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FROM NATURAL LAW TO HUMAN RIGHTS: OR, WHY RIGHTS TALK MATTERS

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Near the beginning of *The Idea of Human Rights*, Michael Perry states that "One of my principal goals . . . is to clarify and address the unusually murky subject of 'moral relativism'—and to do so from the perspective of what can properly be called 'natural law.'"[1] This he defines, following D.J. O'Connor, as a view according to which "basic principles of morals and legislation are, *in some sense or other*, objective, accessible to reason and based on human nature."[2] Subsequently, he explains that the relation between belief in natural law and in human rights is one of presupposition; that is to say, a doctrine of natural rights presupposes the moral realism which in his view is the central core of natural law theories.[3]

As his discussion makes clear, Perry's claim that human rights presuppose a natural law should be understood as a theoretical claim. At the same time, it raises interesting historical issues. That is, when we examine classical accounts of the natural law, are these explicitly linked with doctrines of natural or human rights, or something recognizably similar? (Throughout this paper, I treat the terms "human" and "natural" rights as synonyms.) And more generally, what can we learn from the ways in which our forbears drew connections, or failed to do so, between a natural law and human rights?

It is difficult to deny that the natural law tradition had some influence on the subsequent emergence of doctrines of natural or universal human rights, if only because the most important figures in this development, including Hugo Grotius, Thomas Hobbes, and John Locke, frame their arguments in terms which are recognizably drawn from medieval discussions of the natural law. However, it is

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1. Michael J. Perry, *The Idea of Human Rights: Four Inquiries* 6 (Oxford U Press, 1998).

2. Id.

3. Id at 57-86; the relation between theories of the natural law and human rights is described as one of presupposition at 68.

not so clear that earlier accounts of the natural law are also linked with doctrines of natural rights. In fact, the general question of the relation between earlier concepts of the natural law and modern doctrines of human rights has been debated throughout this century. On the one hand we find a number of scholars, from Michel Villey to Richard Tuck and Annabel Brett, arguing that the first accounts of natural rights properly so called did not appear until the fourteenth century at the earliest. On the other hand, several scholars, including both Jacques Maritain and John Finnis, claim to find a doctrine of natural rights (or at least, the inchoate beginnings of such a doctrine) in Aquinas, and more recently the medievalist Brian Tierney has argued that we find a concept of natural rights in some early thirteenth century scholastics.

What is at stake in this debate for a contemporary defender of a doctrine of human rights? Obviously, for someone such as Maritain or Finnis, who claims that some strand of the medieval natural law tradition is equivalent to a doctrine of natural rights, a great deal is at stake. But Perry does not make such a strong claim; he simply says that belief in human rights presupposes belief in a natural law, understood in very general terms as a commitment to a minimal form of moral realism. And of course, there are a number of philosophers and political thinkers who would defend a version of a human rights theory without relying on appeals to a natural law at all.

Nonetheless, there is something at stake in this debate even for those defenders of rights theories who do not rely on an account of the natural law in developing their views. Consider this question: Do pre-modern natural law thinkers have a concept of human rights? This may seem like a simple question, but as we will see, it is not. And this question is important for just the same reason that it is difficult to answer; that is, what is at issue is not so much the record of what earlier medieval authors thought, as the proper interpretation of that record.

The issue at stake, in other words, is conceptual. How are we to interpret the moral and political doctrines which comprise the earlier medieval concept of the natural law? More specifically, should we count the former as amounting to a doctrine of human rights, which preserves the same essential features as later versions? In order to answer this, it will of course be necessary to determine

what those essential features are. In this way, our assessment of medieval writings forces us to reassess our initial understanding of human rights, and to identify what we consider to be the essential features or core insights of that doctrine.

In this paper, I will examine some of the more recent interventions in the debate over the historical origins of the doctrine of human rights in order to see what they can offer for our understanding of human rights today. My aim in doing so is not to offer a comprehensive survey of this debate, nor even to attempt to resolve it, although my own views on the historical question will become apparent. Rather, I want to use this debate as a framework for focusing and reflecting on our contemporary understanding of human rights. More specifically, I think this historians' debate is important for philosophers, theologians and political theorists because it helps to focus our thinking about what is at stake in deciding among different interpretations of human rights.

