

# Journal of Catholic Legal Studies

---

Volume 45  
Number 2 *Volume 45, 2006, Number 2*

Article 16

---

February 2017

## Wrongful Life Tort and John Paul II

Graham J. McAleer

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcls>



Part of the [Catholic Studies Commons](#)

---

### Recommended Citation

Graham J. McAleer (2006) "Wrongful Life Tort and John Paul II," *Journal of Catholic Legal Studies*: Vol. 45 : No. 2 , Article 16.

Available at: <https://scholarship.law.stjohns.edu/jcls/vol45/iss2/16>

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Catholic Legal Studies by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# WRONGFUL LIFE TORT AND JOHN PAUL II

GRAHAM J. MCALEER†

Three state judiciaries in America—California, New Jersey, and Washington—agree that a child can sue a doctor on the grounds that the doctor harmed the child by failing to abort him.<sup>1</sup> State jurists argue that the child was harmed because it would be better to have never been born than to live life with a disability.<sup>2</sup> By failing to facilitate the abortion, the doctor unjustifiably takes from the child the preferred state of nonexistence when the alternative is a suffering existence. Taking away the good of non-being in such circumstances is the foundation for a wrongful life tort. The tort is controversial; at least eighteen American states have legislated against the tort.<sup>3</sup> It is crucial to appreciate that a wrongful life tort does not rely on the premise that the doctor is responsible for the disability. This is not the harm. The disabilities involved, such as genetic deafness,<sup>4</sup> are not in the power of the doctor to change. What is in the doctor's power, however, is nonexistence rather than existence.<sup>5</sup> Put differently, as one commentator describes it, the tort includes abortion in its definition.<sup>6</sup> It is also important to

---

† Professor of Philosophy, Loyola College in Maryland; D.Phil, Katholieke Universiteit, Leuven, Belgium; M.A., Katholieke Universiteit, Leuven, Belgium; M.A., University of Alberta, Canada; B.A., University College, London University, England. I would like to thank Catherine McCauliff of Seton Hall Law School who kindly read and gave suggestions on how to improve the paper.

<sup>1</sup> See Kimberly D. Wilcoxon, *Statutory Remedies for Judicial Torts: The Need for Wrongful Birth Legislation*, 69 U. CIN. L. REV. 1023, 1023 n.1 (2001) (noting only California, Washington, and New Jersey recognize a wrongful life cause of action).

<sup>2</sup> See Kristin Hackett, *The Fragile X Omen: Scientific Advances Compel a Legislative Treatment of Wrongful Life and Wrongful Birth*, 2 J.L. & TECH 249, 252 (1987); see also Wilcoxon, *supra* note 1, at 1037.

<sup>3</sup> See *Bader v. Johnson*, 675 N.E.2d 1119, 1123 (Ind. Ct. App. 1997).

<sup>4</sup> See Hackett, *supra* note 2, at 262.

<sup>5</sup> To have a case, a child is "required to say not that he should have been born without defects but that he should not have been born at all." Jennifer R. Granchi, *The Wrongful Birth Tort: A Policy Analysis and the Right To Sue for an Inconvenient Child*, 43 S. TEX. L. REV. 1261, 1268 (2002) (quoting *Gleitman v. Cosgrove*, 227 A.2d 689, 692 (N.J. 1967)).

<sup>6</sup> See Wilcoxon, *supra* note 1, at 1035.

distinguish a wrongful life tort from a wrongful birth tort. Wrongful birth purports a harm for which a doctor can be liable if he or she somehow removes a woman's choice of an abortion as a solution to her child's disability.<sup>7</sup> In this tort the harm is *the denial of a choice* to abort; in a wrongful life tort the harm is *the failure* to abort.

Like many legislatures, most courts in America doubt that any coherence attaches to the basic ontological claim underlying the tort: How can life be an injury?<sup>8</sup> One court spoke for many when noting, "[t]he moral implications of allowing the child's claim are philosophically staggering."<sup>9</sup> Indeed. At least since the time of Plotinus,<sup>10</sup> the idea that non-being is a good has made no metaphysical sense.<sup>11</sup> Plotinus argued that privation of being is evil.<sup>12</sup> Augustine famously made this argument a part of Christianity;<sup>13</sup> thus, Aquinas can argue "the good that all things desire is being."<sup>14</sup> Plotinus' position, however, is by no means self-evident to humanitarianism. Humanitarianism is an ethic that views suffering as the very meaning of evil,<sup>15</sup> and if a person's existence is one of "terrible pain," this well warrants the consideration of killing such a person.<sup>16</sup> If having being is necessary for suffering, then non-being can be a solution: a solution the doctor ought to have pursued, according to the tort and with the full support of humanitarian ethics.

In this article, I show that whilst humanitarianism makes the tort intelligible, the tort's appeal rests on its formality of suicide. Strangely, Catholic moral theology agrees that the tort is intelligible. Although the tort is coherent, papal moral theology must deny the tort is just. John Paul II's *Evangelium*

<sup>7</sup> *Id.* at 1027.

