

2022

Interpreting the Understanding of Human Rights Implicit in the U.N. Declarations

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Interpreting the Understanding of Human Rights Implicit in the U.N. Declarations

Cover Page Footnote

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INTERPRETING THE UNDERSTANDING OF HUMAN RIGHTS IMPLICIT IN THE U.N. DECLARATIONS

Nicholas Wolterstorff

PREFACE

Among my most treasured memories are those of the meetings in which Michael Perry and I, along with others, have commented on each other's writings. These have been, for me, memorable learning experiences. Time and again, Perry has approached the issues being discussed from an angle that had not occurred to me. That is true, once again, for the issues that I will discuss in this Essay.¹

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INTRODUCTION

In a good many writings over the course of his distinguished career, Michael Perry has explored what he calls “the morality of human rights”—by which he means, to quote him in his most recent writing, *Interrogating the Morality of Human Rights*, “the morality embodied in the Universal Declaration of Human Rights and/or in one or more of the several international human rights treaties that have entered into force in the period since the adoption of the Universal Declaration.”² Perry describes the writing as the yield of his effort “to present, *in one place* my thoughts—and to present *the final draft* of my thoughts, so to speak—about the various issues in human rights theory, especially issues concerning the morality of human rights, that have long been one of my principal scholarly concerns.”³

In the opening two chapters, Perry presents an interpretation of the fundamental character of the morality of human rights embodied in the United Nations (U.N.) declarations.⁴ Then, in the remaining eight chapters, he explores a number of applications of that interpretation—how it applies, for example, to the issues of capital punishment and the legality of same-sex marriage. My project in this Essay is to engage Perry’s thought in those opening two chapters—that is, to engage his interpretation of the fundamental character of the human rights morality of the U.N. declarations.⁵

Identifying the understanding of human rights embodied in the U.N. human rights declarations is a challenging undertaking. The 1948 Universal Declaration of Human Rights does not explain what it understands by the term “human right,” nor does any other U.N. declaration. The understanding remains implicit. And as for that implicit understanding, no one would say that the U.N. declarations are a lucid expression of a well-thought-out understanding of human rights. That should not come as a surprise. Though there were scholars on the drafting committees who had thought seriously about the matters under consideration, there were also activists who had thought more about applications

² Michael Perry, *Interrogating the Morality of Human Rights*, intro., 2 (Dec. 5, 2021) (unpublished manuscript) (on file with author) (emphasis omitted).

³ *Id.* at 5.

⁴ *See generally id.* (offering an interpretation of the fundamental character of the morality of human rights).

⁵ I have benefited from very helpful comments on an earlier version of this Essay by Terence Cuneo, Ariel Dempsey, and Steven Wykstra.

than about theory.⁶ And in any case, as we can now see looking back, discussions concerning the nature of human rights were then in their infancy.

So, we cannot just pull together what the declarations say to extract a coherent understanding of human rights. Finding ourselves faced with statements that do not fit well together, we must decide which to prioritize and then interpret the others in the light of that decision. Finding ourselves faced with obscure or ambiguous statements, we interpret those in the light of what is clear. We practice hermeneutic charity. We might eventually conclude that the endeavor is hopeless, that not even the most charitable hermeneutic can extract from the declarations a coherent understanding of human rights. But only as a last resort will we draw that conclusion.

Perry's interpretation of the morality of human rights embodied in the U.N. declarations is highly original; to the best of my knowledge, there is nothing remotely like it in the literature. I conclude, however, that for a number of reasons it has to be rejected—one of those reasons being that Perry's interpretation implies that human rights are vastly more comprehensive in scope than those cited as such in the U.N. declarations. I follow my critique of Perry's interpretation with a brief presentation of my own interpretation of the human rights morality of the U.N. declarations.

From what I have said, it will be clear that my engagement with Perry's thought will be critical as well as appreciative. That is likely to give some readers pause. Is it not unseemly, in one's contribution to a Festschrift, to criticize the scholarship of the person in whose honor the Festschrift has been assembled? Not at all! Serious engagement with the line of thought of a fellow scholar is a way of paying honor, a way of declaring that their thought is *worthy* of serious engagement—be the engagement solely appreciative or a blend of appreciation and critique.

Part I of this Essay will present Perry's interpretation of the human rights morality embodied in the U.N. declarations. Part II will pose to Perry's interpretation what he himself regards as the most fundamental and challenging question to be posed to any interpretation—namely, what reason or reasons do we have to accept, as so interpreted, the human rights morality of the U.N.

⁶ See generally, e.g., *Universal Declaration of Human Rights: Drafters of the Declaration*, UNITED NATIONS, <https://www.un.org/en/about-us/udhr/drafters-of-the-declaration> (last visited May 9, 2022); Mónica Pinto, *International Covenant on Economic, Social, and Cultural Rights: Procedural History*, AUDIOVISUAL LIBR. OF INT'L L., <https://legal.un.org/avl/ha/icescr/icescr.html> (last visited May 9, 2022) (describing the drafting history of the International Covenants on Economic, Social and Cultural Rights and Civil and Political Rights).

declarations? Part III will pose some preliminary points of critique of Perry's proposal. Part IV will discuss and critique Perry's claim that the U.N. declarations imply that certain human rights are possessed by only some human beings. Part V will discuss and critique his central claim that human rights can be derived from the mandate to act in a spirit of brotherhood toward everyone. The last section, Part VI, will briefly present my alternative interpretation of the human rights morality of the U.N. declarations.

