

DOES HE PULL IT OFF? A THEISTIC GROUNDING OF NATURAL INHERENT HUMAN RIGHTS?

Richard J. Bernstein

ABSTRACT

This paper focuses on two key issues in Nicholas Wolterstorff's *Justice: Rights and Wrongs*. It argues that Wolterstorff's theistic grounding of inherent rights is not successful. It also argues that Wolterstorff does not provide adequate criteria for determining what exactly these natural inherent rights are or criteria that can help us to evaluate competing and contradictory claims about these rights. However, most of Wolterstorff's book is not concerned with the theistic *grounding* of inherent rights. Instead, it is devoted to a detailed and rigorous articulation of the meaning and defense of a theory of justice as consisting of inherent rights and with showing why this theory of justice is superior to the alternative right order theories that Wolterstorff criticizes. The paper concludes that these accomplishments are not diminished even if Wolterstorff has failed to provide us with a satisfactory theistic grounding of his theory.

KEY WORDS: *God's Law, human rights, human worth, justice, natural rights*

NICHOLAS WOLTERSTORFF'S *Justice: Rights and Wrongs* (2008) is a magnificent achievement. The clarity, scope, erudition, and argumentative finesse are breathtaking. But what I most admire is its intellectual integrity. Whether discussing the Hebrew Bible and the New Testament, the history of eudaimonism, classical and contemporary theories of justice and rights, or the many other topics treated, there is throughout a rigorous sustained argument for Wolterstorff's distinctive understanding and grounding of natural inherent human rights. Wolterstorff is not taken in by fashions and is not afraid to challenge deeply entrenched convictions, whether it be the commonly accepted narrative of those who are convinced that rights talk represents a disastrous decline from an older theory of justice as right order, or the claim that in the New Testament the theme of love supplants the Old Testament concern with justice, or the belief that it is possible to develop a secular theory of justice that provides a sufficient justification for human rights. Every page of this book is challenging and thought provoking.

I also admire the way in which Wolterstorff's intellectual journey is grounded in his profound indignation of the injustices that are all too prevalent in our contemporary world. In the spirit of the "dialogic pluralism" that I deeply share with Wolterstorff, I want to raise objections and questions about some of his key claims. Wolterstorff tells us that his account of *primary* justice is a theistic account, "specifically a *Christian* theistic account" (2008, x). He intends to show the correctness of the intellectual tradition of "the conception of justice as inherent rights," which he contrasts with "the conception of justice as right order" (xii). Most of the manuscript is concerned with explaining in subtle detail precisely what he means by justice as inherent rights. This involves making and justifying careful distinctions about the meanings of "natural," "inherent," and "human" rights, and showing what a conception of justice as natural inherent rights entails. Of course, Wolterstorff is not simply concerned with explaining what justice as natural inherent rights means and why it is superior to a conception of justice as right order, since his primary objective is to develop a theistic *grounding* of his conception of justice.

I will focus on two key issues. I will argue that Wolterstorff's theistic grounding is not successful—as it stands. I will also argue that he does not provide us with *adequate* criteria for determining what exactly these natural inherent rights are or with criteria that can help us to evaluate competing and contradictory claims about these rights. In order to develop my objections, I must first clarify the overall structure of Wolterstorff's argument. I cannot adequately deal with the rich complexity of his many arguments, but I hope that my overview is not a distortion. I will quote key passages where Wolterstorff stands back and tells us what he is doing.

1. Natural Inherent Rights

In Part I, Wolterstorff begins by delineating what is involved in the two conceptions of justice that he examines, and he gives a preliminary characterization of some of his key terms and claims. Despite the criticism of natural rights talk by advocates of the conception of justice as just order, Wolterstorff argues that the primary issue between these two conceptions of justice is not whether or not there are natural rights, but whether there are *inherent* rights. "Rights," he tells us, "are normative social relationships; sociality is built into the essence of rights" (4). Wolterstorff introduces his principle of correlatives: "If Y belongs to the sort of entity that can have rights, then X has a right against Y to Y's doing A if and only if Y has an obligation toward X to do A" (8). For Wolterstorff, this is a necessary truth. I repeat that the real issue between the two conceptions of justice is not whether there

are natural rights but whether or not there are natural *inherent* rights. Let me quote him:

Here is the contrast. The inherent rights theorist agrees that many of the rights we possess are possessed on account of something conferring them upon us—some human agreement, some piece of human legislation, some piece of divine legislation, whatever. But he holds that, in addition, we possess some rights that are not conferred, some rights that are *inherent*. On account of possessing certain properties, standing in certain relationships, performing certain actions, each of us has a certain worth. The worth supervenes on being of that sort: having those properties, standing in those relationships, performing those actions. And having that worth is sufficient for having the rights. There doesn't have to be *something else* that *confers* those rights on entities of this sort [36].

I will return to this extremely rich and crucial passage later, but first I want to clarify what Wolterstorff means by “natural rights.” Natural rights are those rights that are not “socially conferred.” “The understanding of natural rights that I have been working with is that natural rights are not those conferred by human action” (37). Wolterstorff thinks he is simply following the common understanding of the meaning of natural rights. I have serious doubts about this, which I will explain later. However, if this is what is meant by natural rights, then, as Wolterstorff argues, right order theorists are not really objecting to natural rights. Willy-nilly, they are committed to the existence of such rights. They are, however, objecting to the claim that there are natural *inherent* rights. The primary issue—the one that separates right order theorists from the theory that Wolterstorff defends—is not whether there are natural rights, but whether there are natural inherent rights—specifically *natural inherent human rights*.¹

