicals and Politics: A Rethinking,” *J. Law & Religion*, 23 (2007-8), 1.

³⁰ NAE, *For the Health of the Nation*, p. 10.

³¹ Judith Shklar, “The Liberalism of Fear,” in Nancy Rosenblum (ed.) *Liberalism and the Moral Life* (Harvard University Press, 1989), 21.

4. Challenges and Difficulties

Let us turn now to the difficulties and challenges that it poses. The difficulties in regard to public reason are evident enough. *Imago dei* is a highly specific and recondite theological doctrine. Even those who oppose Rawlsian public reason may be uneasy about using foundations that seem completely bewildering to atheists or followers of other traditions.

Even on its home ground of theology, the doctrine of man created in the image of God is far from straightforward or uncontroversial. There are a host of difficulties. Humans are said by scripture to have been created in the likeness of God and created in the image of God. Some Jewish rabbinical sources suggest that image and likeness can mean two different things. Do human rights theorists who use the doctrine have to take sides in these exegetical debates?³²

Secondly, there are questions about what *imago dei* means in relation to our fallen sinful nature. What can human rights theory do with Calvin's doctrine that the image of God in us is now no more than a "relic" or Martin Luther's teaching that since the Fall we are more "like" the devil than "like" or "in the image of" God?³³ When we use *imago dei* in the context of human rights, are we committing ourselves to saying that Luther and Calvin were wrong?

³² See also George P. Fletcher, "In God's Image: The Religious Imperative Of Equality Under Law," *Columbia Law Review*, 99 (1999) 1608, at pp. 1615-17.

³³ See the discussions of the image of God in fallen man in David Cairns, *The Image of God in Man* (London; SCM Press, 1953), pp. 131-2 (Luther) and 137-41 (Calvin).

Thirdly, there are specifically Christian questions about the meaning of *imago dei* in light of the Incarnation. Is the sense in which Christ is the image of the Father (John 14: 8-9; 2 Corinthians 4:4; Colossians 1: 15; and Hebrews, 1:3) the same as or different from the sense in which mere mortals are created in the image of God?³⁴

I have neither space nor wit nor theological learning to address these questions. But do we really want to associate human rights with this degree of theological controversy? And this is to say nothing about whether we should expect the theologians to be happy about having the waters of controversy which lap around the doctrine of *imago dei* muddied by the opportunistic enthusiasms of human rights advocates.

I put this forward as a genuine question about the relation between the theological agenda and the human rights agenda. Awareness of these various objections is not fatal to regarding *imago dei* as a foundation for human rights. My arguments are intended just to slow us down, in a way that is consonant with what we all acknowledge is the seriousness with which the foundational question should be approached.

If we do decide to proceed with the idea that *imago dei* provides a grounding for rights, we have to consider the exact shape of its normativity and whether it matches the deontic structure and the specific normativity of rights. Rights are supposed to be correlative to duties incumbent on persons other than the right-bearer. But religious teachings

³⁴ There is useful discussion in Claus Westermann, *Genesis 1-11: A Continental Commentary* (Fortress Press, 1994), p. 155.

often emphasize a strongly pietistic conception of *imago dei*, and this holds that respect for the divine image in each person is a matter primarily for that person, as he or she endeavors (with God's grace), to live a life more faithful to that image.³⁵

A further feature of human rights, which may not sit comfortably with *imago dei* is the litigiousness that human rights involve. We are told in the Sermon on the Mount that "if any man will sue thee at the law, and take away thy coat, let him have thy cloak also" (Matthew 5: 38-42). The image of the rights-bearer is more self-assertive than this. But when we contrast the self-assertiveness of the right-bearer with the self-abnegation recommended by Jesus, to which side should we assign the doctrine of *imago dei*?

Let me say again: these questions are not supposed to settle anything; they are intended just to make us a little less comfortable than we might be with *imago dei* as a ground of rights.

5. Objective conceptions of rights

As we sound these various notes of caution, we should also observe that religious conceptions such as *imago dei* may have a bearing on a broader debate—a debate about whether rights are to be conceived in an

³⁵ The one use of the image idea in the Gospels (an indirect but as David Cairns points out an unmistakable use; see Cairns, *The Image of God in Man*, p. 38, and Matthew 22: 21, Mark 12: 17, and Luke 20: 25) emphasizes wholly its use in generating duties of man to God, to render oneself unto God just as one renders coins stamped with the image of Caesar unto Caesar. Admittedly, this may show only that *imago dei* cannot generate rights against God. One could say that, while still insisting "that human dignity... makes every man an object of reverence to other men, and gives him right over against them." See Cairns, *The Image of God in Man*, p. 283.

objective or subjective way. Now I don't mean "objective" in the sense of cognition of a moral reality. I mean objective in the sense of treating rights as something like *responsibilities* in the hands of those who bear them, as opposed to a more subjective or *voluntaristic* conception of rights, which represents rights as the property of the person, utterly under the control of his or her will, to be used or disposed of as he or she pleases.