<sup>8</sup> See Granchi, *supra* note 5, at 1266 (quoting *Azollino v. Dingfelder*, 337 S.E.2d 528, 534 (N.C. 1985)) (discussing the "untraditional analysis" of whether "the existence of human life can constitute an injury cognizable at law").

<sup>9</sup> *Schloss v. Miriam Hosp.*, No. C.A. 98-2076, 1999 WL 41875, at \*5 (R.I. Jan. 11, 1999).

<sup>10</sup> The time of Plotinus was 204–70 C.E.

<sup>11</sup> Earlier, Aristotle speculated that the nothingness after death made death the "most frightening" phenomenon. NICOMACHEAN ETHICS, bk. III, 1115a25–30.

<sup>12</sup> PLOTINUS, THE ENNEADS 58 (Stephen MacKenna trans., Penguin Books 1991) (1917).

<sup>13</sup> AUGUSTINE, CONFESSIONS, bk. VII, § 12, at 148 (1975).

<sup>14</sup> Thomas, Sent. IV, d. 49, q. 1, a. 2, qc. 1.

<sup>15</sup> See PETER SINGER, ANIMAL LIBERATION 203–04 (2d ed. 1990) (equating man's dominion over animals with tyranny, based on an animal's ability to suffer).

<sup>16</sup> *Id.* at 20.

*Vitae* reasserted Aquinas' philosophy of law respecting homicide. In it, suicide is again condemned by the Church. Aquinas argued that suicide could only be justified if God's sovereignty was replaced by human sovereignty.<sup>17</sup> Humanitarian ethics has just such an aim, and so, amongst Aquinas' five arguments against suicide, this one is typically thought the weakest. Recently, John Paul the Great strongly re-affirmed this argument in his claim that the culture of death can be traced to the eclipse of God.<sup>18</sup> In the following pages, I defend the argument of *Evangelium Vitae*, in particular paragraph twenty, in which John Paul II argues that contemporary liberal democracy is "a form of totalitarianism," which is regarded as the most outrageous claim of the encyclical. I argue that John Paul II is correct that humanitarian love is totalitarian.

Peter Singer's humanitarian ethics is a good illustration of this papal claim. The finest Catholic analyst of totalitarianism, Aurel Kolnai, identified what he referred to as identitarian, or equalitarian, logic as the animating principle of totalitarianism. Intrinsicism establishes a moral hierarchy which discriminates amongst human needs. This limit to human sovereignty is rejected by humanitarian ethics, and this is completely unsurprising. "Acknowledging the Lord as God is the very core, the heart of the Law,"<sup>19</sup> and some of the precepts of the Law, as John Paul II argues, describe and forbid intrinsically evil acts. These precepts, I argue, are eccentric. They defend the stranger and eccentric from totality, from the urge within humanitarian love to identity and equality. They are a shield for the disabled against the humanitarian love that offers homicide as a solution to their suffering and the suffering of caregivers.

Humanitarianism is perhaps the dominant mode of valuation in the modern Western world. Certainly, Nietzsche thought this. People in the West are thoroughly familiar with ideas of humanitarian relief, humanitarian intervention, and humanitarian organizations like Doctors Without Borders. They are also very familiar with individual humanitarians like U2's

---

<sup>17</sup> SWISS NATIONAL ADVISORY COMMISSION ON BIOMEDICAL ETHICS, Op. No. 9/2005, ASSISTED SUICIDE 15 (2005), available at [http://www.nek-cne.ch/en/pdf/suizid\\_en.pdf#search=aquinas%20suicide%20sovereignty](http://www.nek-cne.ch/en/pdf/suizid_en.pdf#search=aquinas%20suicide%20sovereignty).

<sup>18</sup> JOHN PAUL II, ENCYCLICAL LETTER *EVANGELIUM VITAE* ¶¶ 21–24 (1995).

<sup>19</sup> JOHN PAUL II, ENCYCLICAL LETTER *VERITATIS SPLENDOR* ¶ 11 (1993).

Bono, who was one of *Time's* Persons of the Year in 2005.<sup>20</sup> For his work in trying to secure debt relief for developing nations, Bono was dubbed a "Good Samaritan"<sup>21</sup> by the magazine—this in the year that John Paul II died. In addition, Nietzsche was probably the first person to identify the phenomenon of humanitarianism. His savage criticism of the phenomenon has marked Western thought and life ever since.<sup>22</sup> This criticism certainly found favour with Scheler and with the later generations of the Munich school of phenomenology, Kolnai and Wojtyla.<sup>23</sup> Nietzsche linked humanitarianism to a certain English sensibility that he saw most clearly exhibited by utilitarian thinkers like Bentham.<sup>24</sup> Suffering, Bentham argued, must guide all morals and law.<sup>25</sup> It is no surprise that Bentham was one of the first theorists of vegetarianism, and Singer has argued that it is immoral to eat fish because the pleasures of fishing and eating what you catch could not possibly outweigh the suffering of the fish. This argument makes sense to humanitarians, and even a hard-nosed rationalist like Peter Singer mentions it without any embarrassment at all.<sup>26</sup> Clearly, humanitarian ethics can make ready sense of wrongful life tort! Courts have found persuasive the idea that a child's future

---

<sup>20</sup> *Persons of the Year: The Good Samaritans*, TIME, Dec. 26, 2005, at 38.