¹ I want to call attention to some odd consequences of Wolterstorff's definition of natural rights. Natural rights, we are told, are those rights that are “not socially conferred.” Wolterstorff thinks that he is following accepted usage in defining natural rights in this way. But this “negative” definition states only a necessary, not a sufficient condition for defining natural rights. If we accepted Wolterstorff's definition, then anyone who claims that there are some rights that are, or at least one right that is, not socially conferred holds a doctrine of natural rights. This definition is so all-inclusive, it would include Kant and such Kantians as Rawls and Habermas. All Kantians hold that there are some rights that are not “socially conferred,” but even utilitarians such as John Stuart Mill maintain that there are rights that are not socially conferred. In *On Liberty* chapter 1, paragraph 9, Mill asserts that the independence of the individual “is, of right, absolute.” So Mill too is committed to natural rights because he is certainly *not* claiming that this absolute right is socially conferred. Hannah Arendt argues that the basic human right is the “right to have rights” (1951, 298), and by this she means that an individual has the right to belong to a community that will guarantee and protect her rights; nonetheless, this “right to have rights” is not socially conferred. So, by Wolterstorff's definition, she too holds to a doctrine of natural rights. Furthermore,

Wolterstorff makes careful distinctions between “natural,” “inherent,” and “human” rights. His definition of *natural rights* is essentially negative. “Natural rights are rights that are not socially conferred, plus those that are socially conferred but which we would have even if they had not been socially conferred” (453). Not all natural rights are inherent rights. *Inherent rights* are inherent to the *worth* one has. One can maintain a doctrine of natural rights without claiming these natural rights are inherent. This is the position Wolterstorff ascribes to just order theorists. *Human rights* are those rights where the status required for having the right is being a human being. Not all natural or inherent rights are human rights. Wolterstorff argues that God has natural inherent rights; these rights are not human rights. Wolterstorff seeks to give a Christian grounding for *natural inherent human rights*. Unless otherwise noted, when I speak of Wolterstorff’s conception of rights or inherent rights, it is shorthand for “natural inherent human rights.”

After his introduction of the two conceptions of justice and the primary issue that distinguishes them, Wolterstorff presents a reconstruction of the narrative that is typically employed by right order theorists. He then offers his own counter-narrative. This part serves several functions. Because right order theorists primarily rely on a

consider the case of revolutionaries who rebel against an oppressive regime. Many (although not all) would say that under extreme repressive conditions, the revolutionaries have a right to rebel. But who conferred this right upon the actors? So those who assert that revolutionaries who hold that they have a right to rebel are also committed to natural rights.

One might even argue, according to Wolterstorff’s definition, that *anyone* who maintains that there are socially conferred rights is committed to holding that there are natural rights (whether she recognizes this or not). Consider someone who explicitly maintains that all rights are socially conferred. We can always ask what gives the individuals who confer rights the right to confer them. In a constitutional system, we have established procedures to determine who has the right to socially confer rights. Suppose we press the issue further and ask about the situation before there is a constitution, or even before individuals agree to socially confer rights. It may be objected that in such a situation it is inappropriate to speak about rights because they have not *yet* been socially conferred; and if they are not socially conferred, there are no rights. But why should we accept this response? From the “third person perspective,” it looks as if one is *presupposing* that individuals have the *right* to come together in order to socially confer rights (even if one does not explicitly acknowledge that this is a right). Moreover, this “right to confer rights” is not itself socially conferred. After all, Wolterstorff argues that the lack of any specific language of rights is not sufficient to tell us whether or not one is presupposing natural—indeed, inherent natural rights. But then, given Wolterstorff’s negative definition of natural rights, it looks as if anyone who holds that there are rights (even if she says that all rights are socially conferred) is willy-nilly committed to holding that there are natural rights. There is at the very least the natural right to confer rights. Of course, being committed to the existence of natural rights is not be confused with being *justified* in holding that there are natural rights.

historical narrative in order to “justify” their claims, Wolterstorff seeks to challenge the accuracy of their narrative. He elaborates what he takes to be a more historically accurate counter-narrative about the origins of justice as inherent rights. Specifically, he criticizes the claim that natural rights was an invention of fourteenth-century nominalism, which was subsequently developed by eighteenth-century natural rights theorists—a story that right order theorists take to be a narrative of *decline* from a correct understanding of justice as right order. Insofar as this narrative is faulty, Wolterstorff seeks to undermine the primary justification for a right order theory. But even more crucially, Wolterstorff’s counter-narrative is extremely important for his own theistic justification of rights because it is intended to show that already in the Bible (in both the Hebrew Bible and the New Testament) there is a clear recognition of natural inherent rights, although, of course, not a philosophical theory justifying these rights. Furthermore, he challenges the view that the New Testament represents the triumph of love as agape over the legalistic conception of justice that presumably dominates the Hebrew Bible. Justice is also fundamental in the New Testament.

Nonetheless, a narrative, no matter how persuasive, is not yet a theory. It is not sufficient to provide a philosophical or theoretical justification of the claim that there are natural inherent rights, so Part II is intended to serve as a bridge to the theory proper. In this part, there is detailed analysis of classical eudaimonism where Wolterstorff seeks to show why it cannot serve as a framework for a theory of rights. He develops a very original interpretation of Augustine’s break with eudemonism, a break that occurs because of Augustine’s return to the moral vision of the Scriptures. In Augustine’s late reflections, we discover an understanding of the good life as a flourishing life that provides an adequate framework for a theory of inherent rights. Throughout this part, Wolterstorff refines his understanding of rights, clarifies its ontology, and shows how a theory of rights requires a conceptual analysis of those goods to which we have a right. He also characterizes the types of goods—life-goods and history-goods—that are required for a theory of rights. He introduces important distinctions among several ideas of the good life: “the experientially satisfying life,” “the well-lived [happy] life,” and “the well-going [flourishing] life” (2008, 227).

Wolterstorff begins Part III by telling us that “We now leave narrative behind and attend exclusively to theory” (241). But despite all the preliminary work toward clarifying what Wolterstorff means by natural inherent rights, there is still a great more that needs to be done before he gets to his theistic grounding of human rights. We have to work through three-hundred and fifty pages before we get to the

argument for the theistic grounding. The denouement comes so rapidly that one can easily miss it. It is presented in fewer than nine pages in chapter 16, beginning on page 352. Of course, virtually everything discussed in Part III is relevant for the argument for a theistic justification of natural inherent rights. But without these few pages the argument would not be complete.