I. PERRY'S INTERPRETATION OF THE U.N. DECLARATIONS

A striking feature of the Universal Declaration of 1948, and of the U.N. human rights declarations issued in the 1960s, 1970s, and 1980s,⁷ is that, with one exception, in their preamble or opening paragraphs they all refer to "the inherent dignity . . . of all members of the human family" (or of "[a]ll human beings," or "of the human person").⁸ Several of them go on to declare that human rights "derive from" that inherent dignity. The opening clauses of the Preamble of the International Covenant on Civil and Political Rights provide an example:

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that these rights derive from the inherent dignity of the human person⁹

The reference to "all human beings" does play a role in Perry's interpretation, but the idea of "inherent dignity" does not—in spite of the repeated and emphatic references in the U.N. declarations to such dignity—and so, of course, the idea that human rights are "derived from" that inherent dignity also plays no role.

What is it that leads Perry, in his construal of the human rights morality of the U.N. declarations, to ignore their repeated and emphatic references to

⁷ G.A. Res. 217 (III) A, Universal Declaration of Human Rights pmbl. (Dec. 10, 1948) [hereinafter UDHR]; G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights pmbl. (Dec. 16, 1966); G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights pmbl. (Dec. 16, 1966); G.A. Res. 2106 (XX) A, International Convention on the Elimination of All Forms of Racial Discrimination pmbl. (Dec. 21, 1965); G.A. Res. 44/25, Convention on the Rights of the Child pmbl. (Nov. 20, 1989); G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination against Women (Dec. 18, 1979).

⁸ See *supra* note 7. But see Convention on the Elimination of All Forms of Discrimination against Women pmbl. (stating the U.N. "reaffirms faith in fundamental human rights, in the dignity and worth of the human person," but not explicitly identifying that dignity as "inherent").

⁹ International Covenant on Civil and Political Rights, *supra* note 7, pmbl.

inherent dignity? Though Perry does not explicitly explain his decision, he leaves the reader in no doubt as to his reason.

He declares that “the most fundamental—and the most challenging—question we can ask about the morality of human rights” is this: “What reason or reasons do we have, if indeed we have any reason, to accept, rather than reject, the morality of human rights[?]”¹⁰ One might have a pragmatic reason for accepting the morality of human rights; for example, one might accept it in order to get along with one’s colleagues.¹¹ I interpret Perry as stating “accept” to mean *accept as true*. What reason or reasons do we have to *accept as true* the human rights morality of the U.N. declarations?

The Universal Declaration of 1948 refers in its preamble to “the inherent dignity . . . of all members of the human family.”¹² Article 1 adds, “All human beings are . . . equal in dignity.”¹³ The Declaration gives no reason for its claim that all human beings have equal inherent dignity; it does not explain what it is about human beings that accounts for that dignity. The reason for silence on this point is well known. The drafters of the Declaration found themselves with intractably different reasons for making the claim, so they decided to remain silent on the matter.¹⁴ They concluded that it was enough for the purposes of the Declaration to agree that human beings do all have equal inherent dignity; no need to agree on what it is about them that accounts for that dignity.¹⁵

Perry asks whether all human beings do, in fact, have that dignity: “Is there anything common to each and every human being in virtue of which all human beings—including newborns, the severely cognitively impaired, homicidal psychopaths, and so on—have *equal* inherent dignity?”¹⁶ He observes that theists can point to something common to all human beings in virtue of which they share that dignity. One common theistic view is that “[a]ll human beings are created in the image of God.’ Another: ‘The special love of the Creator for each human being “confers upon him or her an infinite dignity.””¹⁷ But can nontheists point to some feature shared by all human beings that grounds that dignity?

¹⁰ See Perry, *supra* note 2, ch. 2, at 1.

¹¹ Terence Cunco, a professor of philosophy at the University of Vermont, called this point to my attention.

¹² UHDR, *supra* note 7, pmb1.

¹³ *Id.* art. 1.

¹⁴ Cf. JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT chs. 1, 8 (Bert B. Lockwood, Jr. ed., 2000)

¹⁵ See *generally id.* (discussing the drafting of the Universal Declaration of Human Rights).

¹⁶ See Perry, *supra* note 2, ch. 2, at 7.

¹⁷ *Id.* at 8.

Perry quotes a passage from the nontheistic philosopher Brian Leiter in which Leiter says that he sees no such feature.¹⁸ Perry concludes that, though no one has decisively shown that there is no such feature that nontheists can point to, “[t]here is, to say the least, good reason to be skeptical that there is a plausible nontheistic answer.”¹⁹ But it was the intent of the drafters of the Universal Declaration that all comers, theists and nontheists alike, would be able to affirm its claims.²⁰ So, if it turns out that only theists can affirm the equal inherent dignity claim of the Declaration, then something has gone seriously wrong with the project, so Perry argues.²¹ The human rights morality embodied in the Universal Declaration would prove to be parochially theistic, whereas it was the intent of the drafters that the declaration enjoy universal acceptance.²²

It is at this point that Perry makes his decisive move. He ignores the references in the declarations to human dignity and, instead, works out the implications of something else that the Universal Declaration says. Let us have before us, in its entirety, Article 1 of the Universal Declaration: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”²³ Perry’s move is to interpret the human rights morality of the U.N. human rights documents in light of the first article of the Declaration, noting that all human beings should “act towards one another in a spirit of brotherhood.”²⁴ He calls this the *grundnorm*—the basic norm or underlying tenet—of the morality of human rights.²⁵ He quotes with approval a commentator on the French philosopher, Henri Bergson, who claims that “love is the foundation of human rights.”²⁶

Perry is to be applauded for exploring the possibility of grounding human rights in the mandate to act in a spirit of brotherhood to everyone. He does not

¹⁸ *Id.* at 9 (quoting Brian Leiter).

