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Michael J. Perry, TOWARD A THEORY OF HUMAN RIGHTS

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It “commits to the standard physicalist claim that everything in this world, including trees, computers, stones, neutrons, and even our conscious experiences, are, in the relevant sense, all physical” (p. 135). It accepts, along with the arguments that Nagasawa has by now shown we have good reason to reject, the good premise: physical omniscience is omniscience *simpliciter*. However, it maintains—thus blocking these knowledge arguments against it—that “theoretically communicable physical omniscience is not physical omniscience” (p. 136). So, “omniscience *simpliciter* requires an instantiation of extraordinary epistemic powers to intuit relevant propositions” (p. 136). Nagel’s situation (assuming he can’t turn himself into a bat) and Mary’s situation before she leaves the room are ones of (potentially [assuming he hasn’t swotted up on an encyclopaedia of bat theory] in the case of Nagel and actually in the case of Mary) being theoretically physically omniscient, but not omniscient *simpliciter*. Non-theoretical physicalism is still a theory—a physicalist theory indeed—then, but it “does not attempt to define physicalism in terms of theoretically communicable propositions” (p. 139). As Nagasawa points out, “Physicalism in general is committed to the ontological thesis that everything in this world is, in the relevant sense, physical and, consequently, the physical omniscience thesis that physical omniscience is omniscience *simpliciter*. Physicalism is not, however, committed, by itself, even implicitly, to the theoretically communicable omniscience thesis” (p. 141). So non-theoretical physicalism—which denies the theoretically communicable omniscience thesis—is, by the failures diagnosed in the arguments looked at in the course of Nagasawa’s book, the sort of physicalism which should be preferred.

Of course one might tug at some of these strands—definitions of physicalism, epistemic powers, theoretical communicability—and see what unravelled, but all in all *God and Phenomenal Consciousness* is a closely-argued work that maps an underexplored area of shared borderland between the philosophy of mind and the philosophy of religion and, as such, it will be of interest to philosophers working in either field and of especial interest to those working in both.

Toward a Theory of Human Rights, by Michael J. Perry. Cambridge University Press, 2007. 253 pages. Cloth \$70.00.

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In this short book Michael J. Perry addresses three issues. First, he sets out what he calls the morality of human rights and argues that, although it is clear that religious theories can support such a morality, it is far from clear that non-religious theories can do so. Second, he asks which laws people who affirm the morality of human rights should press their government to adopt, especially in relation to capital punishment, abortion, and same-sex unions. Third, he inquires into the proper role of courts in protecting human rights entrenched in a nation’s constitutional law. This is a lot to do in 142 pages of text (the rest of the book is endnotes), and I

have serious doubts as to how much of Perry's account succeeds. Since only Perry's first issue concerns the relationship of faith and philosophy, I shall discuss primarily his treatment of that issue.

Acknowledging that there are many different moral systems, Perry says that by the phrase "morality of human rights" he means the twofold claim that every human being has inherent dignity and that we should respect such dignity. He emphasizes, however, that this definition leaves open the ground of human dignity, i.e., what meta-ethical account we should give of what dignity is and why human beings have it. He himself favors a Christian-eudaimonistic account: we are all beloved children of God and brothers and sisters of one another, and so our deepest fulfillment comes from loving one another as God has loved us.

Perry's insistence that assertions about human dignity can be treated apart from a meta-ethics creates a serious philosophical problem. A word gets its meaning from the key propositions that embed it. By bracketing meta-ethical premises, Perry separates the word "dignity" from many of the propositions that would ordinarily give it meaning. By reducing the content of the concept of dignity to the point that it is equally consistent with eudaimonism, deontology, natural law theory, divine command theory, and maybe even consequentialism, Perry makes dignity into an empty placeholder. Perry implicitly acknowledges the indeterminacy in the concept when he says that whether unborn human beings have dignity depends on what account of dignity we give. The problem, however, goes deeper. With no definite meta-ethics in the background, saying that human beings have inherent dignity means little more than that there are some things we ought not do to human beings. Which things these are, however, has not been specified, and people who disagree about the meta-ethics of dignity will sometimes disagree systematically about which norms dignity supports. Hence, the concept becomes useless for settling many moral disputes.