I can make this point more dramatically by referring to Wolterstorff's discussion of Rorty. In chapter 14, he notes that Richard Rorty "insists that the enterprise in which I will be engaged in the next couple of chapters, namely, determining whether human rights can be grounded in human dignity—*rights foundationalism* he calls it—is 'outmoded'" (2008, 320). I think Wolterstorff is a bit too facile in dismissing Rorty's objection to the project of grounding a theory of human rights. Wolterstorff thinks that Rorty's skepticism results from

confusion over the point at which the concept *natural* is employed. One does not have to believe in human nature to believe in natural human rights. Suppose human beings have no nature, no essence—whatever we take that to mean. It remains the case that they are human beings; they have status. And even the person who does not believe in human nature can hold that the properties and relations composing that status just naturally have a worth that grounds human rights [321].

It is true that Rorty is skeptical about all philosophical theories of human nature. However, even if we accept what Wolterstorff says, I fail to see that this escapes from the spirit (if not the letter) of Rorty's skeptical remarks. For Rorty's point can easily be reformulated into a skepticism about *justifying* the claim that "properties and relations composing that [human] status just naturally have a worth that grounds human rights." The brunt of Rorty's critique is about *grounding*—whether *any* nonquestion begging *theoretical* grounding of natural human rights is really possible. We will soon see that this is really the *primary* issue for Wolterstorff, too. We can see this in the way in which Wolterstorff treats "secular" theorists who attempt to ground a theory of natural inherent human rights. For example, despite Wolterstorff's critique of Kant, much of what he says about what constitutes inherent rights sounds like Kant. After all, Kant himself sought to show that "a theory of rights can be grounded in human dignity." Moreover, Wolterstorff even endorses the categorical imperative. He tells,

[i]n short, Kant's famous principle—act always in such a way as to treat human beings as ends and never merely as means—comes to the same principle I have been defending: always act in such a way as to allow respect for the worth of human beings to trump balance of life-good considerations [310].

Wolterstorff's objection to Kant (and to all secular theories of natural human inherent rights) is not about their understanding of these rights, but rather about their failure to provide any justification or *grounding* for these rights. They attempt to ground such rights by appealing to some *capacity* of human beings, and Wolterstorff argues that this cannot be done—whether by Kant or any other secular theorist. Earlier, I noted that Wolterstorff argues that the real issue that separates the two conceptions of justice is not whether there are natural rights but whether there are natural *inherent* rights. We might say here that the primary issue that separates Wolterstorff from his secular colleagues who advocate a theory of natural inherent human rights is whether (and how) we can *ground* such rights. This is why these nine pages are so crucial. It is here that Wolterstorff attempts to do what he claims that his secular colleagues (as well as most of his Christian colleagues) have failed to do—namely, to ground a theory of rights.

Imagine the following thought experiment. Because of a printing error, pages 352–61 had been omitted from the book. What would we be justified in concluding from the rest of the book? There are many, many important points about rights, goods, the good life, worth, and so on. However, we would *not* be able to say that we have a theistic Christian grounding of rights. We would simply not have any justification of rights. Without these pages, we might even read Wolterstorff as Rorty's covert ally—showing in detail what Rorty only claims in a sweeping manner. Why? Because Wolterstorff argues that all secular justifications of rights fail. Further, in opposition to many—perhaps most—of his Christian colleagues, he argues that divine command theories and theistic theories that appeal *exclusively* to the idea that human beings are created in the image of God (*imago dei*) also fail. He categorically declares, “The image of God is not adequate, all by itself, for grounding natural human rights” (352). Consequently, by his own rigorous standards, unless Wolterstorff can come up with a satisfactory theistic grounding, we simply have no reason to believe that a theory of natural inherent human rights can be grounded—at least in the sense of “grounding” that he *clearly intends*.²

So let us turn to the crucial section “The Location of Bestowed Worth in a Taxonomy of Worth.” What does Wolterstorff mean by *worth* and why is it so important to raise the question: Does God's love bestow

² Although Wolterstorff does not explicitly define what he means by “grounding,” we can reconstruct what it means for him. To ground a claim is to justify it, to support the claim with good reasons. It is to enter into what Wilfrid Sellars calls the “logical space of reasons” (1963, 159). These reasons may include religious or theistic reasons. Furthermore, grounding does *not* entail foundationalism or the claim that our grounding is based upon incorrigible or absolutely certain premises.

worth? How are we to understand the meaning of God's love? Let's begin with the idea of worth. The reason why the concept of worth—specifically “human worth”—is so important for Wolterstorff is because this is the key to his claim that the natural rights are inherent rights. Inherent rights are inherent to the *worth* that one has. The rights of human beings are grounded in *respect* for their worth. “To be a human being is to have worth” (131). If we speak of the worth of something, then there must be some “worth-imparting” property or relation that is the basis or rationale for ascribing worth. Consider the following example. Nick and I are great admirers of the chairs of the Danish designer Hans Wegner, who is considered to be one of the greatest furniture designers of the twentieth century. His chairs have enormous aesthetic worth. What is the property that gives these chairs their aesthetic worth? It is the beauty of their design, the quality of the material used, and the superb craftsmanship. Whenever we ascribe worth to some thing we do so because of some property or relation that it possesses. How does this apply to human beings? What is the property or relation by virtue of which we ascribe worth to human beings? Unless we can single out such a property or relation, and *justify* our reasons for doing so, we will not be able to justify a theory of natural inherent human rights. According to Wolterstorff, secular theories of rights do ascribe worth, sometimes called “dignity,” to human beings, but they fail to single out or ground the property or relation that is “worth imparting.” Secular theories attempt to justify the worth of human beings by appealing to some human capacity (such as reason) that all human beings possess, but Wolterstorff argues that these capacity approaches fail to *justify* the worth of persons. They, as well as most theistic theories, fail to justify the claim that human beings have worth or dignity, and because of this failure, they fail to justify the claim that there are natural inherent human rights. Recall the passage that I quoted earlier.