<sup>21</sup> *Id.*

<sup>22</sup> The most self-conscious humanitarians are alive to the problem Nietzsche poses, but are equally quick to state for the record (yet again) what a boon the man was for Nazi ideology. See, e.g., JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY* 11 (Yale Univ. Press 2000) (1999) (acknowledging the important questions Nietzsche raised concerning the foundations of moral thought, but emphasizing that "his ideas were congenial to the Nazis").

<sup>23</sup> Neither Kolnai nor Wojtyla makes a great deal of use of the resentment analysis that was so central to Scheler's ethics, but they do agree about the problem humanitarianism poses. Wojtyla uses a resentment analysis when discussing chastity in *LOVE AND RESPONSIBILITY*, 143–47 (H.T. Willetts trans., Farrar, Straus & Giroux 1981) (1960). I know of no other places where he does so. There are a few references to resentment in Kolnai's writings. He seemingly thought it a useful tool to capture some particular moral phenomena, but denied it the global explanatory power found in Nietzsche and Scheler.

<sup>24</sup> On the close alliance between utilitarianism and humanitarianism, see FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALITY* 5 (Keith Ansell-Pearson ed., Carol Diethe trans., Cambridge Univ. Press 1994) (1887), and MAX SCHELER, *RESENTMENT* 107 (Andrew Tallon ed., Lewis B. Coser & William W. Holdheim trans., Marquette Univ. Press 1994) (1912).

<sup>25</sup> SINGER, *supra* note 15, at 7–8.

<sup>26</sup> *Id.* at 171–72.

suffering well warrants abortion.<sup>27</sup> This would just be a matter of satisfying Singer's compact definition, "humanitarianism, the tendency to act humanely."<sup>28</sup>

The Munich school early on observed the close alliance between humanitarianism and utilitarianism.<sup>29</sup> As is well known, utilitarianism has a strong voice in public policy discussions in the Western world, and wrongful life tort is no exception. Philosophical defenses of wrongful life tort tend to be variants of utilitarianism. The hope of these studies is to provide a theoretical framework to guide judges. A sticking point for the courts, however, has been the question of whether it could possibly be better for a child never to have existed.<sup>30</sup> A typical response runs as follows: A child's anguished existence is a negative well-being whilst non-existence is a matter of zero well-being. A harm can thus be measured; the child has a lesser degree of well-being now than if the child had never existed at all.<sup>31</sup> A certain elegance attaches to this proposal, but note what is missing: omitted is that the alternatives are not between now existing and never having existed. Rather, the alternative is: better to have been aborted than to have an anguished existence. Is it better to have been aborted—to have an aborted status, more, to suffer dismemberment or bodily dissolution—than to have been born? The proposal really needs to be cast in terms of the true alternative states. It is surely far from clear that non-existence on account of an aborted status is a matter of zero well-being and not rather a negative well-being. It is little surprise, given the abstract character of utilitarianism, that the reality of

<sup>27</sup> Wilcoxon, *supra* note 1, at 1039.

<sup>28</sup> SINGER, *supra* note 15, at 198.

<sup>29</sup> See WOJTYLA, *supra* note 23, at 34–39 (describing utilitarianism and its goal of maximizing pleasure and minimizing pain); see also SCHELER, *supra* note 24, at 107 (noting the amalgamation of humanitarian love, utilitarianism, and Christian morality); Aurel Kolnai, *The Humanitarian Versus the Religious Attitude*, 7 THOMIST 429, 435, 441–42 (1944) (discussing humanitarianism as a moral theory rooted in utilitarian needs).

<sup>30</sup> See *Becker v. Schwartz*, 46 N.Y.2d 401, 411, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978) ("Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians."); *Gleitman v. Cosgrove*, 227 A.2d 689, 692 (N.J. 1967) (stating that it is impossible to determine the difference between a life with defects and "the utter void of non-existence").

<sup>31</sup> See Melinda A. Roberts, *Can It Ever Be Better Never To Have Existed at All? Person-Based Consequentialism and a New Repugnant Conclusion*, 20 J. APPLIED PHIL. 159, 168 (2003) (explaining the calculation of negative existence).

the alternatives is elided. Yet, this is a critical distinction: for our intuitions are by no means so clear once we begin to wonder whether it is better for the child before us to have been dismembered than to exist even with severe disabilities.

To clarify concepts and isolate the implications of arguments is often thought the task of philosophy. But disputing the cogency of arguments offered for wrongful life tort is not yet to get at the heart of the issue. Philosophy is also concerned with strands of ideas—large shifts in the ways people think about the person and the world. Addressed at this level, wrongful life tort poses a special problem for Catholic thinking about homicide. More than sixty years ago, Kolnai observed the peculiar conceptual threat humanitarianism posed to Catholic moral theology. Catholic ethics, he noted, is “universalistic, personalistic and moralistic” and, to a significant degree, rationalistic.<sup>32</sup> It is very like humanitarian ethics, he observed, and even though humanitarianism is “a non-religious, immanentistic, secular moral orientation,”<sup>33</sup> Catholic ethics does agree that “God is, generally speaking, not the thematic center of natural morality.”<sup>34</sup> It is unsurprising, then, but still disturbing, that sometimes moral theologians share the intuitions of humanitarians. M. Cathleen Kaveny, without endorsing the practice, goes to great lengths to explain the plausibility of mothers choosing to kill their unborn children rather than give them up for adoption.<sup>35</sup> Noting how rare it is that a woman gives birth and puts her child up for adoption—at least in the West and where a contract for money has not been entered into—Kaveny explains that there clearly are women “who find separation worse than death.”<sup>36</sup> These women believe that their

---

<sup>32</sup> Kolnai, *supra* note 29, at 434.