This comes out in some of Perry's examples. He claims, for instance, that if a father strangles his innocent child to spare the child torture and death at the hands of another, this does not violate the child's dignity. This seems to imply that any action whatsoever may respect a person's dignity if the alternative is that someone else will do something far worse to him—a view traditionally associated with consequentialism. Perry acknowledges that the Catholic tradition, to which he appealed in giving his religious theory of human rights, has consistently taught that killing the innocent is always wrong no matter what the circumstances. Perry sees this departure from Catholic doctrine, however, not as a deep philosophical disagreement but as an easily resolved disagreement about what a definite moral norm entails in a particular case. "To insist that if I choose to kill my daughter, I'd be treating her as if she lacks inherent dignity is, in a word, ridiculous" (p. 43). Here Perry misses the deep point. As Elizabeth Anscombe noted, the view that there are no actions always and everywhere wrong is a characteristic assumption of modern moral philosophy that was nearly universally rejected by moral philosophers from Aristotle to Kant. My point is not that Perry is wrong to make this assumption (though I think he is) but that the plausibility of the assumption turns on contested issues in meta-ethics and even the philosophy of action. These issues should be identified and analyzed. Perry just looks at the facts of the

case, consults his moral intuitions, effectively reads those intuitions into the concept of dignity, and then pronounces the opposite view ridiculous.

When I say that Perry proceeds by consulting his intuitions, I do not exaggerate. In his closest approximation to a general criterion of what it means to respect the dignity of persons, Perry writes that there is "a crucial question . . . for anyone who affirms that every human being has inherent dignity and who must decide whether intentionally to kill one human being . . . in order to save the lives of a number of others: 'If someone I love dearly—my child, for example—were in the position [of the person I must kill], would I want my child to be killed in order to save those lives?' . . . If the answer is 'No,' it seems fair to suspect that intentionally killing [the person] would be a failure of love, but if the answer is 'Yes,' it seems doubtful that intentionally killing [the person] would be a failure of love, that it would treat [the person] as if he lacks inherent dignity" (p. 49). Leave aside the fact that, when a decision affects the interests of many people, we should have an impartial judge, not someone who especially loves one of the people affected and who is thus likely to shortchange the legitimate interests of others. The important point here is that when we ask ourselves what we would do in hypothetical cases, we are only determining the consequences of moral beliefs we already hold, including deep conceptual presuppositions we may hold unawares. Philosophy should uncover these presuppositions and evaluate them, for often there are multiple, incompatible presuppositions we might hold all of which have some plausibility. Moral thought-experiments are thus not a reliable guide to philosophical truth. On the contrary, they trick us into making unacknowledged assumptions.

As to Perry's assertion that it is clear that a religious theory can support the morality of human rights but far from clear that any non-religious theory can do so, this provocative claim turns out to mean much less than first appears (p. xi). Thus, it is clear to Perry that a religious theory can support the morality of human rights because people have articulated religious theories that, if true, would support the moral propositions in question. Perry does not argue that religious theories are convincing (the plausibility of religious belief, he says, is beyond the scope of the book), and, as far as I can tell, he does not deny the obvious fact that religious theories face well-known objections and are highly controversial. If this is all it takes for it to be *clear* that a certain kind of theory can support the morality of human rights, then surely it is equally *clear* that non-religious theories can support that morality too. There are any number of such theories that, if true, would entail the requisite moral propositions.

But it is *far from clear* to Perry that non-religious theories can support the morality of human rights because, apparently, he can raise philosophical objections to such theories, or, more accurately, he can raise philosophical objections to a few such theories selected not because they cover the field in contemporary moral philosophy but, as Perry candidly admits, their authors all teach in law schools, just as Perry does. Perry thus very briefly examines three non-religious moral theories: John Finnis gets four paragraphs, Ronald Dworkin seven, Martha Nussbaum five. This is the weakest section of the book, for Perry's arguments generally fail to engage with their intended targets.

In discussing Dworkin, for example, Perry refers to Dworkin's argument in *Life's Dominion* that we value human life because we value and wonder at the creative processes, natural and human, that produce human beings. Perry then asks, "But to whom is Dworkin referring with his 'we' and 'our'? Did the Nazis value the Jews intrinsically? The conspicuous problem with Dworkin's specification of the source of normativity . . . is that Dworkin assumes a consensus among human agents that does not exist" (p. 21). This, of course, misreads Dworkin. When Dworkin says that "we" value something, he does not mean that everyone in fact values the thing; he is not such a fool as to be ignorant of the obvious counter-examples to such a claim. Dworkin means, rather, that *there is good reason* to value certain things, regardless of whether anyone in fact does so. This argument may or may not work, but Perry's response never touches it. His treatments of Finnis and Nussbaum are comparably ineffective.