On account of possessing certain properties, standing in certain relationships, performing certain actions, each of us has a certain worth. The worth supervenes on being of that sort: having those properties, standing in those relationships, performing those actions. *And having that worth is sufficient for having the rights.* [36; my emphasis].

Wolterstorff thinks that he can provide a theistic grounding for the relation that imparts worth to human beings. He tells us:

What we need for a theistic grounding of natural rights, is some worth-imparting relation of human beings to God that does not in any way involve reference to human capacities. I will argue that being loved by God is such a relation; being loved by God gives a human being great worth. And if God loves equally and permanently each and every creature

who bears the *imago dei*, then the relational property of being loved by God is what we have been looking for. Bearing that property gives to each human being who bears it the worth in which natural human rights inhere [352–53].

This, in a nutshell, is Wolterstorff's Christian theistic grounding of natural inherent human rights. Is it persuasive? I really do not think so. Let us examine its meaning. When we ask why something has worth, Wolterstorff suggests that we might have two very different questions in mind—an aspectual explanation of its worth and a *philosophical* explanation of its worth. The former is a question about what aspect gives the thing we are considering its worth. In his example of “lemon grass soup,” he tells us that its flavor (or some very specific aspect of its flavor) gives the soup its worth. There is some aspect on which its worth supervenes. However, we may be asking a fundamentally different kind of question when we ask why something has the worth that it does have.

How do you explain the fact that *this* aspect is good, this *basic* aspect? How do you explain the fact that non-instrumental goodness is attached to it, supervenes on it? This “why” question cannot be answered by probing inside the entity to locate explanatory aspects.

It is at this point that general philosophical accounts of excellence enter the picture [355].

Wolterstorff speaks about *bestowed* worth. What is the significance of the qualifier “bestowed”? To clarify his meaning, Wolterstorff appeals to examples of human bestowed worth. For example, Mount Vernon is on the National Registry of Historic Buildings, although it is not the finest old Virginia plantation house. Why? Because it was George Washington's house. This worth is bestowed upon it because it was the house of our first president. The non-bestowed worth or quality of the house is not relevant to its “bestowed worth.” It is not on the National Registry because of its intrinsic beauty or because it is the finest example of a plantation house, but rather because it is where our first president once lived.

When it comes to his theistic justification of rights, Wolterstorff tells us that “being loved by God” is what bestows worth on human beings, yet how are we to understand “God's love”—the love that bestows worth on human beings? Earlier in his discussion of Augustine, Wolterstorff distinguishes three conceptions of love: “love as attraction, love as attachment, and love as benevolence” (358). Furthermore, he argues that “if love bestows worth, it has to be love as attachment that does this” (359). Typically, Wolterstorff appeals to everyday examples to explain his meaning. To explain love as *attachment*, Wolterstorff gives the example of the child Nathan who deeply loves (is attached to) his

favorite stuffed animal—no matter how ugly it may be. Nathan's attachment to his ugly stuffed animal is supposed to clarify God's love as attachment to us. We are now ready for a restatement of Wolterstorff's theistic justification:

From these reflections I conclude that if God loves a human being with the love of attachment, that love bestows great worth on that human being; other creatures, if they knew about that love, would be envious. And I conclude that if God loves, in the mode of attachment, each and every human being equally and permanently, then natural human rights inhere in the worth bestowed on human beings by that love. Natural human rights are what respect for that worth requires [360].

I have no doubt that what Wolterstorff says here represents the fruits of some of his deepest convictions after a lifetime of philosophic and religious reflection. But is it really convincing as a philosophical or theoretical justification? I do not think so.

I initially presented my criticisms at a conference sponsored by the Institute for Advanced Studies in Culture at the University of Virginia in the spring of 2007 that was based on the *penultimate* manuscript version of his book. In the final version, Wolterstorff added a new section—perhaps in response to my criticisms. There is a section entitled, "What Has Not Been Argued." Here is the opening paragraph of this new section:

My argument has been hypothetical. I have articulated a theistic grounding of human rights, arguing that if God loves, in the mode of attachment, each and every human being equally and permanently, then natural human rights are grounded in that love; they inhere in the bestowed worth that supervenes on being thus loved. I have not argued that God does in fact so love every creature who bears the *imago dei*. I have argued that a grounding of natural rights is available to the person who holds the theistic convictions indicated. I have not argued for those theistic convictions themselves. The reader will have discerned, however, that I do in fact hold those convictions [360].

I will first develop my original objections and then show why this crucial caveat, which affirms the "hypothetical" character of Wolterstorff's grand argument, still does not get him off the hook. To support his "hypothetical argument"—to indicate his "theistic convictions"—Wolterstorff's ultimate appeal is to Christian Scriptures. I agree that there are many passages in the Hebrew Bible and the New Testament that support such convictions but there are also many passages that raise doubts about the truth of his claims—passages that need to be "explained away" or at least explained. Throughout his manuscript, Wolterstorff quotes from the Scriptures and gives sensitive and judicious readings of key passages without getting himself embroiled in

theological disputes. In this spirit, let me refer to a passage from *Genesis* that he discusses. In chapter 3, “Justice in the Old Testament Hebrew Bible,” he refers to Abraham’s protest when Yahweh revealed his intention to destroy Sodom and Gomorrah.