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There seems to be little doubt that we find a concept of human rights, recognizably similar to modern accounts, by the later middle ages. The question is whether this concept emerged before the end of the medieval period, and according to a number of scholars, it did not. Michel Villey claims that this concept is first articulated by William of Ockham, writing in the early decades of the fourteenth century.[4] Similarly, Alasdair MacIntyre, who seems to have been influenced by Villey on this point, admits that rights language began to develop at the end of the medieval period.[5] Although they are not so prepared to see the doctrine of natural rights as a radical innovation, both Richard Tuck and Annabel Brett likewise date the emergence of natural rights doctrines from the fourteenth century.[6]

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4. For my information on Michel Villey, and the earlier debate more generally, I am dependent on Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* 13-42 (Scholars Press, 1997).

5. For MacIntyre's comments on this issue, see *After Virtue* 68-70 (U of Notre Dame Press, 2d ed, 1984).

6. See Richard Tuck, *Natural Rights Theories: Their Origin and Development* 7-31 (Cambridge U Press, 1979); Annabel S. Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* 49-87 (Cambridge U Press, 1997).

For those who would argue for a close connection between a doctrine of natural or human rights and the natural law tradition, this line of interpretation presents a problem. Because of course the natural law tradition dates from a much earlier period, at least from the century before the common era, if not even earlier.[7] It is true that the natural law does not appear to have become a focus for systematic reflection until the latter part of the twelfth century, when the prominence of natural law language in key legal texts led to the growth of first jurisprudential, and then theological reflection on the natural law. Even so, on the view sketched above, it takes at least 150 years to move from systematic thought on the natural law, to an articulation of a concept of natural rights. This would suggest that there is a break, or at least significant discontinuity, between the medieval concept of the natural law, and later concepts of natural or human rights.

In contrast, there have been a number of historians, philosophers and theologians who have argued that we find a concept of human rights in some earlier medieval authors. We have already noted that these would include Jacques Maritain, John Finnis, and more recently the medievalist Brian Tierney, even though as we will see, Tierney takes a different line than do Maritain and Finnis.[8]

What are we to make of this debate? It should be noted, first of all, that it cannot be settled on purely linguistic grounds. MacIntyre has famously asserted that "there is no expression in any ancient or medieval language correctly translated by our expression 'a right' until near the close of the middle ages," which he goes on to date at about 1400.[9] However, as Tierney points out, this claim is

7. I am persuaded by Richard Horsley's argument that the tradition of natural law thought takes shape sometime in the century before the beginning of the Common Era, and draws on both Stoic and neo-Platonic elements; see Richard A. Horsley, *The Law of Nature in Philo and Cicero*, 71 Harv Theo Rev 35-59 (1978).

8. For Jacques Maritain's position, see, for example, *Man and the State* 76-107 (U of Chi Press, 1951); John Finnis' basic theory of natural rights is set forth in *Natural Law and Natural Rights* 209 (Clarendon Press, 1980). Both Maritain and Finnis are more interested in developing an account of natural rights, than a reading of Aquinas, but both take their theory to be a development of his views; see *Man and the State* at 84-85, and *Natural Law and Natural Rights* at 42-48. Tierney's arguments will be discussed in more detail below.

9. MacIntyre, *After Virtue* at 69 (cited in note 5).

incorrect.[10] Medieval society in the twelfth and thirteenth centuries was preoccupied with establishing the rights of various groups and individuals over against one another, and the men and women of this society had a perfectly adequate language in which to do so. Central to this rights discourse was the expression *jus* and its declensions, which should sometimes clearly be translated as "law," but which in other contexts should just as clearly be translated as "right," in the sense of an individual or group right. As an example of the latter usage, Tierney offers Gratian's assertion of a papal claim to "the rights of heavenly and earthly empire" (*terreni simul et celestis imperii iura*, *Decretum* D. 22 C.1; Tierney's translation).[11] In this context and in most other examples of a similar usage, the rights asserted are not natural rights, as Tierney recognizes, since they are understood to presuppose specific social arrangements and should therefore be considered to be conventional or legal rights. Nonetheless, the fact remains that the scholastics in the period we are considering did have the linguistic and conceptual resources to develop a doctrine of natural rights.

More positively, if we examine the moral and political writings of the jurists and theologians of the twelfth and thirteenth centuries, it is clear that at the very least, they have much in common with most modern and contemporary defenders of theories of natural rights. Most fundamentally, they believe that there is an objective moral order which places normative constraints on social practices. In addition, they share many substantive views with later rights theorists, including a commitment to non-maleficence as the basis for morality, and a conviction that rational self-direction is central to moral agency.