<sup>33</sup> *Id.* at 429.

<sup>34</sup> *Id.* at 442. Compare the near identical accounts of intrinsic evils in FRANCISCO DE VITORIA, COMMENTARY ON SUMMA THEOLOGIAE II<sup>a</sup>–II<sup>ae</sup> Q. 64 (THOMAS AQUINAS) (1934), reprinted in REFLECTION ON HOMICIDE & COMMENTARY ON SUMMA THEOLOGIAE II<sup>a</sup>–II<sup>ae</sup> Q. 64 (THOMAS AQUINAS) 141 (John P. Doyle trans., Marquette Univ. Press 1997) and IMMANUEL KANT, LECTURES ON ETHICS 119–20 (Louis Infield trans., Peter Smith 1978) (1930). Also see Kolnai, *supra* note 29, at 429, 434, 442.

<sup>35</sup> See M. Cathleen Kaveny, *Conjoined Twins and Catholic Moral Analysis: Extraordinary Means and Casuistical Consistency*, 12 KENNEDY INST. ETHICS J. 115, 121–24 (2002) (describing reasons why some women would choose to terminate a pregnancy over relinquishing a child after birth).

<sup>36</sup> *Id.* at 126.

family obligation to their children cannot be severed by the positive legal enactment of adoption, but can be “completely extinguished only by death.”<sup>37</sup> Apparently, this tells us something about “maternal instinct” and “the underlying realities of the relationships at stake”<sup>38</sup> and indicates that a “laudatory” motive might be found for abortion: “A parent may not wish the death of the child *per se*, but may privilege familial loyalty in a way that makes abandonment a fate worse than death.”<sup>39</sup>

The underlying assumption here is that suffering is a worse evil than killing an innocent person. Humanitarianism affirms this assumption, but moral theology cannot. Christians do not think that suffering is a moral evil, whilst for Singer, suffering is the horizon for all ethical reflection—the norm of ethics is to reduce suffering.<sup>40</sup> Traditional Catholic moral theology distinguishes an intrinsic evil, such as killing the innocent, from the evil of suffering, which somehow, however mysteriously revealed through the Cross, shows “that the meaning of life is fully realized in and through suffering.”<sup>41</sup> Humanitarianism, however, does not identify two different kinds of evil. Rather, these evils are part of a sliding scale that allows comparison. Humanitarianism precludes identifying the qualitative difference between these evils because it cannot tolerate the restraint placed upon human judgment by the idea of intrinsic evil.<sup>42</sup>

Humanitarianism is a bold assertion of human sovereignty that necessarily abolishes the sovereignty of the moral object, and therewith God’s sovereignty. With the sovereignty of the object

<sup>37</sup> *Id.* at 124.

<sup>38</sup> *Id.* at 126–27.

<sup>39</sup> *Id.* at 123.

<sup>40</sup> See PETER SINGER, PRACTICAL ETHICS 181–82 (2d ed. 1993) [hereinafter SINGER, PRACTICAL ETHICS] (highlighting the conflict between protecting life and the ethical goal of reducing suffering in the decision to kill a seriously disabled infant).

<sup>41</sup> CHARLES JOURNET, THE MEANING OF EVIL 236 (Michael Barry trans., 1963); see MATTHEW WEBB LEVERING, CHRIST’S FULFILLMENT OF TORAH AND TEMPLE: SALVATION ACCORDING TO THOMAS AQUINAS 57 (2002) (noting that humans must suffer “[t]o restore the soul to justice”).

<sup>42</sup> See Kolnai, *supra* note 29, at 444 (stating that “irreligious humanitarianism necessarily involves a certain bias for immoralism inasmuch as it has no room for the concept of intrinsic moral evil”); cf. PETER SINGER, THE EXPANDING CIRCLE: ETHICS AND SOCIOBIOLOGY 152–53 (1981) [hereinafter SINGER, EXPANDING CIRCLE] (discussing the importance of individual human judgment in humanitarian ethics).



abolished,<sup>43</sup> a calculation amongst human needs is all that is left. This means, as Kolnai puts it, “[a]ll kinds of ‘needs’ and the ‘needs’ of all men and groups of men are equally legitimate in principle; any preconceived bias or restriction is illegitimate.”<sup>44</sup> Humanitarianism recognizes an equality of needs. The “need” of a child to have been aborted to avoid suffering (wrongful life tort) is no less a need than a myriad of other needs to increase pleasure and avoid suffering (a mother’s need for an abortion because of the pressure of life circumstances) and one that, like the other needs, must be recognized at law. This equalitarianism is basic to humanitarianism and contrasts sharply with the objective moral hierarchy of traditional Catholic ethics.<sup>45</sup> At first blush, wrongful life tort appears to rely on an ontological oddity, but the ethical and metaphysical substructure of humanitarianism<sup>46</sup> makes it readily intelligible. Ideas of human sovereignty, egalitarianism, and suffering as a basic evil, when linked, make for the contemporary mind a potent brew.