“Will you indeed sweep away the righteous with the wicked? Suppose there are fifty righteous people within [Sodom]; will you then sweep away the place and forgive it for the fifty righteous who are in it? Far be it from you to do such a thing, to slay the righteous with the wicked, so that the righteous fare as the wicked! Far be that from you! Shall not the Judge of all earth do what is just?” Yahweh saw the point and relented, whereupon Abraham began to worry that maybe there weren’t even fifty righteous people in Sodom and Gomorrah. So he asked Yahweh to suspend judgment on Sodom if there were forty-five righteous people in the city. And so it went, until Abraham and Yahweh were down to ten. “For the sake of ten I will not destroy it,” said Yahweh [Wolterstorff 2008, 87].

Wolterstorff tells the story of Abraham and Yahweh in order to show that there was an awareness on the part of Abraham that “God holds human beings accountable to himself for acting justly—and that justice is required even of Yahweh” (88). But suppose we examine this story from another perspective—from the perspective of “God’s love.” After all, Yahweh was prepared to murder all the people of Sodom and Gomorrah including the righteous people—and presumably would have done so—if it were not for the intervention of Abraham. Indeed, he was initially prepared to murder fifty righteous people. Frankly, I find it hard to reconcile the claim that God would destroy even a single righteous person with the claim that “each and every human being is loved by God.” Moreover, there is plenty of evidence in the Scriptures that God is not only prepared but actually does all sorts of things that are very hard to reconcile with the claim that God loves each of us. Consider the story of the exodus from Egypt and the terrible things that God does to the Egyptians—including the murder of innocent children: “And it came to pass, that at midnight the Lord smote all the firstborn in the land of Egypt, from the firstborn of Pharaoh that sat on his throne unto the firstborn of the captive that was in the dungeons; and all the firstborn of cattle” (Exodus 12: 29). Is this the God whose love bestows worth on each and every human being—Christian and non-Christian? At the very least, Wolterstorff must offer some account that would justify his claim that Scripture teaches us that God’s love bestows worth on each and every human being.

There are further problems with the idea of God’s love as *attachment*. Consider the example that Wolterstorff provides in order to explain what he means by love as attachment—Nathan’s attachment to his ugly stuffed animal. Let us carry the example a bit further.

Unless Nathan is pathological, as he grows up, he will probably lose his attachment to the stuffed animal. He might even throw it away. All of us are frequently attached to something and at a later stage of life become indifferent or unattached to it. Now in order for Wolterstorff's theistic justification to work, he has to *presuppose* that God's love as attachment is *permanent*, and that he does not bestow worth on us for a limited time and then withdraw it; I fail to see that Wolterstorff has justified this presupposition. Indeed, we might interpret God's willingness to destroy Sodom and Gomorrah as an instance where He once loved the people of these cities but because of their wickedness withdrew his love as attachment to them. What then happens to their human worth after this withdrawal of attached love? The trouble with thinking of love as attachment is that what is attached can, in principle, become unattached. Is it a necessary or a contingent truth that God loves all human beings in the mode of attachment? If it is a necessary truth, then where is the argument to show this? If it is a contingent truth, then is it not always possible that God withdraws his love from some human beings? What then happens to the worth bestowed on human beings by God? Also, if worth is withdrawn, then there is no basis for claiming that we possess natural inherent rights. There are other problems with the understanding of God's love as attachment. There are degrees of attachment. Nathan may be attached to some of his other stuffed animals or toys, but not to the same degree to which he is attached to his ugly stuffed animal. So why cannot God be more attached to some people or individuals than others? After all, the Jews believed that they were the "chosen people," and if we think of love as attachment, then it seems plausible to infer that God loved the Jewish people more than some other peoples or nations such as the Egyptians or the Canaanites. Does this mean that Jews have more worth than other peoples? There are many passages in Scriptures that suggest that God's attachment to some individuals or peoples is greater than it is to others.

Furthermore, I think that this idea of love as attachment also has unfortunate consequences for the very meaning of *inherent* rights. We normally think that what is inherent or intrinsic is a characteristic of something that is essential to it. It would not be the entity we take it to be unless it has the characteristic we take to be inherent. But if the ground for our inherent rights is the worth that is bestowed upon us by a loving God, what happens if God decides to withdraw love from any of us (as he appears to have done with the Egyptians). We are still human beings (*Homo sapiens*), but we would no longer have the worth that is required to ground inherent rights. It strikes me as very odd to speak about inherent rights that can be inherent at one time and not at another.

There is still another oddity. One would think that the primary reason why one ought not to wrong other human beings is because they have *intrinsic* worth or dignity (and not that this worth is *bestowed*). Wolterstorff affirms that human beings do have inherent rights and that we wrong persons when we violate these rights. Further, we may ask, paraphrasing a question that Socrates raises in the *Euthyphro*, does God love (in the mode of attachment) human beings because human beings have intrinsic worth or do human beings have intrinsic worth because God loves them? I take it that Wolterstorff is claiming that human beings would not have intrinsic worth unless God loves them; it is God's love that bestows worth on human beings.

Here is another problem with Wolterstorff's understanding of inherent rights. Suppose, for the sake of argument, we entertain the following hypothesis: we affirm our faith in a Christian God, but we do not think that God's love bestows the *same* worth on all human beings in the mode of attachment. (This is not merely a speculative hypothesis because Wolterstorff gives plenty of evidence that many Christians do *not* believe that all human beings [*Homo sapiens*] have the same worth.) What follows? Certainly, for Wolterstorff, if we deny that "each and every human being is loved by God in the mode of attachment" (to the same degree), then we lack any justification or grounding of natural inherent rights for all human beings. There is a crucial ambiguity here. Sometimes it seems as if Wolterstorff intends only the "weaker" thesis—namely, that if we cannot affirm that God loves us, then his theistic justification would be on the same footing as those misguided secular theorists who affirm human dignity but cannot justify it. Alternatively, to put the issue in Rorty's terms, Wolterstorff represents one more failed attempt to give a noncircular philosophical or theoretical justification of natural inherent human rights, but there is a much "stronger" and more disturbing ontological consequence of Wolterstorff's argument. If the existence of natural inherent rights is logically dependent on the existence of a property or relation that is the basis for affirming the worth of human beings, and there is *no* such property or relation, then the proper conclusion is that there are *no* natural inherent human rights.

