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Moral Equality?

MICHAEL J. PERRY*

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*Few contemporary moral philosophers have really joined battle with Nietzsche about morality. By and large we have just gone on taking moral judgments for granted as if nothing had happened. We, the philosopher watchdogs, have mostly failed to bark . . .*¹

* ©2022 Michael J. Perry. Robert W. Woodruff University Chair and Senior Fellow, Center for the Study of Law and Religion, Emory University. I am grateful to Mathew Sperling, Stanford Law Class of 2024, for discerning commentary and helpful discussion—and for bringing to my attention the “moral sentimentalism” family of moral-philosophical positions. See Antti Kauppinen, “Moral Sentimentalism,” in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/moral-sentimentalism/> [<https://perma.cc/W4XJ-F7RP>].

1. PHILIPPA FOOT, NATURAL GOODNESS 103 (2001).

I. INTRODUCTION

Let me begin by quoting a passage from a recent paper by Brian Leiter:²

[F]or a nonegalitarian like Nietzsche, the Trolley Problem is misconceived from the start: for him, the most important question is: *who are the five, and who is the one to be sacrificed?* . . . Consider the “Nietzschean Trolley Problem” (apologies for anachronism): a runaway trolley is hurtling down the tracks towards Beethoven, before he has even written the *Eroica* symphony (which, of course, he will write if he lives); by throwing the switch, you can divert the trolley so that it runs down five (or fifty) ordinary people, nonentities (say university professors of law or philosophy) of various stripes (“herd animals” in Nietzschean lingo), and Beethoven is saved. For the Nietzschean antiegalitarian, this problem is not a problem: one should of course save a human genius at the expense of many mediocrities. Indeed, for the antiegalitarian, this misstates the conclusion: the interests of the mediocrities do not count at all. To reason that way is, of course, to repudiate moral egalitarianism. Belief in an egalitarian God would thwart this line of reasoning; but absent that belief, what would?³

“[A]bsent belief in an egalitarian God,” and given that human beings are unequal—indeed, profoundly unequal—in compassion, intelligence, creativity, integrity, courage, etc., why should one accept that one should not treat any human being as morally inferior to any other human being?⁴

2. Given the venue of this conference, it bears mention that Brian Leiter began his career as a law professor at the University of San Diego.

3. Brian Leiter, *The Death of God and the Death of Morality*, 102 *THE MONIST* 386, 397–98 (2019). See also Louis Pojman, *On Equal Human Worth: A Critique of Contemporary Egalitarianism*, in *EQUALITY: SELECTED READINGS* 282 (Louis P. Pojman & Robert Westmoreland, eds., 1997).

4. The invitation to participate in this conference stated: “Human beings are unequal along all sorts of dimensions. They vary in virtue, income, wealth, productivity, health, attractiveness, artistic and athletic talent, and in myriad other ways. Which inequalities are problematic, morally or otherwise, and why? And which should be remedied by government?” Whether a particular inequality is morally problematic depends: That a state of affairs is morally problematic *for me* doesn’t entail that it is morally problematic *for you*—or vice versa; we may affirm different moralities.

Economic inequality is, if not the most widely discussed, one of the most widely discussed inequalities in the United States today—including among moral and political philosophers.

The fact that many human beings live in conditions of great material deprivation is obviously of grave moral concern and has long been a matter of serious ethical reflection. The economists’ picture [of extreme and increasing economic inequality] forces us to ask whether there is also something morally troubling about the magnitude, causes, and effects of *differences* in economic resources.

In recent decades, there has been a great deal of work on [economic] inequality . . . in the discipline of political philosophy.

Paul Weithman, *Solidarity and the New Inequality*, 47 *J. RELIGIOUS ETHICS* 311, 311 (2019) (citing, as “a sophisticated treatment,” Martin O’Neill, *Survey Article: Philosophy and Public Policy After Piketty*, 25 *J. POL. PHIL.* 343 (2017)). As Weithman’s article explains, for one who embraces a solidarity-based morality such as the morality of human rights, economic inequality is morally problematic. For a succinct overview of several arguments—

The particular version of the foregoing question I address in the following pages is this: What nontheistic reason or reasons do we have, if any, to accept the morality of human rights, a core constituent of which is the right to moral equality: the right of every human being to be treated as the moral equal of every other human being in *this* sense: as equally entitled with every other human being to be treated—as no less worthy than any other human being of being treated—in what Article 1 of the Universal Declaration of Human Rights calls “a spirit of brotherhood.”⁵ By “the morality of human rights” (as I call it), I mean the particular morality embodied in the Universal Declaration.⁶

II. THE MORALITY OF HUMAN RIGHTS

As I have explained elsewhere,⁷ as the term “human right” is understood both in the Universal Declaration of Human Rights, which was adopted by the General Assembly of the United Nations on December 10, 1948,⁸ and in the several international human rights treaties that have entered into force in the period since the adoption of the Universal Declaration,⁹ a right is a *human right*, *even if according to the right the rights-holders are not*

economic and political as well as moral—that economic inequality is greatly problematic, and that government should do something about it, see Stuart Ford, *The Need for a Wealth Inequality Amendment*, 122 W. VA. L. REV. (2019). For a less succinct treatment, see JOSEPH E. STIGLITZ, PEOPLE, POWER, AND PROFITS: PROGRESSIVE CAPITALISM FOR AN AGE OF DISCONTENT (2019). See also Joseph E. Stiglitz, *Capitalism and Its Discontents*, TIMES LITERARY SUPPLEMENT, June 4, 2019; Paul Krugman, *Notes on Excessive Wealth Disorder*, N.Y. TIMES, June 22, 2019.

5. The Universal Declaration states, in Article 1, that “all human beings . . . should act towards one another in a spirit of brotherhood.”

6. Most of what I say here about the morality of human rights is drawn from this recent essay: Michael J. Perry, *The Morality of Human Rights*, 42 HUMAN RIGHTS Q. 434 (2020) [hereinafter Perry, *Morality of Human Rights*].

7. See *id.* at 435–38.

8. A large scholarly literature discusses the drafting and adoption of the Universal Declaration. Two important works: MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001); JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* (1999). See also SIEP STURMAN, *THE INVENTION OF HUMANITY: EQUALITY AND CULTURAL DIFFERENCE IN WORLD HISTORY 497–508* (2017).