The wrongful life tort sits at the very place these three ideas meet. In liberal regimes, abortion is the homicide of an innocent on the private authority of the mother. A mother is the equal of the state in having lethal authority. If abortion enters into the definition of wrongful life tort, it is significant that it does so formally as a suicide, and more specifically, an assisted suicide. Like abortion, suicide is wrong, says Aquinas, because it is the killing of an innocent on private authority, and in this case, on the authority of the person to be killed.<sup>47</sup> The idea that a person ought to have the authority to say what he is willing and able to suffer has common appeal.<sup>48</sup> Wrongful life tort is quite

<sup>43</sup> See AUREL KOLNAI, *The Sovereignty of the Object, in ETHICS, VALUE, AND REALITY: SELECTED PAPERS OF AUREL KOLNAI* 23–43 (1978).

<sup>44</sup> Kolnai, *supra* note 29, at 435.

<sup>45</sup> I would argue that Charles Curran is a humanitarian theorist and not a moral theologian. He writes, “[*v*eritatis splendor explicitly uses scripture to support the notion of intrinsic evil proposed by the contemporary *hierarchical* magisterium in its arguments against proportionalism and consequentialism.” CHARLES E. CURRAN, *THE MORAL THEOLOGY OF POPE JOHN PAUL II* 53 (2005) (emphasis added).

<sup>46</sup> Kolnai, *supra* note 29, at 443.

<sup>47</sup> See ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. II-II, Q. 64, art. 5, at 14 (1st ed., Benziger Brothers, Inc. 1947) (1266–1273) (“One who exercises public authority may lawfully put to death an evildoer, since he can pass judgment on him. But no man is judge of himself.”).

<sup>48</sup> An opponent of suicide, Kant acknowledged that the argument from suffering was a powerful one. See KANT, *supra* note 34, at 43. Schopenhauer agreed, but he too thought suicide a morally confused response to suffering. See RAYMOND B. MARCIN,

compelling once the formality of assisted suicide is granted; the tort's ontological strangeness all but vanishes if its true ethical and metaphysical tissue is clearly appreciated. Consequently, it is at the level of the ethical and metaphysical substructure of humanitarianism that Catholic ethics must make its argument.

For a culture so deeply influenced by humanitarianism, least persuasive of Aquinas' arguments against suicide is perhaps his claim that suicide denies the sovereignty of God. Yet it is this argument that is central to *Evangelium Vitae*. As a constellation of abortion, eugenics,<sup>49</sup> and suicide, wrongful life tort certainly has all the marks of a paragon of the culture of death. It is a great embarrassment to Catholicism, therefore, when the tort finds its major premise in scripture. Strangely though, it is from this embarrassing similarity between scripture and humanitarianism that the glimmer of an argument against wrongful life tort emerges. Reflecting on the comment of Jesus about Judas—"It would be better for that man if he had never been born"<sup>50</sup>—medieval theologians speculated that the condition of the damned in hell certainly justifies willing non-existence over existence.<sup>51</sup> Not only does theology concede a crucial premise of the tort, de Vitoria's explanation for the intelligibility of the premise is a quality of life argument.<sup>52</sup> Like Aquinas, he argues that the damned can rightly will not to exist.<sup>53</sup> Thomas' argument is exceptionally short and from the authority of scripture<sup>54</sup> ("Preferable is death to a bitter life . . ."<sup>55</sup>).

IN SEARCH OF SCHOPENHAUER'S CAT 106, 108 (2006).

<sup>49</sup> Eugenics is positively embraced by some commentators. See Kelly E. Rhinehart, *The Debate over Wrongful Birth and Wrongful Life*, 26 LAW & PSYCHOL. REV. 141, 143 (2002) (stating the importance to society of reducing genetic defects); cf. Hackett, *supra* note 2, at 265 ("The argument proceeds by claiming that restricting wrongful life and wrongful birth acts effectively licenses physicians to withhold eugenic information from the parents, thus inhibiting the fundamental interest of procreative choice protected by the Constitution.").

<sup>50</sup> *Mark* 14:21 (New American); cf. *Job* 3:11 ("Why did I not perish at birth, come forth from the womb and expire?").

<sup>51</sup> Cf. JOURNET, *supra* note 41, at 202 (noting that Kierkegaard's philosophy puts forth the idea that dignity lies in the fact that humans cannot choose nonexistence).

<sup>52</sup> See DE VITORIA, *supra* note 34, at 103 (stating that suicide may be lawful when a man chooses not to prolong his life).

<sup>53</sup> Cf. *id.* at 171 (noting that for those men who deserve to die, it is lawful for them to ask to be killed).

<sup>54</sup> Thomas, IV Sent., d. 50, qu. 2, a. 1, qc. 3. The references to *Ecclesiastics* here are, in the modern Bible, parts of Sirach. Aquinas also cites *Revelation to John* 9:6 and *Sirach* 41:3.