Earlier, I raised some objections to the way Wolterstorff understands "natural" when he speaks of natural rights, and I have just now raised some objections to the way he understands what is "inherent" when he speaks of inherent rights. I also have some problems with his understanding of "human." In his discussion of Rorty, Wolterstorff cites a passage from Rorty in which he suggests that oppressors do not regard their victims as human. Rorty claims that the moral to be drawn from the stories about cruelties perpetuated in the 1990s by Serbs on Bosnian Muslims

is that Serbian murders and rapists do not think of themselves as violating human rights. For they are not doing these things to fellow human beings, but to *Muslims*. They are not being inhuman, but rather are discriminating between the true humans and the pseudohumans. They are making the same sort of distinction as the Crusaders made between humans and infidel dogs, and the Black Muslims make between humans and blue-eyed devils. . . . They think the line between humans and animals is not simply the line between featherless bipeds and all others. They think the line divides some featherless bipeds from others: There are animals walking about in humanoid form [Rorty 2001, 242; quoted in Wolterstorff 2008, 318].

Here is Wolterstorff's comment:

The word "human" has a number of meanings: and it may be true that the oppressors Rorty cites spoke as he says they did; these beings are "not human," or "not really human." But what I mean by "a human being" is a member of the species *Homo sapiens*. And I would be surprised indeed if any oppressors Rorty cites though their victims were not members of the species *Homo sapiens* [318].

Suppose we accept what Wolterstorff says here and ask how it relates to his Christian theistic justification of natural inherent rights. This justification is supposed to be based on the Scriptures. "The witness of the Christian scriptures is that we are one and all equally loved by God, no matter our present capacities." By "we are one and all" Wolterstorff means *all* human beings. However, what is the Scriptural basis for thinking that references to human beings means what Wolterstorff means by a human being—that is, a member of the *Homo sapiens*? After all, our biological concept of *Homo sapiens* was not available to the authors of the Scriptures. The issue is by no means a trivial one—and unfortunately it has had disastrous consequences throughout the history of Christianity. Since the beginnings of Christianity, there have been millions of "good Christians" who did *not*, and still do not, think that all *Homo sapiens* are the type of human beings who "are one and all equally loved by God." They do not think that God bestows equal worth on all creatures that talk and act like human beings. From his own experience, Wolterstorff knows that many members of his own Christian Reformed Church justified apartheid in South Africa. My primary point is that the appeal to Scripture, by itself, is not *sufficient* to justify the claim that God bestows his love on all *Homo sapiens* in a manner whereby all human beings have equal worth. Furthermore, if Scripture, by itself, is not sufficient to justify this claim, then it is not clear what it is about Wolterstorff's theory that does justify this crucial claim.

We can make the same point in another way. Does God's love, in the mode of attachment, bestow equal worth on gays, lesbians, and

transvestites? No one doubts that they are *Homo sapiens*. This is an issue that is tearing up many Christian communities. However, once again, I fail to see that any appeal to Christian Scripture is *sufficient* to answer this question. Of course, Wolterstorff himself insists that Scripture is not, and should not, be read as a theory. Presumably, theory enables us to understand and systematically justify what we learn from Scripture, but then we need some independent theory and argument to justify the strong theistic claims that Wolterstorff makes in his appeal to Christian Scripture. Where is this theory and argument?

It should now be clear why I find the nine pages dedicated to Wolterstorff's theistic Christian grounding of natural inherent human rights not satisfactory or not convincing—that is, why he fails to justify adequately his thesis that God's love, in the mode of attachment, is a sufficient condition for securing the worth of all human beings, and that the respect for this worth is the basis for grounding natural inherent human rights. There are simply too many unanswered questions, and too many unexamined presuppositions for this to be a satisfactory theistic justification of natural inherent human rights. Perhaps, these are the sorts of issues that will be clarified and answered in the book that Wolterstorff is now writing that deals with love and justice. Now, I can well imagine Wolterstorff responding to me as follows:

“Bernstein you are off the mark. I have made it absolutely clear that my argument is *hypothetical*. This is why I added the section ‘What Has Not Been Argued.’ I also make it clear that my theistic argument depends on affirming that God loves every human being *equally* and *permanently*. Let me reiterate a passage you have already quoted: ‘My argument is hypothetical. I have articulated a theistic grounding of human rights, arguing that if God loves, in the mode of attachment, each and every human being equally and permanently, then natural human rights are grounded in that love; they inhere in the bestowed worth that supervenes on being loved. . . . I have not argued for those theistic convictions themselves.’ Of course, you know—and the other readers of my book will realize—that I do in fact hold those convictions.”

Even so, I am inclined to reply that this caveat—that the argument is only “hypothetical”—is not satisfactory; it begs a lot of hard questions. Throughout, Wolterstorff appeals to Scriptures to explain and justify his claims. When I raise the issues of God's response to Abraham or the evidence that shows that God does not seem to bestow his love on all his human creatures equally and permanently, my point is that Wolterstorff appears to disregard significant passages in the Scriptures that conflict with his “theistic convictions.” He seems to pick and choose what supports his convictions—without giving *good reasons* for his

choices. In the spirit of dialogic pluralism that he advocates, one can ask for reasons that support his key claims. To ask for a *philosophical* justification does not mean asking for *foundational* reasons. Like Wolterstorff, I do not believe that rational grounding means foundational grounding. I am not asking Wolterstorff to “ground what he says in certitudes” (Wolterstorff 2008, 360), but rather to give us good reasons to believe what he believes and takes to be so essential for grounding human rights. There is a serious danger that Wolterstorff’s “grand argument” really comes down to the affirmation of a *credo*: “Here I stand.” This is what I believe! It begins to look as if his argument looks very much like a version of what Sidney Morgenbesser once characterized as the “Yiddish *modus tollens*”: “If not this, then what else?” “Or, if you don’t accept the claim that God loves all of us in the mode of attachment equally and permanently, then how else can one justify the claim that there are natural inherent human rights?” *Perhaps* the proper response to *this* question is Rorty’s. You can’t! You can’t justify the claim that there are natural inherent human rights in a non-question-begging manner. What is the difference that makes a difference between Rorty’s skepticism about grounding human rights and Wolterstorff’s “theistic” grounding? Like Rorty, Wolterstorff claims that the secular attempts to ground and justify human dignity fail. He also argues that virtually all the current religious attempts also fail. None of these succeed in providing a *justification* of the intrinsic worth of human beings. So what remains? What remains is a “hypothetical” argument based on “theistic convictions” that are neither sufficiently clarified nor adequately justified!