¹⁹ *Id.* at 10; see also NICHOLAS WOLTERSTORFF, UNDERSTANDING LIBERAL DEMOCRACY: ESSAYS IN POLITICAL PHILOSOPHY 177–200 (Terence Cuneo ed., 2012) (arguing there is reason to be skeptical that there is a possible nontheistic answer to the question of inherent dignity).

²⁰ MORSINK, *supra* note 14, at 7.

²¹ See Perry, *supra* note 2, ch. 2, at 3.

²² It is worth noting that one might hold that all human beings do have equal inherent dignity while also being at a loss to explain what it is about them that gives them that dignity. There is nothing irrational about finding oneself in such a situation. Probably, most people who agree that we have obligations that we have not voluntarily taken onto ourselves would be at a loss if asked to account for such obligations.

²³ UDHR, *supra* note 7, art. 1.

²⁴ *Id.*

²⁵ Perry, *supra* note 2, ch. 2, at 1–2.

²⁶ *Id.* at 15.

deny that human rights can also be grounded in the inherent dignity of all human beings. He does not declare it to be his view that there is no such dignity. His reason for exploring an alternative way of grounding human rights is that it seems likely that nontheists have no reason to accept the idea of every human being having inherent dignity.²⁷ As they see things, there is nothing about each and every human being that would account for such dignity.²⁸ But—to repeat—it was the intent of the drafters of the U.N. declarations that the declarations be acceptable to theists and nontheists alike.

To the best of my knowledge, Perry's *grundnorm* is mentioned nowhere else in the U.N. declarations. To make it the center of one's construal of the human rights morality embodied in the U.N. declarations is not only innovative but also bold.

The Universal Declaration uses the phrase “act towards one another in a spirit of brotherhood”²⁹ without explaining how the phrase is to be understood; neither does Perry offer an explanation. From his discussion, it is clear, however, how he understands it. We are to treat one another with agapic love—that is, with the sort of love that seeks to promote or sustain the well-being of the other individual.³⁰

Perry notes that a morality in which the *grundnorm* of agapic love is fundamental “is not just a political morality.”³¹ He quotes Alexander Lefebvre: “[C]ontrary to the widespread impression that nation-states are the primary addressees of human rights documents, [the Universal Declaration] explicitly name[s] another subject. . . . [T]he principle addressee . . . is not government or a people; it is, instead, each and every individual person.”³² Perry continues: “But, although not just a political morality, the morality of human rights is *mainly* a political morality, by which I mean a set of norms about how government . . . should act toward the human beings over whom it (or they) exercise power.”³³ Governments are to act “in a spirit of brotherhood.”³⁴ And we, as individuals, are “to do what we reasonably can, all things considered, to get our governments to conduct their affairs—in accord with the norm that

²⁷ Perry, *supra* note 2, chs. 1, 2.

²⁸ *Id.* ch. 2, at 11.

²⁹ UDHR, *supra* note 7, art. 1.

³⁰ Perry, *supra* note 2, ch. 2, at 15.

³¹ *Id.* ch.1, at 5.

³² *Id.* (alterations in original).

³³ *Id.* at 6.

³⁴ *Id.* at 8.

grounds . . . the morality of human rights: to ‘act towards all human beings in a spirit of brotherhood’ norm.”³⁵

Perry holds that “to say that A has a right that B not do X to A is to say that B has a duty not to do X to A; to say that A has a right that B do X for A is to say that B has a duty to do X for A.”³⁶ These are different ways of saying the same thing. So, for example, to say that Malchus has a right to Michael offering him a job is the same as saying that Michael has a duty to offer Malchus a job.

What follows from this view of the relationship between duty-talk and rights-talk is that the *grundnorm* is also the *grundright*: the duty of all human beings to act toward one another in a spirit of brotherhood is identical to the right of all human beings to others acting toward them in a spirit of brotherhood.³⁷ On Perry’s account, rights are not grounded in some feature of the rights-bearer—in particular, not grounded in their dignity. Individual rights are applications of the *grundright*, that everyone has the right to be treated by others in a spirit of brotherhood.³⁸

Perry notes that human rights are often said to be rights possessed by all human beings.³⁹ He quotes the philosopher John Tasioulas as saying that the “orthodox” meaning of the term “human rights” is “rights possessed *by all human beings* simply in virtue of their humanity.”⁴⁰ Perry disagrees, claiming that some of the U.N. human rights declarations specify “rights possessed not by all human beings but only by some: e.g., children, the disabled, (some) women.”⁴¹ He proposes that we instead think of human rights as follows: “[I]f the fundamental rationale for establishing and protecting the right—for example, as a treaty-based right—is that conduct that violates the right violates [the *grundnorm* to] ‘act toward all human beings in a spirit of brotherhood,’” then it is a human right.⁴²

³⁵ *Id.* ch. 2, at 1–2.

³⁶ *Id.* ch. 1, at 2.

³⁷ *See id.* Perry does not use the term “*grundright*”—that term is my own.