Therefore, a biblical theology clearly cannot accept that all human life is sacred.<sup>56</sup> If this admission scrambles certain bedrock assumptions about the way Christians are supposed to conceive of life, what is the significance for humanitarianism that the tort relies upon a secularization of the idea of the damned? Is humanitarian sentiment a sufficient guide for culture if humanitarian pity resurfaces damnation? Can such incoherence be a tolerable guide for jurisprudence? For is it not odd that medieval moral theology and humanitarian pity both agree that a suffering life well warrants the desire that one should never have existed at all?

Apparently, Peter Singer once said that only two people really understand what is at issue in the world today: John Paul II and Peter Singer!<sup>57</sup> Unsure about when he said this and in what context, I have always assumed that what he meant was that with him and John Paul II, humanitarianism and Christianity squared off against one another. Are these two value systems really so different though? Nietzsche, of course, saw little difference, thinking of one as parent and the other offspring.<sup>58</sup> Scheler accepted Nietzsche's analysis of humanitarianism as *ressentiment*, but argued forcibly that Nietzsche was utterly mistaken that Christianity had anything in common with humanitarianism.<sup>59</sup> Though it agrees with Christianity about the idea of the damned, humanitarianism offers a very different meaning of damnation. The Christian idea of damnation is a

<sup>55</sup> *Sirach* 30:17.

<sup>56</sup>

And in the case before us, although not to exist is as such bad, still as a means of avoiding afflictions it can not only be thought to be good, but can actually be good. And although to exist is good in itself, nevertheless, when it is linked with some evil it can not only be thought to be, but actually can become evil.

DE VITORIA, *supra* note 34, at 91.

<sup>57</sup> See Richard John Neuhaus, *A Curious Encounter with a Philosopher from Nowhere*, 120 *FIRST THINGS* 77, 78 (2002) (noting that Singer has stated that "he and the Pope are the only ones who understand what the abortion debate is about").

<sup>58</sup> See FRIEDRICH NIETZSCHE, *THE ANTI-CHRIST* (1895), reprinted in *THE ANTI-CHRIST, ECCE HOMO, TWILIGHT OF THE IDOLS, AND OTHER WRITINGS* 66 (Aaron Ridley & Judith Norman eds., Judith Norman trans., 2005) ("The 'humanitarian' blessings of Christianity! To breed a self-contradiction out of *humanitas*, an art of self-violation, a will to lie at any cost, a disgust, a hatred of all good and honest instincts!").

<sup>59</sup> See SCHELER, *supra* note 24, at 95 ("The profound inner difference between the facts and concepts of Christian and those of humanitarian love seems to have escaped Nietzsche completely.").

punishment suffered: a retribution for unjust acts. Instead, humanitarianism offers homicide as a solution for suffering. Why this turn to homicide? What exactly is it about the mixture of human sovereignty, egalitarianism, and suffering that generates the culture of death? The thinkers of the Munich school agree that there is some deep connection. Readers of *Evangelium Vitae* are typically amazed and thoroughly disturbed by John Paul II's claim that contemporary democracies are both totalitarian and tyrannical.<sup>60</sup> Even pro-life conservative readers think John Paul II is something of a hot-head at this point. Why readers should be so aghast is unclear. Singer has long held that Western liberal democracy is a tyranny,<sup>61</sup> and yet he does not seem to provoke the same angry bewilderment. Elsewhere I have shown the plausibility of John Paul II's claim, but the claim was made before him, albeit a little more provisionally, by Kolnai. No one questions that Kolnai was one of the most astute observers of politics, yet he too saw a logical movement in humanitarianism to "new phenomena of tyranny."<sup>62</sup> In humanitarianism he observed "signs of shifting towards a totalitarian or 'identitarian' loss of liberty and personality"<sup>63</sup> and claimed that "[l]ife that has become 'its own master' is bound for suicide."<sup>64</sup> Yet why should this be so? What about humanitarianism links it interiorly to killing? Singer is the foremost humanitarian philosopher writing today. It seems reasonable to test the Munich school's thesis against his work. Can one find in it an "ideological immoralism" (Kolnai)? I will show that Singer's egalitarianism underlies his ready recourse to homicide as a solution to problems of human welfare.

Traditionally understood, a tort requires that the defendant has a duty to the party bringing suit. How can a duty exist in this case? The right correlative to duty in this case is the right not to have to suffer<sup>65</sup>—and so a legal right not to be born<sup>66</sup>—whilst in wrongful birth, the right is to choose an abortion

---

<sup>60</sup> *EVANGELIUM VITAE*, *supra* note 18, ¶ 20.

<sup>61</sup> See SINGER, *supra* note 15, at 185.

<sup>62</sup> Kolnai, *supra* note 29, at 430.

<sup>63</sup> *Id.* at 443.

<sup>64</sup> *Id.* at 454.

<sup>65</sup> See Hackett, *supra* note 2, at 252.