9. For a comprehensive compilation of the treaties, a compilation that includes, for each treaty, the date the treaty entered into force and a list of the countries that have ratified the treaty, see UNITED NATIONS TREATY COLLECTION, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&clang=_en [https://perma.cc/LQF9-S6R2].

all but only some human beings, if 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 norm stated in the Universal Declaration that “all human beings . . . should act towards one another in a spirit of brotherhood.”

The morality of human rights is not just a political morality. As Alexandre Lefebvre has emphasized, “contrary 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 principal addressee . . . is not government or a people; it is, instead, each and every individual person.”¹⁰ (Again, the Universal Declaration states that “all human beings . . . should act towards one another in a spirit of brotherhood.”) 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—whether a particular government or group of governments, a particular kind of government, or every government—should act toward the human beings over whom it (or they) exercises power. The morality of human rights is mainly a political morality in the sense that the Universal Declaration and the treaties state rules of conduct mainly for government—every government.¹¹ Moreover, the morality of human rights, as I have suggested elsewhere, is the first truly global political morality in human history.¹²

What does the morality of human rights require of government?

10. ALEXANDRE LEFEBVRE, HUMAN RIGHTS AS A WAY OF LIFE: ON BERGSON’S POLITICAL PHILOSOPHY 78 (2013). Cf. Alexandre Lefebvre, *Human Rights as Spiritual Exercises*, in THE SUBJECT OF HUMAN RIGHTS 193 (Danielle Celermajer & Alexandre Lefebvre eds., 2020). Eleanor Roosevelt, who was a member of the United Nations commission charged with drafting what would become the Universal Declaration, said in a speech in 1958:

Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.

United Nations, Peace, Dignity, and Equality on a Healthy Planet, Human Rights, *The Universal Declaration of Human Rights*, <https://www.un.org/en/%E2%80%9Cclose-home%E2%80%9D-universal-declaration-human-rights-0> [<https://perma.cc/2TD9-GLQ2>].

11. Cf. *id.* at xv–xvi: “[Henri] Bergson uses human rights as a kind of perspective from which to evaluate all other institutions, types of political organization, and what we might generally call political phenomena. . . . [For Bergson, human rights] are the means by which to judge the sense, value, and orientation of all other political forms.”

12. See MICHAEL J. PERRY, A GLOBAL POLITICAL MORALITY: HUMAN RIGHTS, DEMOCRACY, AND CONSTITUTIONALISM 26–27 (2017).

In drafting Article 1 of the Universal Declaration as he did, René Cassin, the French delegate to the United Nations commission charged with drafting what would become the Universal Declaration, had wanted to stress “the fundamental principle of the unity of the human race” because Hitler had “started by asserting the inequality of men before attacking their liberties.” Later on, Cassin reiterated the point that “the authors of that Article had wished to indicate the unity of the human race regardless of frontiers, as opposed to theories like those of Hitler.” When someone . . . observed that these principles were too well known and did not need to be stated again, Cassin quickly responded that the argument “was invalid in light of recent events. Within the preceding years,” he said, “millions of men had lost their lives, precisely because those principles had been ruthlessly flouted.” He thought it “was essential that the UN should again proclaim to mankind those principles which had come so close to extinction and should refute the abominable doctrine of fascism.”¹³

The morality of human rights consists both of a general requirement and of specific requirements. The *general* requirement, as Cassin’s comments indicate, is that (in the words of Article 1) “all human beings . . . should act towards one another in a spirit of brotherhood”; neither any government actor nor anyone else should act towards any human being in a demeaning or dehumanizing way; to do so would be to violate the morality of human rights. The most common bases for selecting human beings towards whom to act in a demeaning or dehumanizing way, as Article 2 of the Universal Declaration indicates, include “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁴

13. MORSINK, *supra* note 8, at 38–39. See also STURMAN, *supra* note 8, at 498: “According . . . Cassin, the declaration had to be based on the ‘great fundamental principle of the unity of all the races of mankind.’” Stuurman adds: “. . . Cassin belonged to a Jewish family . . . [and] had lost twenty-nine relatives in the Holocaust . . .” *Id.* On Cassin, see GLENDON, *supra* note 8, at 61–64; JAY WINTER AND ANTOINE PROST, RENÉ CASSIN AND HUMAN RIGHTS: FROM THE GREAT WAR TO THE UNIVERSAL DECLARATION (2013). Cf. GLENDON, *supra* note 8, at 68 (quoting Eleanor Roosevelt’s comments on the use of the word “men”): “[W]hen we say ‘all men are brothers,’ we mean that all human beings are brothers, and we are not differentiating between men and women. . . . I have always considered myself a feminist but I really would have no objection to the use of the word as the Committee sees it.”

14. The work of David Livingstone Smith on dehumanization is illuminating: DAVID LIVINGSTONE SMITH, *LESS THAN HUMAN: WHY WE Demean, ENSLAVE AND EXTERMINATE OTHERS* (2011); David Livingstone Smith, *The Essence of Evil*, AEON, Oct. 24, 2014, at 112–14, n.15; DAVID LIVINGSTONE SMITH, *ON INHUMANITY: DEHUMANIZATION AND HOW TO RESIST IT* (2020).

The *specific* requirements of the morality of human rights are the several rights set forth in the Universal Declaration and/or in one or more of the treaties. Those rights are specifications, for particular contexts, of the general requirement. (For example, Article 5 of the Universal Declaration is, in part, a specification for the context of criminal punishment: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”) In that sense, the general requirement grounds the specific requirements: For government to violate one or more of those rights is for government to fail to act “in a spirit of brotherhood” toward some human beings, thereby violating the morality of human rights.¹⁵

III. THE QUESTION OF JUSTIFICATION

The most fundamental—and the most challenging—question we can ask 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; more precisely, what reason(s) do we have, if any, to live our lives—and to do what we reasonably can, all things considered, to get our governments to conduct their affairs—in accord with the norm that grounds, *and in that sense is the grundnorm of*, the morality of human rights: the “act towards all human beings in a spirit of brotherhood” norm?

That some of us have a reason to do so does not entail that others of us have the same reason—or, indeed, any reason—to do so. For example, some of us have a theistic reason: a reason based on a theistic worldview.¹⁶ But

15. I’ve addressed elsewhere the following questions: Not all human rights are *legal* rights in all legal systems; in what sense are some human rights legal rights in some legal systems? Not all human rights are *moral* rights; in what sense are some human rights moral rights? See PERRY, A GLOBAL POLITICAL MORALITY, *supra* note 12, at 9–23.