³⁸ *See* International Covenant on Civil and Political Rights, *supra* note 7, pmbl. (speaking of human rights as “derive[d] from the equal inherent dignity of the human person”); International Covenant on Economic, Social and Cultural Rights, *supra* note 7, pmbl. (speaking of human rights as “derive[d] from” the equal inherent dignity of human beings); *see also* NICHOLAS WOLTERSTORFF, JUSTICE: RIGHTS AND WRONGS, 21–43 (2008) (presenting a *right-order* in which rights are derived from an objective order of obligations, an account that contrasts with an *inherent rights* account).

³⁹ Perry, *supra* note 2, ch. 1, at 4; *see also id.* ch. 2, at 6 (making reference to the UDHR preamble).

⁴⁰ *Id.* ch. 1, at 4.

⁴¹ *Id.* at 4–5.

⁴² *Id.* at 5.

II. POSING “THE MOST FUNDAMENTAL AND CHALLENGING QUESTION” TO PERRY’S PROPOSAL

After articulating his interpretation of the human rights morality of the U.N. declarations, Perry poses to his interpretation the question that he regards as the most fundamental and challenging question that can be asked about the morality of human rights: “What reason or reasons do we have, if indeed we have any reason, to accept, rather than reject, the morality of human rights?”⁴³

Just as one might have a pragmatic reason for accepting that all human beings have equal inherent dignity, so one might have a pragmatic reason for accepting the *grundnorm*. Let’s state more precisely the question that Perry presumably has in mind: What reason or reasons do we have for accepting the *grundnorm* as *binding*?

Taking for granted that theists of various stripes might well have such a reason, Perry presses the question of whether nontheists could as well.⁴⁴ He notes that a good many nontheists do in fact “embrace” the norm,⁴⁵ they are committed to acting toward others in a spirit of brotherhood. Perry writes that “[t]he problem of justification persists,” however.⁴⁶ The “matter-of-fact [observation] leaves the question of validity intact.”⁴⁷ Can a nontheist not only act in accord with the norm, but also have *good reason* for accepting the norm as binding?

Perry invites us to imagine a person whose character has been formed in such a way that she “detest[s] and oppose[s] states of affairs in which any human being[] suffer[s] grievously in consequence of a law or other policy.”⁴⁸ Call this her “sensitivity.”⁴⁹ More specifically, call it her “agapic sensitivity”—“an aspect of [her] particular way of being oriented in the world; more precisely, her sensitivity is a particular way of being oriented to the Other.”⁵⁰

It is her agapic sensitivity, says Perry, that accounts for her acting in a spirit of brotherhood towards others—not something about the other individual that calls for respect.⁵¹ And if asked “what justifies [your] sensitivity, [your] way of

⁴³ *Id.* ch. 2, at 1.

⁴⁴ *Id.* at 3

⁴⁵ *Id.* at 11–12.

⁴⁶ *Id.* at 13.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 15; see *id.* at 17 n.41 (describing “agapic sensitivity”).

⁵¹ *Id.* at 16.

being oriented to the Other,” she has no argument—“nothing to offer” other than the facts of her sensibility and her experience.⁵²

Perry’s conclusion is that nontheists as well as theists can indeed have good reason to accept as binding the *grundnorm* to act towards one another in a spirit of brotherhood, and thus, good reason to accept as binding the human rights morality embodied in the U.N. declarations.⁵³ “Because *agape* is a prominent feature of Christian morality, it bears emphasis,” he says:

[O]ne need not be a Christian—or a theist, or a religious believer of any sort—to have an agapic sensibility. Many of the European non-Jews who during the Holocaust, at great risk to themselves and their families, rescued Jews and others who were strangers to them—were not theists.⁵⁴

Perry’s example is curious. After describing the woman that he imagines as striving to act in accordance with the spirit-of-brotherhood norm, he presses the questions: What justification might she have for doing so, what reason might she have for treating the norm as binding?⁵⁵ The answer he imagines her giving is that she acts as she does because of her sensibility to suffering.⁵⁶

But the question being considered was what, if anything, *justifies* her acting in accord with the spirit-of-brotherhood norm? What reason does she have, if any, for regarding the norm as *binding*? To say that it is her sensibility to suffering that leads her to act as she does is not to answer that question. And let it be noted that not all violations of rights involve suffering on the part of the victim.

So far as I can see, Perry, surprisingly, never answers his question as to whether nontheists could have good reason to accept as binding the mandate to act towards one another in a spirit of brotherhood.

III. SOME PRELIMINARY CRITIQUES OF PERRY’S INTERPRETATION

Before we assess Perry’s construal of the human rights morality embodied in the U.N. declarations, let me briefly comment on his thesis concerning the relation between duties and rights, and on the scope of what he calls the *grundnorm*.

⁵² *Id.* at 13–14 (emphasis omitted).

⁵³ *Id.* at 17–18.

⁵⁴ *Id.*

⁵⁵ *Id.* at 12.

⁵⁶ *Id.*

Consider this sentence: *A* has a duty to do (or not do) *X* to *B* if and only if *B* has a right that *A* do (or not do) *X* to *B*. Perry holds that the proposition this sentence expresses is analytically true; the first clause expresses the same proposition as the second clause.⁵⁷ This seems to me incorrect.