Are these points of agreement sufficient to establish that the high medieval concept of the natural law implies a doctrine of natural rights? Both Maritain and Finnis would agree that they are.[12] So

10. Tierney, *The Idea of Natural Rights* at 44 (cited in note 4); for his subsequent discussion of the uses of the term *jus*, see 54-69. This discussion, in turn, occurs in the context of a more far-reaching investigation of the linguistic and conceptual origins of the idea of natural rights from 1150 to 1250; see id at 43-77.

11. Tierney, *The Idea of Natural Rights* at 54 (cited in note 4).

12. Maritian does not say explicitly that rights claims can be translated without remainder into claims about mutual obligations, but his discussion seems to imply

would Perry himself: "Indeed, properly understood, rights talk is a derivative and even dispensable feature of modern moral discourse . . .. What really matters—what we should take seriously—is not human rights talk but the claims such talk is meant to express: the claims about what ought not to be done to or about what ought to be done for human beings. We can take rights seriously (so to speak) without taking rights talk too seriously."[13]

For all these authors, natural rights should be seen as expressions of the claims and duties which persons have over against one another by virtue of their mutual participation in an objective moral order. Because this order is seen as both supremely authoritative and universal in scope, it gives rise to claims and duties which are not dependent on any particular social arrangement, and which all communities are bound to respect. Furthermore, on this view the rights of one individual are generally correlated with duties which are incumbent on someone else. Indeed, someone may be said to have a right because another person has a duty which affects him (although it may not be a duty towards him specifically); for example, my right to life is grounded in the duty which everyone else has not to kill people, including me. On this view, rights talk offers a particularly emphatic and concise way of expressing our sense of our obligations to others, but it does not add anything in the way of justifying those obligations or modifying their content.

This last point raises a further difficulty, however, because as Tuck points out, it seems to imply that the language of rights is nugatory:

> If any right can be completely expressed as a more or less complete set of duties on other people towards the possessor of the right, and those duties can in turn be explained in terms of some higher-order moral principle, then the point of a separate language of rights seems to have been lost, and with it the explanatory or justificatory force possessed by references to

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this; see in particular *Man and the State* at 97-107 (cited in note 8). Finnis does say this explicitly in *Natural Law and Natural Rights* at 209-10 (cited in note 8); I first noticed this reference through its citation by Perry in *The Idea of Human Rights* at 56 (cited in note 1).

13. Id. For Finnis' expression of the same view, see *Natural Law and Natural Rights* at 209-10 (cited in note 8).

> rights. This result has been acceptable to many political philosophers, but others have been worried by it, feeling . . . that the point of attributing rights to people is to attribute to them some kind of "sovereignty" over the moral world. According to this view, to have a right to something is more than to be in a position where one's expressed or understood want is the occasion for the operation of a duty imposed upon someone else; it is actually in some way to impose that duty upon them, and to determine how they ought to act towards the possessor of the right.[14]

I believe Tuck's objection to this view is well taken. He is not aiming to legislate usage; if Perry and others wish to describe the claims arising out of a shared morality as rights, there is no logical reason why they should not do so. However, this way of speaking trivializes the historical question before us, and by the same token it obscures an important theoretical issue. For if a rights theory amounts to nothing more nor less than the view that there is an objective morality, then of course medieval natural law authors had a theory of rights—and so did any number of other modern and contemporary authors, including Jeremy Bentham, who famously described the doctrine of "natural and imprescriptible rights" as "nonsense on stilts."[15]

However, when modern theorists refer to natural rights, they frequently mean something more than the claims arising within a moral order.[16] On such a view, a natural right properly so called attaches to a person as, so to speak, one of the individual's moral properties. In the terms of contemporary political theory, it is a subjective, rather than an objective right. Furthermore, secondly, the duties correlative to such a right arise *in virtue of* the right. That is to say, the right is itself the ground of the duty. Finally, on this view

14. Tuck, *Natural Rights Theories* at 6 (cited in note 6).

15. The phrase occurs in his essay on the French Declaration of Rights of 1791, *Anarchical Fallacies*, reprinted in abridged form in A.I. Melden, ed, *Human Rights* 28-60, 30 (Wadsworth Pub, 1970). In fact, Bentham offers a model for reducing rights claims to a more general account of entitlements and obligations; see *An Introduction to the Principles of Morals and Legislation* 224-25 (first published in 1789; Hafner, 1948, reprint of final 1823 ed).

16. I am dependent on Tuck's account of modern natural rights theories here, although the summary is my own; see generally *Natural Rights Theories*.

natural rights exist prior to particular social arrangements, even though their effective exercise may require the existence of specific institutions, such as law courts.