More generally, Perry thinks that secular philosophers cannot articulate a plausible ground for human dignity because they deny the existence not only of God but also of any metaphysical order in the universe. In fact, metaphysics is a thriving business in contemporary philosophy departments, but even if what Perry says is correct, I think he should have to consider non-religious moral systems that eschew ontology, such as the prescriptivism of R. M. Hare, the moral constructivism of John Rawls, the quasi-realism of Simon Blackburn, or what Hilary Putnam says in *Ethics Without Ontology*. Perry mentions none of these. Perhaps even odder, Perry considers the possibility of non-religious eudaimonism (which he unaccountably thinks must be connected with evolutionary biology) but concludes, "As far as I am aware, it is not a position that any contemporary secular moral philosopher has advanced" (p. 25). Not in connection with evolutionary biology, to be sure, but Alasdair MacIntyre, Philippa Foot, Peter Geach, Rosalind Hursthouse, and Michael Slote have all defended non-religious eudaimonist theories.

At most, therefore, Perry has shown that there are religious theories of undetermined merit that, if true, would support the morality of human rights, but that there are philosophical objections to the non-religious theories advanced by some famous law professors. In my view, this is not a reasonable basis for saying that it is "clear" that there is a religious ground for the morality of human rights but "far from clear" that there is a non-religious ground.

When Perry asks what laws the morality of human rights supports, his conclusions are nuanced. For example, he argues that all human beings have dignity from the moment of fertilization, but that the law should permit abortion when the life or health of the mother is endangered, the fetus has a grave defect and will soon die anyway, the pregnancy arises from rape, or the fetus has "a serious genetic abnormality" (p. 61). The reasons for these exceptions, however, have less to do with human dignity than with the practical difficulty of enacting more stringent laws in a pluralistic society. This highlights a problem that Perry never addresses head-on: which laws we should have depends on many things other than whether the underlying actions respect human dignity. Hence, many of Perry's arguments are unconnected with human dignity. At one point, Perry introduces a duty, supposedly based on the morality of human rights, to pre-

vent “unwarranted human suffering” (p. 34). But this duty is wider than the duty to prevent violations of dignity, for, Perry expressly says, some forms of “unwarranted human suffering” do not violate human dignity. How a moral system based on human dignity entails a duty to prevent certain actions that do *not* violate that dignity Perry never explains. Arguments like this do much of the work in this part of the book.

As to the proper role of courts in protecting human rights, Perry argues that unelected judges can protect such rights better than elected legislators or executive officers because judges are more insulated from popular influence. This argument goes back at least to *The Federalist*. Perry then refers to the counter-majoritarian difficulty, the idea that judicial review is suspect because allowing unelected judges the final say on the validity of legislation is anti-democratic. He argues for a compromise solution that allows courts to invalidate legislation but also allows legislatures to overrule courts by following special super-majoritarian procedures. Such compromises between unfettered democracy and judicial supremacy have been discussed in the literature for many years, and Perry provides illuminating accounts of the compromise systems in Canada and the United Kingdom. Finally, Perry argues that when, as in the United States, courts have the last word and amending the constitution is usually impracticable, courts should declare legislation unconstitutional only if there is no reasonable reading of the constitutional text under which such legislation would be valid—a position famously developed by Thayer. Perry applies Thayerian principles to conclude that the Supreme Court should find that capital punishment, laws banning abortions, and a state’s refusal to recognize same-sex unions are all constitutional. Given Perry’s moral views on these issues, this section of the book is an impressive display of intellectual integrity.

In sum, the problems that infect Perry’s use of the word “dignity” ripple throughout his philosophical discussions in this book, and Perry’s argument that religious theories have an advantage over non-religious theories in supporting the morality of human rights is not persuasive. His discussion of the law of human rights is stronger, however, and his explanations of various systems of judicial review will enlighten those who have not kept up with the relevant literature. Especially for philosophers not trained as lawyers but interested in the problems of translating moral conclusions into legal norms, this is a valuable book.

Body-Self Dualism in Contemporary Ethics and Politics by Patrick Lee and Robert P. George. Cambridge University Press, 2008; viii + 222 pp. Cloth, \$80.00.

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In his attempt to “Newtonianize” what would now be called psychology, Locke famously reduced the contents of mental life to corpuscular entities (“simple ideas”) which, by a process of association, were melded into ever more complex ensembles. The source of the elementary ideas was comparably elementary sensations. Locke’s related and further task was to rid