2. What Are Natural Human Rights?

I want to turn to the second focus of my critique. One might think that a theory of justice as inherent rights would answer the straightforward question: what are these rights? Although Wolterstorff gives many examples of what he takes to be rights, he never really answers this question. Even more troubling, there is very little guidance about *how* to answer this question, and this is a serious failure. Let me explain.

Let us consider one of the most controversial issues of our time—the *moral* question of abortion. Does Wolterstorff’s theory of justice as rights help to resolve or even clarify the issues involved in the controversy? I do not see that it does. Anti-abortion advocates might well read Wolterstorff as providing a justification for some of their controversial claims. The human fetus is the type of entity that can have natural inherent rights. God’s love bestows worth on the fetus, thereby grounding its rights. If it is aborted, then this is murder, and the human fetus

is wronged. Furthermore, employing the principle of correlatives, we can say that if the fetus has certain inherent rights, then there is a duty or obligation not to violate those rights.

With a little imagination, however, we can develop a similar argument about the natural inherent rights of the mother who has a right to choose whether to abort the fetus in order to achieve those life-goods that are required for her to lead a “flourishing” life. She claims that it is her inherent right to decide what to do with her body; she is violated if she is forbidden to have the right to choose whether or not to have an abortion. Most serious questions concerning rights arise when we are confronted with *conflicting* claims about rights. Wolterstorff is certainly aware of these conflicts, and he thinks that such conflicts can be resolved only by discerning nuanced serious discussion. I agree. But in any such discussion, we must explicitly or implicitly appeal to some criteria—no matter how vague or fuzzy these criteria may be. However, Wolterstorff does not provide *any* criteria for determining what one’s inherent rights are—or, more importantly—how to resolve serious conflicting claims about these inherent rights.

Consider the extended example that Wolterstorff gives in chapter 13, the chapter dedicated to showing how the rights of human beings are grounded in respect for their worth. The example concerns a socially conferred right and is intended to help us to understand how “rights emerge from a certain interweaving of life- and history-goods and evils, on the one hand, and the worth of human beings, on the other” (2008, 288). The hypothetical example is of a “piano competition in which the rule is that the person who performs best in the final stage of the competition is to be declared winner and given a prize of \$100,000; no other considerations are to be used in determining who shall be declared winner and given the prize than just the quality of the final performance” (288). Frank is a one-man jury in this competition. Frank judges that No. 1 gave the best performance, but he is tempted to give the prize to No. 2 because No. 2 is a far more attractive person and would benefit to a much greater extent than No. 1 by receiving the prize. Wolterstorff argues, just as a good Kantian might, that despite the heavy balance of life-goods favoring No. 2, Frank should award the prize to No. 1. If he fails to do so, he is violating the rights of No. 1; he is wronging No.1, even if “Frank was correct in his judgment that greater good was achieved by declaring No. 2 the winner” (290).

Let us alter the example slightly by adding one more rule. Frank is told that there can be only one winner; no splitting of the prize. (This is similar to a situation at my university when we are told to give an ordinal rank to candidates for fellowships or teaching assistantships and we are instructed that we cannot assign the same rank to more than one candidate. One and only one person can be ranked number

one.) Now let us also suppose that, after careful reflection, Frank sincerely judges the two final performances to be the best; they have *equal* merit, but he can only award the prize to one person. He might reason that although the two performances deserve the prize, he should award the prize to No. 2 because No. 2 not only deserves it, but if he received it, there will be a much greater enhancement of his life-goods. No. 2 can use the money and the prestige much more than No. 1. However, if he awards the prize to No. 2, Frank is violating the rights of No. 1. If he decides that, since both performances were equally outstanding and he cannot split the prize, he will *not* award the prize, then he violates the rights of both No. 1 and No. 2. Wolterstorff does not offer any criteria for deciding what to do in situations where fulfilling our obligation to Y entails wronging X. Unlike the piano competition, which involves socially conferred rights, the same type of situation can arise with natural rights. If we were merely concerned with *legal* rights, we do have institutions and procedures for dealing with such conflicts. This is what our legal system and courts do. Wolterstorff's primary concern is not with legal rights but with *moral* rights—indeed with inherent moral rights. What reason do we have to believe that all natural inherent human rights are *compatible* with each other? Do some natural rights trump other natural rights? If so, how do we determine this?

Consider a more serious example—a tragic one. Even though the ancient Greeks did not have our contemporary language of rights, it is not too difficult to see how a tragedy like Sophocles' *Antigone* can be interpreted as a tragic conflict of competing rights and obligations. The setting for the tragedy is Antigone's obligation to perform the funeral rites for her brother. The example is apt because Wolterstorff himself argues that the dead have rights that ought to be honored. Otherwise they are wronged. This is, in effect, what Antigone argues: "It is the dead/Not the living, who make the longest demands/We die forever" (1954, 10). We might even say, using Wolterstorff's language, that Antigone would also be violating the rights of the divinities of funeral rites if she fails to bury her brother. However, she is forbidden to do so by Creon who has decreed that Polynices "who came back from exile, and sought to consume utterly with fire the city of his fathers" is not to be buried; "touching this man, it has been proclaimed to our people that none shall grace him with sepulture or lament, but leave him unburied, a corpse for birds and dogs to eat, a ghastly sight of shame." Creon is fulfilling his obligations as ruler by honoring the rights of the citizens of Thebes. The tragic situation arises because, as Hegel argues, both Creon and Antigone have *legitimate* rights and corresponding *obligations*. Yet the rights stand in tragic conflict with each other. What are we to do when there is a genuine conflict of natural rights—a

conflict that may have tragic consequences? I fail to see how Wolterstorff's theory helps to answer this question.