Does the earlier medieval concept of the natural law contain or imply a doctrine of natural rights in this stronger sense? At the very least, we cannot say that there is any *necessary* connection between this concept of the natural law, and a doctrine of natural rights. Certainly, twelfth and thirteenth century jurists and theologians believe that men and women have claims over against one another for certain kinds of aid and forbearance. However, they do not generally ground these in subjective individual rights; rather, these claims follow from fundamental obligations of non-maleficence which are thought to be apparent to all. And as Tierney observes, "to be the beneficiary of a duty is not necessarily the same thing as having a right. Medieval canonists understood this point too. A bishop might have a duty to grant a dispensation when circumstances warranted it, they pointed out, but the petitioner did not have a right to insist on the grant."[17]

The moral/ political theory of Thomas Aquinas is often cited as an example of a medieval doctrine of natural rights.[18] But as others have pointed out, this is so only if we assume that natural rights are equivalent to natural duties; this is one point at which Tierney agrees with both Brett and Tuck.[19] Aquinas has a concept of the natural right, or *jus*, as an objective order of equity established by nature, but he does not speak in terms of rights inhering in individuals, which give rise to duties in others (*Summa theologiae* II-II 57.1, 2). In his remarks on property, he seems at first glance to assert the existence of a natural right to ownership:

> . . . exterior things can be considered in two ways. In one way, with respect to their nature, which is not subject to human

17. Tierney, *The Idea of Natural Rights* at 70-71 (cited in note 4).

18. As do both Maritain and Finnis; see note 8.

19. Brett offers a generally insightful discussion of Aquinas' concept of objective right, and I agree with her conclusion that Aquinas has a notion of objective, but not of subjective right; see Brett, *Liberty, Right and Nature* at 88-97 (cited in note 6). This is likewise the view of both Tuck and Tierney; see *Natural Rights Theories* at 19-20 (cited in note 6), and *The Idea of Natural Rights* at 45 (cited in note 4), respectively.

> power, but only to the divine power, which all things obey straightaway. In another way, with respect to the use of the thing itself. And so the human person has natural ownership (*dominium*) of exterior things, because through his reason and will he is able to make use of them for his benefit, as if they were made for him, for more imperfect things always exist for the sake of more perfect things . . .. And by this argument, the Philosopher proves in the first book of the *Politics* that the possession (*possessio*) of exterior things is natural to the human person. Furthermore, this natural ownership (*dominium*) over other creatures, which is appropriate to the human person on account of reason, in which consists the image of God, is manifested in the very creation of the human person, where it is said, "Let us make the human person to our image and likeness, and let him have authority over the fishes of the sea," etc. [*Gen* 1.26] (*Summa theologiae* II-II 66.1; all subsequent references to Aquinas are taken from the *Summa theologiae*, and all translations from Aquinas are my own.)

Yet Aquinas considers the natural *dominium* over created things to be proper to the human person as a species; further on in this question, he explicitly says that private ownership by individuals is introduced by human ingenuity in view of the needs of life (II-II 66.2 *ad* 2). Elsewhere, he explicitly endorses Gratian's claim that community of possessions and universal liberty pertain to the natural law, whereas property and servitude are introduced by human reason on the grounds of expediency (*Summa theologiae* I-II 94.5 *ad* 3). As Tuck notes, this aligns him with the more general scholastic view that persons can only lay claim to private ownership or to the services of others on the basis of specific social arrangements, which give rise to obligations and claims not specifically grounded in the natural law.[20] In other words, Aquinas has a concept of the right, and he apparently also has a concept of claims emerging out of a particular set of social arrangements, more or less equivalent to our concept of civic rights, but he does not appear to have a concept of natural rights in the strong sense.

Yet at some points, Aquinas does come close to articulating a doctrine of subjective natural rights, even though he does not quite do so. The most striking such example occurs in his discussion of the

20. Tuck, *Natural Rights Theories* at 19-20 (cited in note 6).

obligations of obedience, which for him include the obligations of servants to masters as well as the obligations of those under religious vows to their superiors, and in general, every sort of obligation of a subordinate to a superior (II-II 104.5).