16. Notwithstanding the profound differences among the three main theistic worldviews—Judaism, Christianity, and Islam—in each of them, as philosopher Hilary Putnam noted, “the whole human race [is regarded] as One Family [and] all women and men as sisters and brothers.” HILARY PUTNAM, THE MANY FACES OF REALISM 60–61 (1987).

Charles Taylor has written that the “affirmation of universal human rights [that characterizes] modern liberal political culture [represents an] authentic development[] of the gospel . . .” CHARLES TAYLOR, A CATHOLIC MODERNITY? 16 (1999). Taylor hastens to add “that modern culture, in breaking with the structures and beliefs of Christendom, also carried certain facets of Christian life further than they ever were taken or could have been taken within Christendom. In relation to the earlier forms of Christian culture, we have to face the humbling realization that the breakout was a necessary condition of the development.” *Id.* For Taylor’s development of the point, with particular reference to modern liberal political culture’s affirmation of universal human rights, see *id.* at 18–19.

Consider, in the context of Taylor’s “authentic development of the Gospel” statement, that both Pope John XXIII and Pope John Paul II revered the Universal Declaration. In his encyclical *Pacem in Terris* (1963), John XXIII called the Universal Declaration “an act of the highest importance.” In his first encyclical, *Redemptor Hominis* (1979), John Paul II referred to the Universal Declaration as “a magnificent effort.” Sixteen years later

not all of us are theists. And in any event the inquiry I want to pursue here is secular, not theological: What nontheistic reason(s) do we have, if any, to accept the “act towards all human beings in a spirit of brotherhood” norm?¹⁷

A. The “Natural Law” Answer (per John Finnis)

I want to consider two main answers—perhaps the two main answers—beginning with the answer that can be inferred from the writings of John Finnis, who is widely regarded as one of the most important “natural law” moral philosophers of our time.¹⁸ The Universal Declaration tells us that we (“all human beings”) should act towards one another “in a spirit of brotherhood.” Finnis tells us, in his book *Natural Law and Natural Rights*, that we should act towards one another with “fundamentally impartiality”.¹⁹ If we understand (as I think we should) Finnis’s “act towards all human beings with fundamental impartiality” norm²⁰ as essentially an alternative articulation of the “act towards all human beings in a spirit of brotherhood” norm, and if Finnis’s (nontheistic) defense of the “fundamental impartiality” norm is sound, then Finnis has provided us with a sound defense of, a

(1995), in his address to the United Nations, John Paul II described the Universal Declaration as “one of the highest expressions of the human conscience of our time.” In 1998, in his message for World Peace Day, John Paul II emphasized that the Universal Declaration should be “observed integrally both in spirit and in letter.” Quoted in Avery Dulles, *Human Rights: Papal Teaching and the United Nations*, 179 AMERICA 14, 15 (1998).

On the Christian origins of modern human rights thinking, see SAMUEL MOYN, CHRISTIAN HUMAN RIGHTS (2015). For critical commentary by several scholars on Moyn’s book, along with Moyn’s response, see, at the blog titled The Immanent Frame, <https://tif.ssrc.org/?s=Samuel+Moyn%2C+Christian+Human+Rights> [<https://perma.cc/G89L-UJT3>].

17. If there is a nontheistic reason to accept the “act towards all human beings in a spirit of brotherhood” norm, it can, of course, serve as a reason for a theist, no less than for a nontheist, to accept the norm.

18. For recent critical commentary on Finnis’s natural law position concerning “natural rights”, see NIGEL BIGGAR, WHAT’S WRONG WITH RIGHTS? 82–92 (2020).

19. See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 106–09 (2d ed. 2011). Finnis allows that there is “reasonable scope for self-preference”—there are “bounds of reasonable self-preference, of reasonable discrimination in favor of myself, my family, my group(s)” (*Id.* at 107–08)—but that aspect of Finnis’s position needn’t detain us here. Cf. Bharat Ranganathan, *On Helping One’s Neighbor*, 40 J. RELIG. ETHICS 653 (2012) (arguing that “accepting an obligation to assist does not necessarily result in one’s abandoning one’s special relations, abnegating self-regard, or no longer pursuing other non-moral strivings”).

20. Or, in Finnis’s own words: the requirement of “fundamental impartiality among the human subjects who are or may be partakers of [the basic forms of good].” FINNIS, *supra* note 19, at 107.

sound reason to accept, the “in a spirit of brotherhood” norm. Is Finnis’s defense sound?

Why, according to Finnis, should we act towards all human beings with “fundamental impartiality”? “My own well-being”, Finnis insists, “is [not] of more value than the well-being of others, simply because it is mine: intelligence and reasonableness can find no basis in the mere fact that that A is A and not B (that I am I and not you) for evaluating his (our) well-being differently.”²¹ My own well-being is not of more value *to whom* than the well-being of others? It is not at all unreasonable—and would not be in the least bit surprising—that A values his own wellbeing and the wellbeing of his family, friends, tribe, etc., more highly than he values B’s wellbeing and the wellbeing of B’s family, etc. I concur in legal philosopher Jeffrey Goldsworthy’s judgment that “Finnis has tried to do in two pages [in *Natural Law and Natural Rights*] what . . . others have devoted entire books to: . . . show that egoism is inherently self-contradictory or irrational. All of these attempts have failed. It is surprising that Finnis deals with such a problematic and contentious issue in such a brief and casual fashion.”²²

In a lecture delivered in 2005, twenty-five years after *Natural Law and Natural Rights* was first published, Finnis said something suggestive of a different defense of the “fundamental impartiality” norm: that an act that violates the norm so contravenes human nature as to be “self-mutilating”.²³ But is it plausible to think that there is there is a human nature *of the sort imagined by Finnis*: a human nature such that only one morality—in Finnis’s case, a morality that includes, as a core feature, the “fundamental impartiality” norm—is consistent with human nature.²⁴ Even if to live a life in accord with the “fundamental impartiality” norm does not contravene human nature, why should we believe that it contravenes (what we know of) human nature, *that it is “self-mutilating”*, to live a life of a different sort: a life *not* in accord with the norm, a life, say, in which, although one’s “treatment of a rather narrow range of featherless bipeds is morally impeccable”, one

21. *Id.* at 107.