There is, indeed, a necessary truth in the region. To see what that truth is, first note that it is plausible to hold that we have duties to things that do not themselves have rights—animals, for example, or perhaps even works of art. We can do things to them that we ought not to do, with the result that we are guilty. But they have not been wronged or deprived of things to which they have a right. Note, secondly, that there are third-party duties: *A*'s obligation to *B* to do so-and-so, where “so-and-so” does not name a way of treating *B*. For example, consider my promise to Malchus to give a book to Maynard. So, too, there are third-party rights: *B*'s right for *A* to do so-and-so, where “so-and-so” does not name a way of being treated by *B*. For example, Malchus's right to my giving a book to Maynard. The principle then is this: If *B* is an entity of the sort that can be wronged, then *A* has a duty to *B* to do (or not do) *X* if and only if *B* has a right that *A* do (or not do) *X*. I hold that though this is indeed a necessary truth, it is a synthetic necessary truth. The two clauses of the biconditional do not express the same proposition in different words.

Perhaps the best way to see this is to consider the situation when someone does not treat another as they ought to treat them. The moral condition of the first person is, then, that they are guilty; the moral condition of the second person is that they have been wronged. The first person's being guilty is not the same as the second person's being wronged.

The way to think of the situation is as follows. The moral order has two dimensions, necessarily connected but distinct: (1) the agent-dimension and (2) the patient- or recipient-dimension. The language of duty and guilt brings to speech the moral significance of the agent-dimension, the moral significance of what we do. The language of rights and of being wronged brings to speech the moral significance of the recipient-dimension, the moral significance of how we are done-unto. With the language of duty and guilt, an abused spouse can bring to speech the moral condition of the agent in the situation, *A*'s abuser: *B* failed to do their duty; *B* is guilty. To bring to speech *A*'s own moral condition as recipient of *B*'s action, *A* needs the language of rights and being wronged. *A* was not treated as *A* had a right to be treated; *A* was wronged.

⁵⁷ *Id.* ch. 1, at 2

Perry could, of course, grant this point about the relation between rights and duties without changing anything of substance in his interpretation of the human rights morality of the U.N. declarations.

Second, Perry rather often phrases what he calls the *grundnorm* as “act[ing] towards all human beings in a spirit of brotherhood.”⁵⁸ But that’s impossible. Nobody can act toward all human beings in any way whatsoever. Jesus did not say, “Love everybody as you love yourself.” He said, “Love *your neighbor* as yourself.”⁵⁹

Article 1 of the Universal Declaration does not say, “All human beings should act towards *everyone* in a spirit of brotherhood.” It says, “All human beings . . . should act towards *one another* in a spirit of brotherhood.”⁶⁰ Hermeneutic charity requires that we not interpret “one another” as meaning *all human beings*.

IV. DO THE U.N. DECLARATIONS REGARD SOME HUMAN RIGHTS AS POSSESSED BY ONLY SOME HUMAN BEINGS?

The core of Perry’s construal of the human rights morality embodied in the U.N. rights declarations is his claim that human rights are derived from the *grundnorm* to act towards one another in a spirit of brotherhood. He does not deny that if human beings possess equal inherent dignity, then human rights can also be derived from that shared dignity. His claim is only that those rights can be seen as derivations of that *grundnorm*.

To assess Perry’s proposal concerning the derivation of human rights, we must address his interpretation of the U.N. declarations concerning the scope of human rights. Recall his quoting the philosopher John Tasioulas as saying that the “orthodox” meaning of the term “human rights” is “rights possessed *by all human beings* simply in virtue of their humanity.”⁶¹ Perry holds that the “orthodox” meaning is misinformed. He holds that some of the rights cited by the U.N. declarations as *human* rights are not, in fact, possessed by all human beings. He writes:

⁵⁸ *Id.* at 5.

⁵⁹ A paraphrase of *Matthew* 22:39 (King James), “Thou shalt love thy neighbour as thyself.”

⁶⁰ See UDHR, *supra* note 7, art. 1 (emphasis added). Additionally, hermeneutic charity requires that we also interpret “all human beings” in Article 1 as meaning *all human beings capable of acting in a certain way towards others*.

⁶¹ Perry, *supra* note 2, ch. 1, at 4 (quoting John Tasioulas, *On the Foundations of Human Rights*, in *PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS* 45, 45 (Rowan Cruft, S. Matthew Liao & Massimo Renzo eds., 2015)).

[I]n the context of discourse about international human rights—which is the principal contemporary discourse about human rights—the “orthodox” meaning is mistaken: In that context, some human rights . . . are rights possessed not by all human beings but only by some: e.g., children, the disabled, (some) women. In what sense is such a right truly a *human right*? . . . As the term “human right” is understood both in the Universal Declaration and in the several international human rights treaties that have followed in the Universal Declaration’s wake, a right is a *human right, even if according to the right the rights-holders are not all but only some human beings*, if the fundamental rationale for establishing and protecting the right . . . is that conduct that violates the right violates the Article 1 norm: “act towards all human beings in a spirit of brotherhood.” The fundamental rationale for Articles 37 and 38 of the Convention on the Rights of the Child, for example, is that to engage in conduct that violates either article is to fail to act “in a spirit of brotherhood” toward some human beings: children.⁶²

Contrary to Perry’s claim concerning the “fundamental rationale” for Articles 37 and 38 of the Convention on the Rights of the Child, these articles do not mention that (or any other) rationale for the rights they cite. Rather, the rationale for the rights they cite, and for all the others cited in the Convention, is given in the Preamble to the Convention. The Preamble opens with these familiar words: “Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.”⁶³ Though the Preamble does not *declare* that the rights cited in the Convention are derived from the inherent dignity of all members of the human family, clearly that is the suggestion. Derived not from the mandate to act towards one another in a spirit of brotherhood, including towards children, but rather derived from the inherent dignity of everyone, including children. Acting in a spirit of brotherhood is nowhere mentioned in the Convention.