As we would expect, Aquinas is quite prepared to defend the general institutions of subordination and superiority that structure his society. What may be surprising is that he places strict limits on the extent of this obedience. For him, there is no such thing as an obligation of *unlimited* obedience between one person and another. The requirements of obedience are limited by the point of the relationship, for one thing (II-II 104.5 *ad* 2). More importantly, there are limits on the sorts of obedience that can be exacted of anybody, under any circumstances. These limits are set by the fundamental inclinations of human life, which all persons share, and with respect to which all are equal: "However, one person is held to obey another with respect to those things which are to be done externally through the body. Nevertheless, in things which pertain to the nature of the body, one person is not held to obey another, but only God, since all persons are equal in nature" (II-II 104.5; compare I 96.4). Thus, he goes on to explain, no one can command another either to marry or not to marry, for example, because marriage stems from an aspect of human existence which is common to all persons.

In this passage, Aquinas does not explicitly say that individuals have a right to freedom, which can be asserted over against others and defended as such in a court of law. However, he offers what many would consider to be the next best thing; that is, he defends human freedom in terms of an immunity from the interference of others with respect to the pursuit of certain basic human goals. If we agree with Tuck that for a defender of a strong subjective rights theory, "to attribute rights to someone *is* to attribute some kind of liberty to them," then it would appear that Aquinas comes very close to asserting a limited but definite right to freedom here.[21]

Similarly, in his discussion of the obligation of the rich to share their surplus wealth with the poor, Aquinas does not say that a poor individual has a right to the goods of a rich person (II-II 66.7). But

21. Id at 7 (emphasis in the original); note, however, that Tuck here speaks of active rights, rather than subjective rights.

he does say that a poor person who takes from another what is necessary to sustain life is not guilty of robbery or theft. This, in turn, implies that someone is free to take from another in such circumstances, in the sense of enjoying immunity from guilt or punishment. This is not equivalent to saying that the poor person has a right which could be claimed against the rich person and defended at law, but it does imply that the rich individual cannot lodge a claim against the poor individual for the return of what the latter has taken. In other words, the poor individual cannot defend a claim against the rich, but neither can the rich individual defend an accusation of robbery or theft against the poor person in such a case. This is at least a subjective immunity, if not a full-fledged subjective right.

My point here is not that Aquinas has a concept of subjective human rights; I agree with Tuck, Brett, and Tierney that he does not. Nonetheless, it is significant that even though he does not articulate a strong concept of subjective natural rights, he comes very close to such a concept at some points. This fact suggests that there is at least some affinity between natural rights theorists and medieval natural law thinkers, even though the latter may not explicitly assert the existence of subjective rights.

In his recent study of the emergence of a doctrine of subjective rights, Tierney argues that at least some thirteenth century authors went still further in the direction of developing a theory of human rights.[22] As is well known, the scholastics in the twelfth and thirteenth centuries defended the view that the rich have an obligation to share their goods with the poor in time of need. We have just noted that Aquinas interprets this to mean that a poor individual who takes from another what is necessary to sustain life does not sin, but he does not actually say that the poor individual has a right to the superfluous goods of the wealthy. However, other thirteenth century scholastics do say this explicitly. For example, the canonist Laurentius, who says that when the poor person takes from another under press of necessity, it is "as if he used his own right and his own thing."[23] Moreover, as Tierney goes on to show, this came to be recognized as a right which could be adjudicated at law:

22. Tierney, *The Idea of Natural Rights* at 69-76 (cited in note 4).

23. Id at 73; I am quoting from Tierney and the translation is his. He offers here several other examples of similar expressions from the same period.

> Alongside the formal judicial procedures inherited from Roman law the canonists had developed an alternative, more simple, equitable process known as "evangelical denunciation." By virtue of the authority inhering in his office as judge, a bishop could hear any complaint involving an alleged sin and could provide a remedy without the plaintiff bringing a formal action. From about 1200 onward several canonists argued that this procedure was available to the poor person in extreme need. He could assert a rightful claim by an "appeal to the office of the judge." The bishop could then compel an intransigent rich man to give alms from his superfluities, by excommunication if necessary. The argument gained general currency when it was assimilated into the *Ordinary Gloss* to the *Decretum*.[24]

Those scholastics who speak of a right on the part of the poor to the superfluities of the rich do so on the basis of more general natural law considerations, and they do not go on to develop a comprehensive theory of natural subjective rights. Nonetheless, it would be captious to deny that the authors, whom Tierney cites do assert the existence of a subjective right, explicitly referred to as a *jus*, which is grounded in the natural law rather than in specific social conventions. It is not clear that the obligation of the rich person in such a case would be seen as arising from the right of the poor person (as opposed to the more general obligation of the rich to share with those in need), but at the very least, general obligations are seen as giving rise to claims which function as subjective rights. Most importantly, these rights are seen as having juridical effect, that is to say, they give rise to claims which can be vindicated through a public process of adjudication. Of course, this does not mean that these rights could be successfully vindicated apart from some actual legal structure, but that does not mean that they presuppose the existence of such a structure; rather, it is one of the benchmarks of a just society that it provide some forum in which such rights can be claimed and enforced. That is why the scholastics attempted to devise mechanisms through which the right to surplus wealth could be publicly defended and enforced.