22. J.D. Goldsworthy, *God or Mackie: The Dilemma of Secular Moral Philosophy*, 30 AM. J. JURIS. 43, 75 (1985).

23. John Finnis, *On ‘Public Reason’* 16–17 (2005), <http://ssrn.com/abstract=955815> [<https://perma.cc/3294-APYS>]. According to Finnis, “one’s pursuit of fulfillment would be unreasonable and self-mutilating if it were indifferent to friendship and to the worth of the instantiation of human goods in the lives of other people; therefore,] one needs look to putting in order one’s relations with one’s fellows, one’s communities. The name for that order, *and* for one’s constant concern for it, is justice.” *Id.*

24. See D.J. O’Connor, *AQUINAS AND NATURAL LAW* 57 (1968): “In so far as any common core can be found to the principal versions of the natural law theory, it seems to amount to the statement that the basic principles of morals and legislation are, *in some sense or other*, objective, accessible to reason, and based on human nature.”

“remains indifferent to the suffering of those outside this range”?²⁵ Given what we know about the vast range of human communities across space and time, it is more plausible to conclude that, as philosopher Stuart Hampshire stated, although “[t]here are obvious limits set by common human needs to the conditions under which human beings flourish and human societies flourish[,]” it is nonetheless the case “that human nature, *conceived in terms of common human needs and capacities*, always underdetermines a way of life, and underdetermines an order of priority among virtues, and therefore underdetermines the moral prohibitions and injunctions that support a way of life.”²⁶

B. The “Human Dignity” Answer

Let’s move on to consider what is probably the most common answer to the “What nontheistic reason(s) . . .” question: the answer embedded in the three components of the International Bill of Human Rights: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. The Universal Declaration refers, in its preamble, to “the inherent dignity . . . of all members of the human family” and states, in Article 1, that “[a]ll human beings are born free and equal in dignity . . . and should act towards one another in a spirit of brotherhood.” The two international covenants each refer, in their preambles, to “the inherent dignity . . . of all members of the human family” and to “the inherent dignity of the human person”—from which, both covenants declare, “the equal and inalienable rights of all members of the human family . . . derive.” In 1986, the UN General Assembly adopted a resolution—A/RES/41/120,

25. Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in *ON HUMAN RIGHTS: THE 1993 OXFORD AMNESTY LECTURES* 111, 123–24 (Susan Hurley and Stephen Shute, eds., 1993). The full passage:

Plato got moral philosophy off on the wrong foot. He led moral philosophers to concentrate on the rather rare figure of the psychopath, the person who has no concern for any human being other than himself. Moral philosophy has systematically neglected the much more common case: the person whose treatment of a rather narrow range of featherless bipeds is morally impeccable, but who remains indifferent to the suffering of those outside this narrow range . . .

Id.

26. Stuart Hampshire, *MORALITY AND CONFLICT* 155 (1983) (emphasis added). Cf. Phillip Honenberger, *Review of Maria Kronfeldner, What’s Left of Human Nature? A Post-Essentialist, Pluralist, and Interactive Account of a Contested Concept* (2018), *NOTRE DAME PHIL. REV.* (2019).

titled “Setting International Standards in the Field of Human Rights”—according to which international human rights treaties should not designate a right as a human right unless the right is, *inter alia*, “of fundamental character and derive[s] from the inherent dignity and worth of the human person.” In 1993, the UN-sponsored World Conference on Human Rights adopted the Vienna Declaration and Programme of Action, which includes this language in its preamble: “Recognizing and affirming that all human rights derive from the dignity and worth inherent in the human person . . .”

The passages quoted in the preceding paragraph constitute this twofold claim: *Each and every (born) human being (1) has equal inherent dignity and (2) is therefore inviolable: not-to-be-violated*. A few words of clarification are in order. The *Oxford English Dictionary* gives this as the principal definition of “dignity”: “The quality of being worthy or honourable; worthiness, worth, nobleness, excellence.” That every human being has “inherent” dignity is the International Bill’s way of saying that the dignity that every human being has, she has not as a member of one or another group (racial, ethnic, national, religious, etc.), not as a man or a woman, not as someone who has done or achieved something, and so on, but simply as a human being. To say that every human being has “equal” inherent dignity is to say that no human being has more—or less—inherent dignity than any other human being: “All human beings are . . . equal in dignity . . .” That every human being is inviolable—not-to-be-violated—is to say that one should not violate any human being; instead, one should respect every human being; that is, “all human beings . . . should act towards one another in a spirit of brotherhood.” One *violates* a human being, in the relevant sense of “violate”, when one fails to act in accord with the “in a spirit of brotherhood” norm. One *respects* a human being when one does so act.

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? There are theistic answers,²⁷ one of which is: “All human beings are created in the image of God.”²⁸ Another: “[T]he special love of the Creator for each human being ‘confers upon him or her an infinite dignity.’”²⁹ Eleanor

27. More generally, there are *religious* answers, some of which are theistic and some of which are not. See VALUE AND VULNERABILITY: AN INTERFAITH DIALOGUE ON HUMAN DIGNITY (Matthew Petrussek and Jonathan Rothchild, eds., 2020).

28. See ROGER RUSTON, HUMAN RIGHTS AND THE IMAGE OF GOD (2004). Cf. Frederick Mark Gedicks, *Christian Dignity and the Overlapping Consensus*, 46 BYU L. REV. 1245 (2020).