<sup>66</sup> See *id.* at 252 n.22 (listing cases that deal with the question of whether to recognize a legal right not to be born).

secured by *Roe*.<sup>67</sup> Until 1946, courts did not recognize a doctor's duty to an unborn child. By 1971, every American jurisdiction recognized such a duty.<sup>68</sup> By 1983, this duty, argued the Supreme Court of Washington, "may extend to persons not yet born or conceived at the time of a negligent act or omission."<sup>69</sup> Of course, this ontologically expansive duty had already been trumped in 1973 by the duty owed first to the mother's choice whether to abort the child or not. Still, assuming certain conditions, the tort asserts a doctor has the duty to end the known future life of suffering of an unborn child. Peter Singer's work on homicide readily supplies this duty. The fourth chapter of Singer's book *Practical Ethics* has for its title "What's Wrong with Killing?"<sup>70</sup> It is now a *locus classicus* for thinking about homicide. Singer wants to change our basic laws on homicide and especially those that protect innocent children: he wants the law to enable parents and medical officials to kill children.<sup>71</sup> This is putting the matter starkly, but truthfully, and Singer would not object to putting matters thus. The problem is, however, are there answers to his arguments?

Like Thomas' natural law theory, Singer's theory of homicide does not rely on rights.<sup>72</sup> Because Singer is a leftist,<sup>73</sup> egalitarianism is basic to his thinking:<sup>74</sup> this egalitarianism is at the service of the essential goal of leftism, which according to Singer, is to reduce "the vast quantity of pain and suffering."<sup>75</sup> A universal perspective in ethics—which is essential to morality, we are told—is to acknowledge that "my own interests cannot,

---

<sup>67</sup> Granchi, *supra* note 5, at 1269.

<sup>68</sup> Rhinehart, *supra* note 49, at 149.

<sup>69</sup> *Id.* at 154.

<sup>70</sup> See SINGER, PRACTICAL ETHICS, *supra* note 40, at 83.

<sup>71</sup> See *id.* at 169–70.

<sup>72</sup> Important Thomists like Maritain and Finnis argue that there is a theory of natural right or human rights in Aquinas. See John Finnis, *Natural Law: The Classical Tradition*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 1, 24–25 (Jules Coleman et al. eds., 2004). I agree with Thomists like McIntyre, who deny this is true. As an example, Aquinas' theory of homicide nowhere mentions such things nor conceptually relies upon them, and nor does one find in the tradition of Catholic moral theory such reliance. See SINGER, EXPANDING CIRCLE, *supra* note 42, at 110–11; SINGER, PRACTICAL ETHICS, *supra* note 40, at 89.

<sup>73</sup> PETER SINGER, A DARWINIAN LEFT: POLITICS, EVOLUTION AND COOPERATION 9 (1999) [hereinafter SINGER, A DARWINIAN LEFT].

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 8.

simply because they are *my* interests, count more than the interests of anyone else.”<sup>76</sup> This assumption requires examination because it is clearly driven not by any ordinary ethical consciousness but by a political ideology. Singer is simply wrong when he says that “[w]e cannot, if we are to think ethically, refuse to take this step.”<sup>77</sup> Those of us interested in liberty and escaping the grip of totalitarian thinking certainly can refuse this first step. Without it, the power of Singer’s arguments diminishes rapidly. Nowhere does this thinker, famous for questioning received opinion and tradition, address why one should accept that equality is basic to ethical orientation. What is known as the “order of charity”—an idea shared across centuries by authors as diverse as Aristotle,<sup>78</sup> Vitoria,<sup>79</sup> Smith,<sup>80</sup> and Spencer,<sup>81</sup> to name a few—not only rejects this assumption, but accords far better with our basic intuitions and behaviour. The order of charity holds that family is a matter of privilege and the source of *ethical* inequality. Let me give an example that shows that Singer’s claim that privileging some people’s interests over those of some others is not moral is unconvincing. I live in a city with an awful public school system. Parents that can, by and large, do send their children to private schools. They seek privilege for their children. However, there is a cadre of parents committed to the local, neighbourhood school. These parents are wealthy and liberal in their politics. Now, the neighbourhood school is not all that bad—it is regarded as the city’s one decent school and it even has an elite division within it where most of the white, liberal parents have their children. But, here’s the interesting thing—none of these parents volunteer their children to enter any other school in the entire city. If they are so egalitarian, why not send their children, in solidarity, to one of the exclusively black schools in the city? Parents do not do this because it is deeply unnatural to reject

---

<sup>76</sup> SINGER, PRACTICAL ETHICS, *supra* note 40, at 12 (emphasis added); see SINGER, EXPANDING CIRCLE, *supra* note 42, at 100–01, 106.

<sup>77</sup> SINGER, PRACTICAL ETHICS, *supra* note 40, at 14.

<sup>78</sup> See NICOMACHEAN ETHICS, *supra* note 11, at 1097a24–b6.

<sup>79</sup> See DE VITORIA, *supra* note 34, at 199.

<sup>80</sup> See ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 219–22 (Knud Haakonssen ed., Cambridge Univ. Press 2002) (1759) (discussing the qualities of superior reason and sacrifice and their ethical value).