Hence, even though the earlier medieval concept of the natural law does not necessarily imply a doctrine of subjective natural rights,

24. Id at 74.

some scholastics in the latter part of this period do speak in terms of individual rights grounded in the natural law. Given this, later natural rights theories appear as a natural (so to speak) development of the earlier medieval concept of the natural law, even though they do not represent the only possible way in which that concept could be developed.

This conclusion would be important in itself, because it implies that there is no sharp break between the high middle ages and early modernity on this issue. If Tierney is correct (as I believe him to be), not only do later doctrines of natural or human rights draw on linguistic and conceptual resources developed in the thirteenth century, the age of high scholasticism, but an incipient doctrine of natural subjective rights can already be found in this period. At the very least, this conclusion suggests that we need to rethink our historiography.

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Even more importantly, it indicates what is at stake affirming a doctrine of subjective human rights which goes beyond an assertion of mutual duties. Let me expand on this point.

Seen in the context of their pre-history in the early medieval period, later medieval and modern rights theories represent a further development of central concerns of the earlier medieval period, a development which places particular emphasis on the authority of the individual as a participant in the divine attributes of reason or will.[25] All the canonists and theologians of the earlier medieval period would have agreed that the natural law gives rise to claims and duties stemming from the dignity of the human person, considered as a bearer of the divine image and a potential participant in salvation. Furthermore, they would have agreed that these claims and duties have social implications, at least insofar as any truly just society is bound to respect them. The incipient account of subjective rights we have just considered goes beyond this consensus, to assert the existence of individual claims which have juridical effect, and to assert further that a just society will necessarily give legal expression to these claims.

25. As Tierney shows in some detail; see id at 43-69.

As such, this account places great emphasis on the value of individual liberty, which is seen as not only an ideal to be respected, but a source for individual claims which have juridical force within the community. While the value of liberty is shared by all the earlier medieval natural law thinkers, the concept of subjective rights places distinctive emphasis on this value by pointing to a specific way in which it might be given social effect. At the same time, this account places at least some of the responsibility for enforcing claims of non-maleficence on (potential or actual) victims themselves.

Are these happy developments, or not? Certainly, they are not free of all ambiguity. The emphasis on freedom which we find in accounts of subjective human rights has not always been connected with political liberalism; on the contrary, as Tuck observes, "most strong rights theories have in fact been explicitly authoritarian rather than liberal."[26] If my claims to freedom and right are grounded in subjective rights, which I can cede, then it is at least arguable that my subjection to an authoritarian regime or my status as a slave is justified because at some time in the past, I or my ancestors ceded these rights. This at least was a common argument in defense of both authoritarian governments and slavery, as Tuck goes on to show in some detail.[27]

Yet a theory of subjective natural or human rights need not be developed in such a way as to incur these implications. The theories which Tuck discusses were distinctive in their reliance on the concept of subjective natural rights as the primary or sole basis for moral and political claims. That is why they opened up the possibility that an individual might cede immunities from even the most fundamental forms of coercion and harm. If my immunity against being enslaved is grounded solely or primarily in my subjective right to liberty, then it is at least thinkable that I might cede my liberty to you by becoming your slave. But if that those immunities are based in more overarching moral considerations, then I cannot cede them, and you cannot enslave me even with my permission.

26. Tuck, *Natural Rights Theories* at 3 (cited in note 6).
27. Id at 50-57, 119-42.

However, it is possible to develop a concept of subjective rights in another way, which places them in a wider natural law context. As Tierney observes,

> by around 1200 many canonists were coming to realize that the old language of *jus naturale* could be used to define both a faculty or force of the human person and a "neutral sphere of personal choice," "a zone of human autonomy." But they did not, like some modern critics of rights theories, expect such language to justify a moral universe in which each individual would ruthlessly pursue his own advantage. Like most of the classical rights theorists down to Locke and Wolff they envisaged a sphere of natural rights bounded by a natural moral law. The first natural rights theories were not based on an apotheosis of simple greed or self-serving egotism; rather, they derived from a view of individual human persons as free, endowed with reason, capable of moral discernment, and from a consideration of the ties of justice and charity that bound individuals to one another.[28]

On this view, natural rights would not stand as the sole source for moral obligations, since they would derive their force from a wider moral framework, which would at the same time set parameters on their exercise. In this sense, an account of natural rights which takes the high scholastic account as its starting point would differ from those modern accounts which take rights to be foundational for obligations of non-maleficence. Yet on this view, claims of natural or human rights would not simply be equivalent to obligations of non-maleficence, because they would add the possibility of the individual lodging a claim, having juridical force, for respect for these obligations.