29. So spoke Pope Francis, in paragraph 65 of his 2015 encyclical, *Laudato si’*: *On Care for Our Common Home* (2015), http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html [<https://perma.cc/5MKB-RUZU>]. In a 2020 encyclical, Pope Francis stated that “God has created all human

Roosevelt, who played a crucial role in the drafting and adoption of the Universal Declaration of Human Rights,³⁰ wrote: “I happen to believe that we are born free and equal in dignity and rights because there is a divine Creator, and there is a divine spark in men.”³¹ Again, however, we are not all theists—as Roosevelt herself well understood. She continued:

But, there were other [commission members] who wanted it expressed in such a way that they could think in their particular way about the question, and, finally, these words were agreed upon because they stated the fact that all men were born free and equal, but they left each of us to put it in our own reason, as we say, for that end.³²

But is there any plausible *nonthestic* answer to the question at the beginning of the preceding paragraph?³³ There is reason to be skeptical. Again, Brian Leiter has argued recently that “the moral egalitarianism that is central to modern morality cannot be defended on any basis other than the supposition that there is an egalitarian God that invests everyone with equal moral worth.”³⁴ He writes:

Here is the dilemma that haunts the basis of equality problem: any feature of persons one might identify as *justifying* their equal treatment is not, in fact, shared equally by persons, thus raising the question how it could justify *equality*

beings equal in rights, duties and dignity, and has called them to live together as brothers and sisters.” Pope Francis, *Fratelli Tutti: On Fraternity and Social Friendship*, par. 5 (2020), http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20201003_enciclica-fratelli-tutti.html [<https://perma.cc/45AW-D69G>].

30. See GLENDON, *supra* note 8.

31. ELEANOR ROOSEVELT, *WHAT I HOPE TO LEAVE BEHIND: THE ESSENTIAL ESSAYS OF ELEANOR ROOSEVELT* 561 (Allida M. Black, ed., 1995).

32. *Id.*; see also PERRY, *supra* note 12, at 34–35.

33. The REPORT OF THE COMMISSION ON UNALIENABLE RIGHTS (2020) observes (at p. 32) that the Universal Declaration of Human Rights makes only “a minimally foundational appeal to human dignity without any specification of the source of that dignity. In Jenna Reinbold’s account, which I commend to the reader, the effort of the commission charged with drafting what would become the Universal Declaration

to imbue the Declaration with an immanent transcendence [of human dignity] is not the product of aversion to religion; rather, it is the result of an endeavor to navigate what Charles Taylor has famously called “a secular age.” In his expansive exploration of the topic, Taylor describes this age as one marked by a shift from an existence in which “it was virtually impossible not to believe in God, to one in which faith, even for the staunchest believer, is one human possibility among others.”

Jenna Reinbold, *The Secular Subject of Human Rights*, in *THE SUBJECT OF HUMAN RIGHTS* 228, 234 (Danielle Celermajer and Alexandre Lefebvre, eds., 2020).

34. Leiter, *The Death of God and the Death of Morality*, *supra* note 3, at 398.

of moral consideration. People differ, for example, in their rationality, their sensitivity to pleasure and pain, and their moral capacities, not to mention, to put it in more banal terms, their intelligence, alertness, and empathy. If what warrants equal moral consideration is reason, sentience, or moral sensitivity, then there is no reason to think humans per se warrant equal moral consideration given how much they differ in these attributes.³⁵

In any event, many of us, nontheists as well as theists, *are* skeptical.

C. *The Agapaistic Answer*

Again, what nontheistic reason is there, if any, for us to live our lives, and to do what we reasonably can to get our governments to conduct their affairs, in accord with the “act towards all human beings in a spirit of brotherhood” norm?

Imagine that we are talking with someone, a nontheist,³⁶ who is skeptical that there is anything common to each and every human being in virtue of which all human beings have equal inherent dignity. More broadly, she is skeptical that there is *any* successful nontheistic “normative theory”: “a theory that purport[s] to justify, discursively and systematically, [one’s] normative opinions, to show them to be rationally obligatory and objectively valid.”³⁷ Her skepticism encompasses any such theory—including Finnis’s

35. *Id.* at 394. Leiter, quoting at length from a “devastating” article by Richard Arneson, explains why John Rawls’s “appeal to ‘range properties’” is not successful. *See id.* at 394–95 (in part quoting Richard Arneson, *What, if Anything, Renders All Humans Morally Equal?*, in PETER SINGER AND HIS CRITICS 103 (Dale Jamieson, ed., 1999). *Cf.* GRIFFIN, ON HUMAN RIGHTS 92 (2008): “We have a better chance of improving the discourse of human rights if we stipulate that only normative agents bear human rights—no exceptions: not infants, not the seriously mentally disabled, not those in a permanent vegetative state, and so on.”

36. Ronald Dworkin emphasized that one’s being a nonbeliever in the sense of a nontheist does not necessarily mean that one is not “religious” or “spiritual”. *See* Ronald Dworkin, *Religion Without God*, N.Y. REV. BOOKS (Apr. 4, 2013). Dworkin cites footnote 11 of the U.S. Supreme Court’s decision in *Torcaso v. Watkins*, 367 U.S. 488 (1961):

Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others. *See* Washington Ethical Society v. District of Columbia, 101 US App. D.C. 371, 249 F. 2d 127; Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 315 P. 2d 394; II ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 293; 4 ENCYCLOPAEDIA BRITANNICA (1957 ed.) 325–327; 21 *id.*, at 797; Archer, FAITHS MEN LIVE BY (2d ed. revised by Purinton) 120–138, 254–313; 1961 WORLD ALMANAC 695, 712; YEAR BOOK OF AMERICAN CHURCHES FOR 1961, at 29, 47.

As the Court noted in *Torcaso*, Buddhists are not, in the main, theists. *Cf.* Sallie B. King, *Buddhism and Human Rights*, in RELIGION & HUMAN RTS. 103 (John Witte Jr. and M. Christian Green, eds., 2012).

37. I borrow the term “normative theory” and its definition from Brian Leiter. *See* Brian Leiter, *Why Marxism Still Does Not Need Normative Theory*, ANALYSE & KRITIK 01+02/2015 S. 23–50, http://www.analyse-und-kritik.net/Dateien/5a798590516c6_leiter.pdf [<https://perma.cc/XWU4-SH75>]. The quoted language appears on the first page of the Article.

or any other natural law theory—that purports to justify the “in a spirit of brotherhood” norm or any equivalent egalitarian norm, that purports to show the norm “to be rationally obligatory and objectively valid.” Nonetheless, our interlocutor is unyielding in her embrace of the “in a spirit of brotherhood” norm—unyielding in her commitment to do all she reasonably can, in alliance with like-hearted others, to “tame the savageness of man and make gentle the life of this world.”³⁸ We ask her: “*Why* do you embrace—*why* do you live your life, or aspire to live it, in accord with—the norm?”