Now, let us address Perry’s claim that some of the rights cited by the U.N. declarations as human rights are possessed by only some human beings.⁶⁴ Some of them, he says, are rights distinctive of certain subsets of human beings, such as “children, the disabled, and (some) women.”⁶⁵ For a reason that will become clear shortly, let me formulate Perry’s claim this way: some of the rights cited

⁶² *Id.* at 4–5.

⁶³ Convention on the Rights of the Child, *supra* note 7, pmb1.

⁶⁴ See Perry, *supra* note 2, ch. 1, at 5.

⁶⁵ *Id.*

by the U.N. declarations as human rights are possessed by only some human beings or persons, not by all human beings or persons. Is this claim correct?

With one exception, all the U.N. rights declarations issued in the 1960s, 1970s, and 1980s employ the concept of human rights in their preamble or opening paragraphs, and they all do so in such a way as to suggest that the rights to be cited in the declarations that follow are human rights.

The exception is the Convention on the Rights of the Child.⁶⁶ In the case of this declaration, the rights cited are clearly the distinctive rights of a particular sub-set of human beings or persons; viz., children. The Declaration does not, however, suggest that these are *human* rights. Though it, like all the other declarations of the time, does employ the concept of human rights in its preamble, it does not do so in such a way as to suggest that the rights to be cited in the text that follows are human rights.⁶⁷

The title of another declaration, “Convention on the Elimination of All Forms of Discrimination against Women,” might lead one to expect that it, too, is an exception—that the rights it cites are those distinctive of a particular subset of human beings or persons: namely, women. But not so. Though the convention does focus on the rights of women, the rights it cites are, with one exception, not rights distinctive of women but rights shared by women and men alike.⁶⁸

So, once again: Is the term “human rights” understood in the U.N. declarations in such a way that some human rights are possessed by only some human beings or persons? Pervasive in the documents are the terms “everyone,” “no one,” “all persons,” “every human being.” May it nonetheless be the case, as Perry suggests, that when we look at the rights that are actually cited in what is presented as a list of human rights, we are forced to conclude that the documents do not in fact think of all human rights as possessed by all who are human beings or persons?

Article 25 of the Universal Declaration of Human Rights does single out certain rights distinctive of mothers and children, and Article 26 of the Universal

⁶⁶ See Convention on the Rights of the Child, *supra* note 7. The Convention against Torture does not use the term “human rights.” But it does refer to “the equal and inalienable rights of all members of the human family.” And that is clearly the same concept, in other words, as the concept of human rights. G.A. Res. 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment pmbl. (Dec. 10, 1984).

⁶⁷ See Convention on the Rights of the Child, *supra* note 7, pmbl.

⁶⁸ Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 7.

Declaration singles out a right distinctive of parents.⁶⁹ Is this sufficient reason for drawing Perry's conclusion as to the scope of what the U.N. declarations regard as human rights?

I think not. Article 25 has two parts. The first part reads, "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family."⁷⁰ The second part then reads, "Motherhood and childhood are entitled to special care and assistance."⁷¹ I think it would be a serious over-interpretation to construe this latter sentence as an indication that the drafters understood the term "human rights" along Perry's lines. I suggest that it is most plausibly understood as a parenthetical comment.

So, too, for Article 26. The article has three parts. The first part begins, "Everyone has the right to education."⁷² The third part then reads, "Parents have a prior right to choose the kind of education that shall be given to their children."⁷³ I suggest that this latter sentence is also most plausibly construed not as an indication that the drafters understood the term "human rights" along Perry's lines, but rather as a parenthetical comment.

A number of other articles in the Declaration are to be understood along the same lines, namely, as parenthetical comments concerning rights distinctive to a certain subset of human persons.⁷⁴

V. ASSESSING PERRY'S PROPOSED DERIVATION OF HUMAN RIGHTS

Governments, says Perry, are mandated by Article 1 of the Universal Declaration to act in a spirit of brotherhood toward all those over whom they exercise power; and he suggests that the understanding of human rights implicit in the U.N. declarations is that it is those rights that governments should secure by laws, treaties, and administrative regulations and decisions.⁷⁵

Are these claims true? Can the U.N. declarations be interpreted as stating or implying this to be the mandate for government? And can the declarations be interpreted as working with this as their implicit understanding of human rights?

⁶⁹ UDHR, *supra* note 7, arts. 25, 26.

⁷⁰ *Id.* art. 25.

⁷¹ *Id.*

⁷² *Id.* art. 26.

⁷³ *Id.*

⁷⁴ *See, e.g., id.* arts. 11, 14, 25.

⁷⁵ Perry, *supra* note 2, ch. 1, at 5–6.

Can human rights be seen as derived, in the way Perry suggests, from the spirit-of-brotherhood mandate?

What contributes to someone's well-being differs greatly among human beings and changes significantly over an individual's lifetime. If government is to act in a spirit of brotherhood toward all those over whom it exercises power, then it will have to differentiate correspondingly in how it treats its subjects.

One surmises that Perry discerned this implication of his proposal and that it was this, in part, that led him to interpret the U.N. declarations as regarding some of the rights distinctive of such subsets of human beings as children, the disabled, and new mothers as *human* rights. We have cast doubt on this interpretation of the U.N. declarations. But notice, now, that if this were the declarations' implicit understanding of human rights, not only would there be human rights distinctive of children but also human rights distinctive of one type of child, human rights distinctive of another type of child, human rights distinctive of a third type of child, and so forth. For not only do human beings in general differ greatly with respect to what contributes to their well-being; children also differ greatly, as do the disabled, women, and so forth.