Interpreted in this way, a doctrine of subjective natural rights would not be so liable to the ambiguities which Tuck describes. At the same time, it would add an important dimension to Perry's account of rights as grounded in the sacredness of human life. The latter concept has its own problematic implications, and a stronger doctrine of subjective rights would serve to correct these.

Let me illustrate what I mean. In the last chapter of *The Idea of Human Rights*, Perry raises the question whether human rights are

28. Tierney, *The Idea of Natural Rights* at 77 (cited in note 4).

absolute. In the course of this chapter, he raises the example of a case recently considered by the Supreme Court of Israel, "involving the use of physical force in the interrogation of a Palestinian detainee believed to have 'extremely vital information whose immediate extraction would help save lives and prevent severe terror attacks in Israel.'"[29] He goes on to quote the attorney for the government to the effect that "No enlightened nation would agree that hundreds of people should lose their lives because of a rule saying torture is forbidden under all circumstances."[30]

So far as I can tell, Perry never does state his own view on this issue. He does describe the claim that torture is absolutely forbidden as "counterintuitive," but he acknowledges that it might nonetheless be true.[31] However, he turns immediately from a consideration of torture to the right to life, on the ground that "many believe [the right to life] to be the most fundamental of all human rights—or certainly one of them."[32] After an extended consideration of John Finnis' defense of an absolute right to life, he concludes that the right to life is not absolute. This at least suggests that he would not consider the right not to be tortured as an absolute. At the same time, he apparently would consider it to be nonderogable; that is to say, its violation can never be juridically sanctioned, even though it may be justified in certain extreme and exceptional cases.[33]

I found Perry's discussion of this case to be troubling. My reaction did not stem from a disagreement with his conclusion. I am very reluctant to say that torture could ever be justified, and yet one can imagine situations in which an absolute prohibition would be difficult indeed to sustain, situations of genuine emergency in which the consequences of such a prohibition would be not only tragic, but catastrophic (say, triggering a nuclear war).

What disturbs me about Perry's treatment of the specific case he cites is that he moves so quickly from this case to a consideration of extreme and hypothetical cases. In doing so, he glosses over the

29. Id at 94.
30. Id.
31. Id at 95.
32. Id.
33. Id at 95-106; unless I have overlooked it, Perry never does return to the specific issue of torture.

moral issues involved in this non-exceptional and all too real case. For what we have in this instance is not a situation in which desperate men and women resort to torture in order to meet an extraordinary emergency; rather, this is a situation in which torture is employed in order to prevent a loss of life which is certainly tragic, but which cannot be described as catastrophic. Moreover, given the sanction of the Israeli supreme court, this case opens up the prospect of the use of torture in similar situations, *as a sanctioned governmental policy*.

This latter point, it seems to me, is critical. After all, why do we find torture so profoundly objectionable? Not only, I would suggest, because it involves the deliberate infliction of pain on another human being—although that is bad enough—but also, and more fundamentally, because it consists in an attempt to coerce another through direct assault on his physical (or perhaps psychological) integrity. As such, it represents a fundamental attack on the juridical personality of the individual, his claim to recognition as a free subject who can choose either to speak on matters of concern to him, or to remain silent. When such an attack is undertaken by the agents of the state, which exists (in part) to protect the juridical claims of those who are subject to it, it is a particularly egregious offense. When such attacks become part of sanctioned state policy, they are intolerable. It is precisely the mark of a civilized nation to refuse to adopt such a policy, even at the risk of "hundreds of lives."

This example is instructive, because it reveals the limitations of the ideal of the sacredness of human life, taken by itself. This ideal is attractive, because it seems give powerful expression to our sense that there are fundamental constraints on our treatment of one another. Up to a point, it does so, but as Perry's discussion in Chapter Four indicates, even this ideal allows for the possibility of harming individuals under certain conditions. That concession, in itself is not problematic; it is difficult to imagine any credible account of morality which would not make such a concession.