She responds:

I detest and oppose states of affairs in which human beings—any human beings, not just myself and those for whom I happen to care deeply, such as my family and friends—suffer grievously in consequence of a law or other policy that is misguided or worse. I detest and oppose such states of affairs, because I detest and oppose such suffering. And so I work to build a world in which such suffering is, over time, diminished, all the while remembering, with Dietrich Bonhoeffer, that “[w]e have for once learned to see the great events of world history from below, from the perspective of the outcast, the suspects, the maltreated, the powerless, the oppressed, the reviled—in short, from the perspective of those who suffer.”³⁹

“But,” we reply, “the problem of justification persists: the justification of the sensibility that animates your answer. Listen to Leszek Kolakowski: ‘When Pierre Bayle argued that morality does not depend on religion, he was speaking mainly of psychological independence; he pointed out that atheists are capable of achieving the highest moral standards . . . and of putting to shame most of the faithful Christians. That is obviously true as

38. On April 4, 1968, in Indianapolis, Indiana, after telling the largely African American audience what he himself had just learned—that a little earlier that evening, in Memphis, Tennessee, Martin Luther King, Jr., had been assassinated—Robert F. Kennedy quoted Aeschylus: “Let us dedicate ourselves to what the Greeks wrote so many years ago: to ‘tame the savageness of man and make gentle the life of this world.’”

39. DIETRICH BOHOEFFER, *AFTER TEN YEARS: A LETTER TO THE FAMILY AND CONSPIRATORS*, in *A TESTAMENT TO FREEDOM* 482, 486 (1995). “After Ten Years” bears the date “Christmas 1942.” Richard Rorty, addressing the question “Why should I care about a stranger, a person who is no kin to me, a person whose habits I find disgusting?”, sketches these responses:

“Because this is what it’s like to be in her situation—to be far from home, among strangers,” or “Because she might become your daughter-in-law,” or “Because her mother would grieve for her.” Such stories, repeated and varied over the centuries, have induced us, the rich, safe, powerful people, to tolerate, and even to cherish, powerless people—people whose appearance or habits or beliefs at first seemed an insult to our own moral identity, our sense of the limits of permissible human variation.

Rorty, *supra* note 25, at 133–34.

far as it goes, but this matter-of-fact argument leaves the question of validity intact . . . ”⁴⁰

To Kolakowski’s “question of validity”, our interlocutor explains:

Again, I detest and oppose states of affairs in which any human beings suffer grievously in consequence of a law or other policy that is misguided or worse. You ask what justifies my sensibility, my way of being oriented to the Other, if indeed anything justifies it. Are you asking for an argument in support of the claim, which for me is a conviction, that there is no better—no more beautiful, no more ennobling—way of being oriented to the Other? I have no such argument. I have nothing to offer other than my experience, my experience both of the sensibility and of others, such as the Vietnamese Buddhist Thich Nhat Hahn, who embody the sensibility, my experience of their beautiful, ennobling humanity and peace.⁴¹

There is much to be done, and life is short. So I work to build a world in which such suffering is, over time, diminished. And I work to build that world with whomever who will work with me, whatever their particular beliefs or motivation.⁴²

Our interlocutor’s sensibility, as her responses to our questions indicate, is an aspect of a particular way of being oriented in the world; more precisely, her sensibility is a particular way of being oriented to the Other. Let’s call her sensibility “agapic”. *Agape* is a kind of love—different from *eros* and *philia*, but a kind of love nonetheless.⁴³ In his informative book on Henri

40. LESZEK KOLAKOWSKI, RELIGION, IF THERE IS NO GOD: ON GOD, THE DEVIL, SIN, AND OTHER WORRIES OF THE SO-CALLED PHILOSOPHY OF RELIGION 191 (1982).

41. See Robert Ellsberg, ed., THICH NHAT HAHN: ESSENTIAL WRITINGS (2001); THUPTEN JINPA, A FEARLESS HEART: HOW THE COURAGE TO BE COMPASSIONATE CAN TRANSFORM OUR LIVES (2015). Cf. LINDA TRINKHAUS ZAGZEBSKI, EXEMPLARIST MORAL THEORY (2017).

Louis Pojman would have assigned our interlocutor’s answer to “the existential strategy” category. See Pojman, *infra* note 3, at 284–85.

42. Cf. LEFEBVRE, *supra* note 10, at 193.

There is no reason to suppose that our interlocutor’s orientation to the *human* Other does not extend beyond the human Other. Cf. MATHIEU RICARD, A PLEA FOR ANIMALS: THE MORAL, PHILOSOPHICAL, AND EVOLUTIONARY IMPERATIVE TO TREAT ALL BEINGS WITH COMPASSION (2016) (Ricard is a Buddhist monk); Marilyn L. Matevia, *Creature Comfort: Foundations for Christian Hospitality Toward Non-Human Animals*, 40 J. SOC. OF CHRISTIAN ETHICS 329 (2020); John Berkman, *Must We Love Non-Human Animals? A Post-Laudato Si Thomistic Perspective*, 102 NEW BLACKFRIARS 322 (2021).

43. To love another—love in the sense of *agape*—is not necessarily to feel a certain way, but it is necessarily to act a certain way. Cf. Jeffrie G. Murphy, *Law Like Love*, 55 SYRACUSE L. REVIEW 15, 21 (2004):

There are, of course, many fascinating questions that can be asked about the love commandment. Does it command love as an emotion or simply that we act in a certain way? Kant, convinced that we can be morally bound only to that which is in our control, called emotional love pathological love and claimed that it could not be our duty to feel it. What is actually commanded he called practical love—which is simply acting morally as Kant conceived acting morally.