Wolterstorff might reply that in his discussion of human rights, he does begin to sort out what are and what are not human rights. When discussing the *Universal Declaration of Human Rights* he tells us that many of the rights that it enumerates are not really human rights. He asserts that "It appears to me that there are relatively few positive rights that are truly human rights" (2008, 314). Human rights are those rights where the only *status* required for having the right is being a human being. Consequently, the right to the benefit of a formal education and the right to periodic holidays with pay are not truly human rights. Only those rights attached to one's status as a human being are human rights, but even having this status is not sufficient for having the right that is attached to the status. "The main reason for this is that it is true of rights in general that one does not have a right against someone to the good of some action or restraint from action on their part if they are incapable of bestowing that good upon one—or capable only at the cost of violating rights" (315). Even if we agree with all of this, we are still left in the dark about what actually does qualify as rights that belong to humans *on account of their status as human beings*. Suppose Wolterstorff were a drafter of a declaration of human rights, what rights would *he* list as natural inherent human rights? To tell us that the list would consist of those rights and only those rights that are attached to our *status* as human beings (*Homo sapiens*) is not very helpful because this is just what we want to figure out. It is frequently much easier to determine what alleged rights are *not* genuine human rights than to state (and justify) what truly belongs to us because of our status as human beings.³ How are we to resolve

³ Wolterstorff tells us that "it is easier to find examples of negative rights that are truly human rights than of benefit rights that are" (2008, 452). His example is the negative right "not to be tortured for the pleasure of the torturer." But he concedes that the right not to be tortured may not be universal. "Some writers hold that if a person possesses information that I and others can use to save the lives of many persons, if there is no other way to acquire the information than to get it out of this person, and if there is no other way to get it out of this person than by torturing him, then torturing him is morally permissible—which is to say, that he does not have a right against us to our refraining from torturing him. If this is correct, then the negative right not to be tortured, though it is a human right, is not a universal right" (2008, 452). Given the policy of the Bush administration, this is not a mere "hypothetical." The real difficulty arises because, when "justifications" of torture are advanced in order to gain vital information, this is just the type of justification that is frequently given. And, in concrete situations like that of the United States in the so-called "War on Terror," how is one to determine whether such a justification is really *correct*; whether the claim that there is no other way of gaining this information except by torture is *true*—or simply a rationalization for an abhorrent policy? The issue is not only moral and political; it is

conflicting claims about what does and does not really attach to our status as human beings? If we are going to specify what human rights are, then these are the questions that need to be answered.

I want to make my criticism absolutely clear. I do not think that any theory of justice or of natural inherent rights can be *sufficient* to provide clear and explicit criteria for specifying what are and are not our human rights in concrete situations. A theory of natural inherent rights is not a “rule book” for deciding what does and does not count as a right. We cannot ignore the role of history and of social context in determining what human rights are. We cannot substitute fixed rules for judgment and practical wisdom (*phronesis*). Nonetheless, I do not think it is unreasonable to expect that a theory of justice as natural inherent rights should provide *some* guidance about the principles and procedures for determining these rights. Although Wolterstorff gives many instances of what he takes to be our rights, he never clarifies the procedures for deciding what these rights are. Nor does he provide much illumination for resolving the serious conflicts that we so frequently encounter in our everyday lives. He deals with the questions concerning natural inherent human rights at a level of abstraction that does not enable us to answer the straightforward question: what precisely are these rights?

I have raised a number of objections to Wolterstorff’s theory of justice as natural inherent human rights. His theistic grounding, as it stands, fails. Furthermore, he fails to specify what precisely these rights are or even to provide us with *effective* criteria for helping us to adjudicate conflicting claims about what these rights are. However, I would like to conclude on a more conciliatory note. Nothing that I have said diminishes the outstanding significance of this book, even if he does not pull off his theistic grounding of natural inherent human rights. After all, most of this book is not concerned with the theistic *grounding* of inherent rights but with a detailed and rigorous articulation of the meaning and defense of a theory of justice as consisting of inherent rights. Wolterstorff is also concerned with showing why this theory of justice is superior to right order theories. This is an impressive accomplishment, and it is not diminished even if he has failed to provide us with a satisfactory theistic grounding of his theory. But knowing Wolterstorff as I do, and in the spirit of ongoing dialogic pluralism, I have no doubt that he will have a vigorous reply to my criticisms.

epistemological. How is one to *know* (not simply believe) that there is “no other way” of gaining such vital information except by torturing someone?

REFERENCES

- Arendt, Hannah
1951 *Origins of Totalitarianism*. New York: Harcourt, Brace, Janovich.
- Mill, John Stuart
2002 *The Basic Writings of John Stuart Mill*. 1869. Introduced by J. B. Schneewind and notes and commentary by Dale Miller. New York: Modern Library.
- Sellars, Wilfrid
1963 "Empiricism and the Philosophy of Mind." *See* Sellars, ed. 1963, 127–96.
- Sellars, Wilfrid, ed.
1963 *Science, Perception and Reality*. London: Routledge and Kegan Paul Ltd.; New York: The Humanities Press.
- Sophocles
1954 *Antigone*. Edited and translated by David Grene and Richmond Lattimore. Chicago: University of Chicago Press.
- Wolterstorff, Nicholas
2008 *Justice: Rights and Wrongs*. Princeton, N.J.: Princeton University Press.