Rather, the difficulty with the ideal of sacredness is that taken by itself, it offers us little guidance for determining what kinds of harms are permissible, towards whom and under what circumstances. If every life is sacred, then this seems to imply that no life may be

taken under any circumstances. But as Perry shows, this conclusion is untenable. It is not a denial of the sacredness of the individual to kill him, assuming that the killing is justified. This seems fair enough, but it offers us little guidance in determining which killings are justified, and which are not. Moreover, it offers even less guidance for determining whether the infliction of harm other than killing would be justified. That, I believe, is why the logic of the ideal directs Perry's argument away from the specific case of judicially sanctioned torture, in the process obscuring the distinctive issues which that case raises.

Moreover, the ideal of the sacredness of life, taken by itself, can actually provide a sanction for violence against others who are seen as threatening that ideal. We see this very clearly in this country, where harassment and even murder are justified in the name of protecting the sacred lives of the unborn. Of course I am not suggesting that Perry intends or would in any way support such an interpretation of the sacredness of human life. Yet we can understand how this ideal, translated into a social program and applied without any countervailing principles, might be developed in the direction that the most violent anti-abortion protestors have taken it.

If human life is taken to be sacred, and if other moral commitments are considered to be secondary at best, then the protection of life readily becomes an overriding value. This might imply that no one at all should be subject to violent attack, and of course many do draw just this conclusion. But it can also be taken to imply that those who appear to be attacking human life are so profoundly depraved that they have forfeited any claims to consideration. Seen from this perspective, the humanity of abortion providers recedes from view, while the loss of life intrinsic to abortion takes on overwhelming moral significance. Is it any wonder that from this perspective, the killing of abortion providers appears to some to be a justified evil, or even a commendable act?

I do not know whether the Israeli court that sanctioned torture made an appeal to the sacredness of human life in its deliberations. Yet it is easy to see how this ideal might be interpreted in an analogous way to support such a policy. If we focus our attention on the sacredness of the lives of the victims of Palestinian terrorists, then

it is easy to lose sight of the humanity of the terrorists—and from there it is a small step to focusing on the sacredness of potential victims, to the detriment of possible terrorists. In such a frame of mind, what is the value of this Palestinian, who may well be a murderous terrorist (although we cannot be sure of that!), over against the blameless, sacred individuals who may (or may not) become the victims of his attack?

It is in this context that we can appreciate the value of a doctrine of subjective human rights. That is, this doctrine is valuable because it keeps attention focused on the individual before us, *this* person who claims immunity from fundamental forms of injury and assault. It does not follow that these claims can never be overridden. But because they have juridical force, they cannot be overridden without some process of adjudication, in which the individual can speak freely on his own behalf. This proviso would allow for judicial punishment, perhaps even capital punishment, but it is clearly incompatible with torture, which is meant precisely to destroy a person's capacity to speak and act on his own volition.

This, in my view, is why rights talk matters—that is to say, why we need a concept of subjective rights which adds something distinctive to a general commitment of non-maleficence. This concept is valuable and important for just the same reason that many have found it to be problematic, namely its focus on the individual and his claim to juridical recognition. By maintaining this focus, it confers on individuals the opportunity to assert their own sense of dignity, and where necessary, their own sense of injury before society as a whole.[34] In this way, it is both an expression of, and a vital safeguard for the dignity of the individual person. It is true that rights theories are subject to abuse, and need to be contextualized by a wider framework of moral and social commitments. Nonetheless, I believe that a strong concept of human rights is essential to maintaining a just and humane society, and for that reason, we should

34. I came to realize the significance of this aspect of natural rights theories through reading Judith N. Shklar, *The Faces of Injustice* (Yale U Press, 1990), even though natural rights theories as such are not her main focus of concern there.

avoid the conclusion that "rights talk" is simply a dispensable way of expressing whatever we take to be an exigent moral claim.[35]

35. A portion of this paper is taken from my *Natural and Divine Law: Retrieving the Tradition for Christian Ethics* (Novalis: Ottawa & Eerdmans, 1999) and the relevant section is reprinted with the kind permission of Novalis Press. In addition, earlier drafts of this paper were read during a series of lectures sponsored by the Australian Theological Forum, April 17-18, 1998, and at a faculty seminar sponsored by the Erasmus Institute, the U of Notre Dame, December 8, 1998. I benefited greatly from the many comments offered at these lectures.