It has sometimes been said that Jewish theology understands the idea of obligation much more easily than it understands the idea of rights. I think this is a mistake; what is true is that Jewish theology understands rights in what we might call an "obligatarian" way, as representing not just privilege but obligation on the part of the right-bearer. So X's right to do A or receive B is connected with some responsibility in relation to God's order that it is incumbent on X to discharge. And in this regard, I think Jewish teaching is similar to much Christian teaching, where the possession of rights is conceived as a matter of responsibility. The rights of parenthood are an example. Most Christian social thought orients this right not so much to individual freedom ("I can do whatever I like with my children") but to active and definite responsibilities in which individuals need to be assisted and protected.³⁶ These responsibilities are not just duties, in the sense of

³⁶ Think of a parent's right to reprimand her child. It is not best thought of as a right to do anything she pleases so far as the disciplining of her child is concerned. Though it protects her decisions in this matter (to a large extent), it is understood that the right corresponds to a serious responsibility that she has taken on. Suppose a stranger intervenes (on a bus or somewhere) to reprimand a little kid. The mother may protest: "It is not for you to

specific actions that we must or must not do. They call upon resources of thought and practical reason as they require continual exercises of intelligence to discern what is necessary for ordering the area of human life committed to one's care. A conception like this—motivated as it is by a deeper religious foundation—is going to sit rather uncomfortably with any understanding of human rights that privileges the free decision of the subject simply on account of that decision's representing an exercise of will.

Earlier this year (March 2009), the government in the United Kingdom issued a Green Paper entitled “Rights and Responsibilities: developing our constitutional framework,”³⁷ in which the government deplored the fact that “[r]esponsibilities have not been given the same prominence as rights in our constitutional architecture.” Mostly I think the authors of that Green paper, Jack Straw and Michael Wills, meant responsibility in the sense of ordinary social duty; they mentioned criminal and regulatory law and private law obligations as well, such as duties of care.³⁸ And they mentioned the obligations that we have which are correlative to the rights of others.

reprimand my child; that is my responsibility.” What she is claiming here is something like a right that she holds, but it is a right that is kind of synonymous with a responsibility.

³⁷ Green Paper, “Rights and Responsibilities: developing our constitutional framework” (Cm 7577), available at <http://www.justice.gov.uk/publications/docs/rights-responsibilities.pdf>

³⁸ “For example, and most obviously, we prohibit behaviour such as murder, rape and theft; we impose traffic rules that ensure safety on our roads; we also have duties to pay taxes, which contribute to the overall welfare and order of our society. Many areas of private law require us to bear in mind fellow members of society. For example, we may owe a legal duty of care to others when we interact with them. This ensures that when we cross paths with others or engage in actions which affect others, we are under a duty not to act negligently in a way which harms them. We

But I think they also meant to refer to a responsibility-based conception of our rights themselves: they mentioned for example Article 10 of the European Convention on Human Rights which, in setting out the right to freedom of expression, specifically recognises that the exercise of this freedom “carries with it duties and responsibilities.”³⁹

I hope that discussion of the Green Paper in the UK will not neglect this version of the “responsibilities” idea. Conceiving of rights *as responsibilities* is different from replacing or complementing rights with responsibilities. I actually think lots of rights are best conceived in this way. Take political rights, for example —rights of participation and voting. The person who exercises them is exercising a responsibility to play her part (along with millions of others) in running the democratic community. This does not mean that they are really just duties in disguise. They are not, because—as we saw with the parenthood example—the responsibility in question cannot be conceived of as simply submitting to a set of rules. Instead it involves a continual and active exercise of intelligence and choice.⁴⁰

owe duties to certain individuals by virtue of special relationships or positions – duties as parents; when we contract with others; and when we hold positions of public authority.” (Ibid., 2.16-2.17).

³⁹ Ibid., 2.13

⁴⁰ In saying that the parenting right is a responsibility, I don’t mean that it is contingent on the parent doing it well or responsibly. True, in the parenting case, there are limits, beyond which we will collectively intervene to take the right/responsibility away from her—on account of the direct involvement of another person’s welfare in the matter, i.e. the child’s). In the parenting case, we may even say that the right is something which a person, if she is a parent, has a duty to exercise. It’s her job, it is something incumbent on her; but it’s still a RIGHT that she has; and in the sense described above, it’s something which (in the normal case) she holds against others. In other cases, the presence of a sense of duty incumbent on the right-bearer may be more attenuated. In Australia, there is a legal duty to exercise the right to vote. But in other countries, there is no legal requirement to this effect. (But there is such a duty in regard to other forms of participation, such as serving on juries for example.)