In short, the rights purportedly derived from the spirit-of-brotherhood mandate are vastly more numerous than those cited as human rights by the U.N. declarations and described as derived from the equal inherent dignity that the declarations attribute to all individuals. Perry has not articulated an alternative way of deriving distinctively human rights.

Another point worth noting is that, should a government attempt to act in accord with the spirit-of-brotherhood mandate, it would find itself unavoidably compelled to violate some of the rights derived from that mandate. Consider the following example. A new highway is proposed. There is general agreement that the highway would be a great boon to residents of the area. But the highway, as proposed, would go through a farm owned by the same family for generations. The present owners refuse to sell. They go to court to try to stop the project. They lose. The farm is taken by eminent domain. The spirit-of-brotherhood mandate implies that the family has the right, *vis a vis* the government, to the government promoting their well-being. In promoting the well-being of most people in the area, the government has violated their right.

Governments cannot promote the well-being of all their subjects equally; they have to establish priorities, promoting the well-being of some more than that of others, often even finding themselves in the unfortunate position of having to diminish the well-being of some in order to promote the well-being of others.

VI. AN ALTERNATIVE INTERPRETATION OF THE HUMAN RIGHTS MORALITY OF THE U.N. DECLARATIONS

Recall Perry's reason for embarking on his novel construal of the human rights morality of the U.N. declarations. After taking note of the fact that the declarations refer emphatically and repeatedly to the equal inherent dignity of all members of the human family and claim that human rights are derived from that dignity, he asked whether nontheists can have a reason for affirming the claim that all human beings, no matter how impaired they may be, have equal inherent dignity.⁷⁶ Or to put what I understand to be Perry's question in different words: can nontheists hold that there is something about each and every human being that gives them equal inherent dignity? The relevance of the question is that it was the intent of the drafters of the declarations that non-religious as well as religious people would be able to affirm the declarations.

Perry observed that, so far as he could see, it's unlikely that nontheists could have a reason for affirming the claim that all human beings have equal inherent dignity.⁷⁷ Perry quoted the nontheistic philosopher Brian Leiter as being of the same opinion.⁷⁸ It was this view that led Perry to explore a way of construing the human rights morality of the declarations that did not appeal to the idea of equal inherent dignity—or, indeed, to dignity of any sort. Let us take up Perry's challenge and offer a dignity-based construal of the human rights morality of the U.N. declarations that nontheists as well as theists can affirm.

Begin by posing a question different from Perry's—one aimed at the claim of most of the declarations, that all human beings have equal inherent dignity and that the rights cited in those declarations derive from that dignity. Let us ask whether the rights cited in the documents *are in fact* possessed by “all members of the human family” and whether they can all be seen as derived from that shared dignity.⁷⁹

Article 3 of the Universal Declaration declares, “Everyone has the right to life, liberty and the security of person.”⁸⁰ Let us grant that all members of the human family do possess this right, vague though it is, including those who are seriously impaired and those who are not, and that they possess the right in virtue of simply being human. All one needs, to possess the right, is to be human; one

⁷⁶ See Perry, *supra* note 2, ch. 2, at 11.

⁷⁷ *Id.* at 11–12.

⁷⁸ *Id.* at 9.

⁷⁹ See generally Convention on the Rights of the Child, *supra* note 7 (listing rights that are obviously not shared by all individuals).

⁸⁰ UDHR, *supra* note 7, art. 3.

need not be any particular kind of human being. Article 5 of the Universal Declaration declares, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment.”⁸¹ Let us grant that all members of the human family also possess this right and that they do so in virtue of simply being human.

But now consider Article 27: “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”⁸² Those who possess this right do not possess it in virtue of simply being human; they possess it in virtue of being a *human person*. Those who are not persons do not possess this right: newborn infants do not, nor do those sunk deep into dementia and those in a permanent coma. The reason they do not possess the right is that they are incapable of participating in the cultural life of the community. Talk about rights would run seriously amok if we attributed to individuals the right to do things that they are incapable of doing.

The U.N. human rights declarations interchangeably use the terms “human person,” “human being,” and “member of the human family.” For example, the opening sentence of the Preamble of the International Convention on Civil and Political Rights speaks of “the inherent dignity . . . of all members of the human family.”⁸³ The next sentence then speaks of “the inherent dignity of the human person.” I submit that the terms are not synonymous. A fundamental fact about human beings is that not all human beings are persons—that is, not all are capable of performing the functions definitive of personhood. Those sunk deep into dementia are not capable of doing so, nor are those in a permanent coma. An individual can lose his or her personhood while remaining a human being.

The Preamble of the Universal Declaration suggests, without actually saying, that the rights to be cited are derived from the inherent dignity of “all members of the human family.”⁸⁴ But when we look at the rights that are actually cited, we see that although some are indeed derived from the inherent dignity that one has in virtue just of being a human being (a member of the human family)—again, assuming that there is such dignity—most are instead derived from the inherent dignity that one has in virtue of being a human person.

⁸¹ *Id.* art. 5.

⁸² *Id.* art. 27.

⁸³ International Convention on Civil and Political Rights, *supra* note 7, pmbl.

⁸⁴ *See id.*; International Covenant on Economic, Social and Cultural Rights, *supra* note 7, pmbl. (identifying that the rights cited in the covenant are derived from the inherent dignity of the human *person*—not the inherent dignity of the human *being*).