Murphy explained to me in discussion several years ago that by “pathological” (which is the English word commonly used to translate the German word Kant used) Kant did not

Bergson's political philosophy, Alexandre Lefebvre argues that for Bergson, "love is the foundation of human rights. . . . [T]his is precisely Bergson's thesis: the essence of human rights is love."⁴⁴ Our interlocutor is a personification of Bergson's thesis. Her agapic orientation to the Other brings to mind this statement by the acclaimed Australian philosopher Raimond Gaita,⁴⁵ who, like our interlocutor, is a nontheist: "The language of love compels us to affirm that even those who suffer affliction so severe that they have irrevocably lost everything that gives sense to our lives, and the most radical evil-doers, are fully our fellow human beings." Gaita continues:

On credit, so [to] speak, from this language of love, we have built a more tractable structure of rights and obligations. If the language of love goes dead on us, . . . if there are no examples to nourish it, either because they do not exist or because they are no longer visible to us, then talk of inalienable natural rights or of the unconditional respect owed to rational beings will seem lame and improbable to us.⁴⁶

Compare to our interlocutor's agapic sensibility the sensibility of someone "whose treatment of a rather narrow range of featherless bipeds is morally impeccable, but who remains indifferent to the suffering of those outside this narrow range . . ."⁴⁷ Consider, for example, Doktor Pannwitz's sensibility—Pannwitz, the German chemist before whom Primo Levi stood at Auschwitz: "To Doktor Pannwitz, the prisoner standing there, before the desk of his examiner, is not a frightened and miserable man. He is not a dangerous or inferior or loathsome man either, condemned to prison, torture, punishment, or death. He is, quite simply, not a man at all."⁴⁸ What sort of world was Pannwitz preparing for *his* great-grandchildren?

mean diseased or sick but simply something from our passions with respect to which we are passive and thus not in voluntary control.

44. ALEXANDRE LEFEBVRE, *HUMAN RIGHTS AS A WAY OF LIFE: ON BERGSON'S POLITICAL PHILOSOPHY* 70 (2013).

45. See *PHILOSOPHY, ETHICS AND A COMMON HUMANITY: ESSAYS IN HONOUR OF RAIMOND GAITA* (Christopher Cordner, ed., 2011).

46. *Id.* at xviii–xix. What Gaita says next is sobering, to say the least: "Indeed, exactly that is happening." *Id.* at xix.

47. See Rorty, *supra* note 25.

48. ALAIN FINKIELKRAUT, *IN THE NAME OF HUMANITY: REFLECTIONS ON THE TWENTIETH CENTURY* 5–6 (2000).

Because *agape* is a prominent feature of Christian morality,⁴⁹ it bears emphasis that, as the case of our interlocutor illustrates, one need not be a Christian—or a theist, or a religious believer of any sort—to have an agapic sensibility.⁵⁰ Many of the rescuers interviewed by Kristen Renwick Monroe—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.⁵¹ Moreover, there are many who fit this profile: was a theist in the grip of the agapic sensibility; no longer a theist, but still in the grip—and no less in the grip—of the agapic sensibility.⁵²

49. See, e.g., TIMOTHY P. JACKSON, *POLITICAL AGAPE: CHRISTIAN LOVE AND LIBERAL DEMOCRACY* (2015); AGAPE, JUSTICE, AND LAW: HOW MIGHT CHRISTIAN LOVE SHAPE LAW? (Robert F. Cochran, Jr. & Zachary Calo, eds., 2017).

50. The agapic sensibility is not sectarian. The sensibility could just as fittingly be called by other names, including non-western names, such as, for example, “karunic,” deriving from the Buddhist term for compassion: *karuṇā*. The agapic sensibility is ecumenical. See, e.g., Philip J. Ivanhoe, *Confucian Cosmopolitanism*, 22 *J. RELIG. ETHICS* 22, 37 (2014) (quoting *Analects* [of Confucious] 12.5):

Sima Niu, feeling distressed, said, “Others all have brothers; only I have none!”
Zixia replied, I have heard the saying: *Life and death are matters of fate; Wealth and honor depend upon Heaven*. Cultivated people are reverently attentive and do nothing amiss; they are respectful and practice the rites, regarding all within the four seas as brothers. How could cultivated people ever worry about having no brothers?”

Ivanhoe then comments:

This passage describes the attitude of cultivated people toward others in terms of the notion of a shared, universal family; it encourages us to regard non-kin, even distant strangers, on the analogy of the feelings we have for our own siblings.

This remains an important feature of contemporary Chinese culture within which people call and refer to one another using familial terms such as “sister,” “brother,” “aunt,” and uncle.” This gives rise to our second conception of Confucian cosmopolitanism: cosmopolitanism as the attitude of seeing other people as part of one’s family.

See also Mee-Yin Mary Yuen, *Human Rights in China: Examining the Human Rights Values in Chinese Confucian Ethics and Roman Catholic Social Teachings*, 8 *INTERCULTURAL HUM. RTS. REV.* 281 (2013). Cf. Hans Ingvar Roth, P.C. CHANG AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 211–14 (2018).

51. See KRISTEN RENWICK MONROE, *THE HEART OF ALTRUISM: PERCEPTIONS OF A COMMON HUMANITY* (1996). See also Kristen Renwick Monroe, *Explicating Altruism, in ALTRUISM AND ALTRUISTIC LOVE: SCIENCE, PHILOSOPHY, AND RELIGION IN DIALOGUE* 106 (Stephen G. Post et al., eds., 2002); KRISTEN RENWICK MONROE, *ETHICS IN AN AGE OF TERROR: IDENTITY AND MORAL CHOICE* (2012).

52. Because our interlocutor rejects the “equal inherent dignity” rationale for the “in a spirit of brotherhood” norm, she does not use the terminology of “human dignity”, which is pervasive in contemporary discourse, secular as well as religious, about human rights. For example, instead of saying that government is violating A’s human dignity, she says simply that government is failing to act towards A “in a spirit of brotherhood.”

IV. THE HUMAN RIGHT TO MORAL EQUALITY

Again, the specific requirements of the morality of human rights are specifications, for particular contexts, of the general requirement. By “specification”, I mean “the act of setting a more concrete and categorical requirement in the spirit of [the general requirement], and guided both by a sense of what is practically realizable (or enforceable), and by a recognition of the risk of conflict with other [requirements] or values.”⁵³ Because some of the specifications—some of the rights set forth in the Universal Declaration and/or in one or more of the international human rights treaties—are reasonably contestable specifications of the general requirement, it is not surprising that some who accept the general requirement reject one or more of the specific requirements. But not every specification is reasonably contestable; some are incontestable.