Let me generalize now. I think it is beyond doubt that any view of human rights that relies upon a conception of the right-holder as embodying the image of God will tend to represent those rights that privilege freedom of various sorts as responsibilities in the way that I have described. In Jewish thought and Christian thought, *imago dei* has been associated with man's capacity to use God-given powers of reason and understanding to apprehend something of God Himself and His order and purpose in the world. Reason in this conception is not the servant of arbitrary will; it is the regent of moral insight. And so, as I said, this conception is going to sit uncomfortably with any subjective understanding of human rights that privileges the free decision of the subject simply on account of that decision's representing an exercise of will.

A number of commentators have noticed a similar phenomenon in connection with the grounding of rights in the idea of human dignity.⁴¹ Dignity is not always a religious idea, but even in its secular versions it often retains an aspect of this objective tendency. “[T]he dignity of prostitutes is diminished ... by their engaging in commercial sex work,” said the South African Constitutional Court in 2002, even when the decision to engage in this type of work is voluntary and

⁴¹ See, e.g., Stéphanie Hennette-Vauchez, ‘A Human Dignitas? The Contemporary Principle of Human Dignity as a Mere Reappraisal of an Ancient Legal Concept’ (EUI Working Papers LAW 2008/18)

consensual.⁴² Or think of the famous French dwarf-tossing case: the principle of human dignity was used as a ground for prohibiting the activity even though the dwarves apparently had agreed to participate in this demeaning work.⁴³ Many human rights advocates deplore this result; but results of this kind must be expected to flow not only from the invocation of dignity as a foundation but even more from the introduction of Judaeo-Christian conceptions.

What should we conclude from all this? I certainly do not conclude that it is a mistake to use these conceptions, just because it yields uncongenial results. I think it is an open question in human rights theory how these cases should have been decided, and more generally to what extent human rights should be conceived as responsibilities.

It is sometimes thought that modern human rights ideas could not have emerged from the discourse of natural rights, if the objective understanding of rights as responsibilities had not been superseded by a more subjective conception. But actually that is a mistake.⁴⁴ Early modern ideas of *inalienable* rights actually represented a resurgence of an objective theory of rights against subjective theories that had flourished in sixteenth-century thought and had been used to underpin contractarian defenses of slavery and absolute rule. After all, if our rights are our property to bargain with as we like, then why should we

⁴² Constitutional Court of South Africa, 9 Oct. 2002, Case CCT31/01, *Jordan v. State* (available at: <http://www.constitutionalcourt.org.za/Archimages/661.PDF>)

⁴³ Conseil d'Etat, Ass., 27 oct. 1995, *Commune de Morsang sur Orge*, Recueil Lebon p. 372.

⁴⁴ There is an excellent discussion in Tuck, *Natural Rights Theories*, pp. 143 ff.

not sell ourselves into slavery or subjection if that offers advantages in terms of security and sustenance? It was only with the revival of the idea of objective rights that it became possible for thinkers like John Locke and Thomas Jefferson to say that our natural rights are inalienably ours; they are not ours to give away; and that means that a contractarian defense of slavery or subjection to an absolute monarch is simply out of the question. Now perhaps under the influence of free market ideas, some people want to go in the opposite direction, and privilege the freedom of people to subject themselves to exploitative arrangements, or sell themselves into sex-slavery or degradation. We should not expect religious conceptions of rights to be neutral in this debate, any more than we expect them to be neutral in the debate about torture. And I for one value the difference they are likely to make.

6. Conclusion

Here is my philosophical conclusion. Foundations matter; they are not just nailed on to the underside of a theory or a body of law as an after-thought. If we are looking for foundations for our convictions about human rights, we are looking for something that may well make a difference to what it is that we believe about rights. This is particularly true if we say we are looking for religious foundations. It is not their function simply to reassure us or strengthen us in our pre-existing convictions.

I believe that if we build a conception of human rights on the basis that humans are created in the image of God, we must expect to find some differences between the conception that results and conceptions erected on other foundations or arrived at pragmatically with no foundations at all. Some of these changes we may find congenial. Other changes we may find disconcerting—a greater emphasis on those rights that can be seen also as responsibilities and a greater emphasis on the responsible rather than the wilful or disordered exercise of our rights. Either way, we will be conscious, I think, of an enrichment of our thought, whether we agree with the difference or not.