It is one of the most fraught imprecisions of the U.N. declarations that they do not distinguish between “a human being” and “a human person.” But given that they do not, I suggest another way to interpret the concept of human rights implicit in the Universal Declaration and subsequent U.N. human rights declarations. A right that one has is a *human* right if one has the right in virtue of possessing the inherent dignity of being a human person or that of being a human being.

In contrast to Perry’s interpretation, this interpretation honors the repeated and emphatic statement of the U.N. declarations that human rights are grounded in the inherent dignity of the rights-bearers. It requires, however, that we interpret the Universal Declaration as speaking loosely when it suggests that human rights are those derived from the inherent dignity of all members of the human family, and that we likewise interpret subsequent declarations as speaking loosely when they suggest that human rights are those derived from the inherent dignity of the human person. Human rights are those derived from the inherent dignity that we have as human persons or as human beings.

Now, for an adaptation of the question that Perry described as the most fundamental and challenging question that can be put to an interpretation of what he calls “the morality of human rights”: Could nontheists agree with theists that there are individuals who possess the inherent dignity of being a human person or a human being? And could they, accordingly, agree with theists that there are rights derived from that dignity?

They could indeed. Consider, once again, the right to life, liberty, and security of the person cited in Article 3 of the Universal Declaration.⁸⁵ Nontheists can join theists in affirming that there is this right and that it is derived from the inherent dignity that an individual has by virtue of being a human person or a human being. All the other rights cited as “human rights” in the U.N. declarations are so, too, derived. Human rights are those derived from the inherent dignity one has as a human being or a human person.

To return to the main point, we do not have to give up on a dignity interpretation of the human rights morality embodied in the U.N. declarations because some of our fellows do not believe that all human beings have inherent dignity. Enough if they agree that all human persons or human beings have inherent dignity. Human rights are derived from that dignity.

⁸⁵ UDHR, *supra* note 7, art. 3.

Of course, though nontheists can readily join theists in affirming that there is the inherent dignity of being a human person or a human being, many of them are likely to refrain from affirming that merely *being* a human *being*—not a human *person* but a human *being*—bestows any dignity on an individual. If so, they will then disagree with theists as to the scope of the right to life, liberty, and security that, nontheists agree, is derived from the dignity that an individual has in virtue of being a human person and/or a human being. Nontheists will doubt or deny that those human beings who are not persons have that right. To quote once more Article 3 of the Universal Declaration, “Everyone has the right to life, liberty, and security of person.”⁸⁶ Nontheists will disagree with theists on the scope of the term “everyone.” Theists will take it to mean “every human being.” Nontheists will take it to mean “every human person.”⁸⁷

An important point of interpretation remains to be addressed. It is in virtue of being a human person, not just a human being, that one has the right to participate in the cultural life of one’s community. But there are human persons who are disabled or handicapped in such a way that they cannot participate in the cultural life of their community. What does this imply? Does it imply that those persons do not have those rights of participation? Or does it imply, rather, that they do have those rights and that we were mistaken in the claim we made earlier that one does not have the right to do something that one is incapable of doing?

The answer is neither. I suggest that when the Universal Declaration states, “Everyone has the right to participate in the cultural life of the community,”⁸⁸ this is most plausibly interpreted as meaning that all persons have the right to participate in the cultural life of the community *if able*.⁸⁹ All human persons have that conditional right, and they have it *in virtue* of being a human person. It is a human right. So, too, for the statement in Article 23 of the Universal Declaration that “[e]veryone has the right to work.”⁹⁰ This is most plausibly

⁸⁶ *Id.*

⁸⁷ See NICHOLAS WOLTERSTORFF, UNDERSTANDING LIBERAL DEMOCRACY: ESSAYS IN POLITICAL PHILOSOPHY 177 (Terence Cuneo ed., 2012). In my essay, *On Secular and Theistic Groundings of Human Rights*, I develop a theistic account of what it is about being human that gives us dignity. NICHOLAS WOLTERSTORFF, *On Secular and Theistic Groundings of Human Rights*, in UNDERSTANDING LIBERAL DEMOCRACY, *supra*, at 177–200. In my essay, *Grounding the Rights We Have as Human Persons*, I develop a non-theistic account of what it is about being a human person that gives us dignity. NICHOLAS WOLTERSTORFF, *Grounding the Rights We Have as Human Persons*, in UNDERSTANDING LIBERAL DEMOCRACY, *supra*, at 201–26.

⁸⁸ UDHR, *supra* note 7, art. 27.

⁸⁹ This interpretation was suggested to me by Steve Wykstra. Stephen Wykstra is retired from teaching philosophy at Calvin University, where he and I overlapped for a good many years.

⁹⁰ UDHR, *supra* note 7, art. 23.

interpreted as meaning that all persons have the right to work *if able*. And this is true, also, for many, perhaps most, of the other rights of persons cited in the U.N. human rights declarations. They are conditional rights that an individual has in virtue of possessing the inherent dignity of being a human person.

CONCLUSION

The bulk of this Essay has been devoted to engaging the interpretation of the human rights morality embodied in the U.N. declarations that Michael Perry articulates in his recent writing, *Interpreting the Morality of Human Rights*. Perry's interpretation is both novel and challenging, deserving of careful consideration. I conclude, however, that it proves ultimately unsuccessful; in response, I have offered my own, more traditional interpretation of the morality of human rights as intended by the U.N. declarations.