The human right to moral equality—the human right not to be treated as morally inferior to any other human being—is an incontestable specification of the general requirement. Indeed, the human right to moral equality is an *entailment* of the general requirement: Article 1 of the Universal Declaration begins by affirming that “[a]ll human beings are born free and equal in dignity and rights” and then goes on to state that all human beings “should act towards one another in a spirit of brotherhood.” According to Article 1, then, every human being is as worthy as every other human being—no human being is less worthy than any other human being—of being treated “in a spirit of brotherhood.” Thus, the right to moral equality: the right of every human being to be treated as the moral equal of every other human being, in this sense: as *equally entitled with every other human being to be treated—as no less worthy than any other human being of being treated—in a spirit of brotherhood.* The human right to moral equality is therefore an *entailment* of the general requirement: To accept the requirement to “act towards all human beings in a spirit of brotherhood” is *necessarily* to accept the human right to moral equality; it would make no sense to accept the former and reject the latter.

53. Neil MacCormick, *Reconstruction after Deconstruction: A Response to CLS*, 10 OXFORD J. LEGAL STUDIES 539, 548 (1990). Whereas I use the term “specification”; MacCormick used the Latin term *determinatio*, borrowing it from John Finnis. “John Finnis has to good effect re-deployed St. Thomas’ concept of *determinatio*; Hans Kelsen’s translators used the term ‘concretization’ to much the same effect.” *Id.* (citing John Finnis, “On ‘The Critical Legal Studies Movement,’” 30 AM. J. JURIS. 21, 23–25 (1985), and Hans Kelsen, *THE PURE THEORY OF LAW* 230 (1967)).

The most common grounds for treating some human beings as morally inferior—as less worthy than some other human beings, if worthy at all, of being treated “in a spirit of brotherhood”—have been, as listed both in Article 2 of the Universal Declaration and in Article 26 of the International Covenant on Civil and Political Rights, “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁵⁴

Under the right to moral equality, government may not disadvantage any human being based on the view that she—or someone else, someone, for example, to whom she is married⁵⁵—is morally inferior. Similarly, government may not disadvantage any human being based on a sensibility to the effect that she is morally inferior—a sensibility such as “racially selective sympathy and indifference,” namely, “the unconscious failure to extend to a [racial] minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one’s own group.”⁵⁶ Or, analogously, a sensibility such as sex-selective sympathy and indifference. Government is disadvantaging a human being based at least partly on such a view or sensibility if but for that illicit, demeaning view or sensibility, government would not be disadvantaging her.

The right to moral equality entails not only that government may not deny to any human being the status of citizenship based on the view (or on a sensibility to the effect) that she is morally inferior; it also entails the right to *equal* citizenship: Government may not disadvantage any citizen based on the view that she is morally inferior. So, for example, government may not abridge—it may not dilute much less deny—any citizen’s right to vote based on the view that she is morally inferior.⁵⁷

54. See *supra* note 14.

55. See *Loving v. Virginia*, 388 U.S. 1 (1967). In response to “a now-discredited argument in defense of antimiscegenation laws”—namely, “that whites can marry only within their race; nonwhites can marry only within their race; therefore, antimiscegenation laws do not deny ‘equal options’”—John Corvino has written:

Putting aside the problematic assumption of two and only two racial groups—whites and nonwhites—the argument does have a kind of formal parity to it. The reason that we regard its conclusion as objectionable nevertheless is that we recognize that the very point of antimiscegenation laws is to signify and maintain the false and pernicious belief that nonwhites are morally inferior to whites (that is, unequal).

John Corvino, *Homosexuality and the PIB Argument*, 115 *ETHICS* 501, 509 (2005).

56. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 *HARV. L. REV.* 1, 7–8 (1976).

57. Cf. Mathias Risse, *Rights: The Hard Questions*, NOTRE DAME *PHIL. REV.* (Cindy Holder and David Reidy, eds., 2014) (2013):

[I]t would not be helpful to appeal to [the human right to democratic governance] under many of the typical circumstances that prevent the emergence of democracy. In particular, if there are substantial concerns that the racial or ethnic constellation

The right to moral equality obviously does not require—no sensible right requires—that government treat every human being the same as every other human being. Government need not permit children to vote—or to drive cars. Nor need government distribute food stamps to the affluent. And so on. The examples are countless. But what government may *not* do is deny a benefit to anyone or impose a cost on anyone—government may not disadvantage any human being—based on the view (or on a sensibility to the effect) that she is morally inferior: less worthy than someone else, if worthy at all, of being treated “in a spirit of brotherhood.”

As (in part) a right against government, the right to moral equality is often articulated as the right to “the equal protection of the law.” Some examples:

- Article 26 of the International Covenant on Civil and Political Rights: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”
- The African Charter on Human and People’s Rights states, in Article 2, that “[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status;” the Charter then states, in Article 3: “1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law.”
- Article 15(1) of the Canadian Charter of Rights and Freedoms: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without

in a country would, under the political conditions that one could reasonably expect to obtain, lead to a kind of excessively populist politics that might generate or exacerbate violent conflict, the sheer fact that there is a human right to democracy should not be decisive for anything.

For a concrete example of a situation of the sort to which Risse is referring, see Thomas Fuller, “*In Myanmar, Democracy’s Euphoria Losing Its Glow*,” N.Y. TIMES, July 5, 2014.

discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

- Article 9 of the South African Constitution: “1. Everyone is equal before the law and has the right to equal protection and benefit of the law. . . . 3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

Like the preceding provisions, the United States Constitution, in the second sentence of section one of the Fourteenth Amendment, speaks, *inter alia*, of equal protection:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*

(Emphasis added.) As I have explained elsewhere,⁵⁸ the human right to moral equality is the core of the constitutional right to equal protection.

V. CONCLUDING COMMENT

The invitation to participate in this conference stated: “Human beings are unequal along all sorts of dimensions. They vary in virtue, income, wealth, productivity, health, attractiveness, artistic and athletic talent, and in myriad other ways. Which inequalities are problematic, morally or otherwise, and why?” Even if a particular inequality (difference) among human beings is not in and of itself morally problematic, any inequality among human beings is morally problematic, according to the morality of human rights, *as a basis for excluding any human being from the circle of those (“all human beings”) towards whom, in the words of the Universal Declaration, we (“all human beings”) “should act . . . in a spirit of brotherhood.”*

Would it contravene the “in a spirit of brotherhood” norm to sacrifice two or more professors of law or philosophy in order to save Beethoven from the trolley hurtling toward him? I happily leave that question to others.

58. Most recently in my contribution to the Festschrift honoring Richard Kay: Michael J. Perry, “*Two Constitutional Rights, Two Constitutional Controversies*,” 52 CONN. L. REV. 1597, 1608–12 (2020).