<sup>81</sup> See HERBERT SPENCER, THE PRINCIPLES OF ETHICS vol. I, 54–55 (Liberty Fund, Inc. 1978) (1897) (arguing that ethics is based upon the evolution of conduct).

preferment for one's child.<sup>82</sup> It is unnatural to reject privilege, and this is felt by those parents who love to read Singer! Singer, even when it comes to contemporary America and its deepest veins of liberal culture, seems to be simply wrong that a consensus has been reached that equal consideration of interests is basic to ethical judgment. Singer does acknowledge that biology imposes this preferment, but he denies it any moral standing.<sup>83</sup> Singer accepts that there is a human nature,<sup>84</sup> but it is irrelevant to ethics on account of the naturalistic fallacy.<sup>85</sup> He recognizes that the "natural affection" of parents for their children<sup>86</sup> is a basic feature of human nature and, therefore, a restraint upon reform. As part of the reform school of utilitarianism,<sup>87</sup> Singer, nevertheless, accepts Burke's caution that reform must be judicious in acknowledging limits;<sup>88</sup> for Singer, those established by sociobiology.<sup>89</sup> Still, ordinary moral consciousness, expressed in the *ius gentium*, for example, is thoroughly rejected as a guide to moral right and wrong<sup>90</sup> and merely tolerated as a sign of what the reformer might be best to leave alone. I take my example to show that only someone with the most ideologically attenuated grasp of ordinary moral consciousness could agree with Singer. All the evidence of ordinary moral consciousness says that Singer's equality intuition—"an interest is an interest, whoever's interest it may be"<sup>91</sup> or "each life is of equal value"<sup>92</sup>—is no intuition at all.

---

<sup>82</sup> The well-known one-time Marxist, Gerry Cohen, openly acknowledges this, and interestingly, on the matter of school choice. See G.A. COHEN, IF YOU'RE AN EGALITARIAN, HOW COME YOU'RE SO RICH? 179 (2000).

<sup>83</sup> SINGER, A DARWINIAN LEFT, *supra* note 73, at 61.

<sup>84</sup> SINGER, PRACTICAL ETHICS, *supra* note 40, at 43–44.

<sup>85</sup> See SINGER, *supra* note 15, at 5 (noting the fallacy of the principle of equality since it would have to be expanded to all living beings); SINGER, EXPANDING CIRCLE, *supra* note 42, at 53, 73–75 (1981) (noting the error in moving from facts to values regarding the value of human survival).

<sup>86</sup> SINGER, PRACTICAL ETHICS, *supra* note 40, at 182; accord SINGER, EXPANDING CIRCLE, *supra* note 42, at 31–34 (discussing the disparity between resources expended on a parent's child and charity).

<sup>87</sup> See SINGER, *supra* note 15, at 5 (discussing Jeremy Bentham, the founder of the reform school of utilitarianism).

<sup>88</sup> See SINGER, EXPANDING CIRCLE, *supra* note 42, at 151, 154–55 (noting societal reform "grow[s] out of long practical experience").

<sup>89</sup> See *id.* at 27, 157 (noting that the core of ethics has a biological basis).

<sup>90</sup> See SINGER, PRACTICAL ETHICS, *supra* note 40, at 93–94 (stating that departures from intuitive moral principles may produce the best outcomes).

<sup>91</sup> *Id.* at 21; accord SINGER, *supra* note 15, at 5.

<sup>92</sup> SINGER, PRACTICAL ETHICS, *supra* note 40, at 105.

Sensing this himself, Singer falls back on elitism, assuring us that his position is at one with “the leading figures in contemporary moral philosophy.”<sup>93</sup>

Scorning intuitionism as relying on “a mysterious realm of objective ethical facts,”<sup>94</sup> he nevertheless, without argument, asks us to accept that “[e]quality is a basic ethical principle,”<sup>95</sup> a “moral idea.”<sup>96</sup> That is a basic ethical intuition. Singer’s reliance on intuitionism is really quite extensive. He thinks, for example, that it is self-evident that any social order which provokes a sense of superiority, a feeling of hopeless inferiority or a divided society<sup>97</sup> stands forthwith morally condemned. Singer explicitly says, if inconsistently, biological theories of human nature cannot provide “the ultimate premises of ethics” but they can operate negatively to make us “think again about moral intuitions which we take to be self-evident moral truths.”<sup>98</sup> How exactly biology makes us possibly rethink moral intuition is unclear, especially as Singer is adamant that no factual knowledge can ever dislodge the core conviction of utilitarianism that suffering is an intrinsic evil.<sup>99</sup> He tells us that the “ultimate moral reason for relieving pain is simply the undesirability of pain as such.”<sup>100</sup> Thus, “[i]f a being suffers, there can be no moral justification for refusing to take that suffering into consideration.”<sup>101</sup> This is the only exceptionless moral norm,<sup>102</sup> and it is crucial because from it moral interests are derived. Interests are immediately tied to “[t]he capacity for suffering and enjoyment.”<sup>103</sup> Singer denies that his ethics is a naturalism or an intuitionism. His

<sup>93</sup> SINGER, *supra* note 15, at 5.

<sup>94</sup> SINGER, PRACTICAL ETHICS, *supra* note 40, at 8; accord SINGER, EXPANDING CIRCLE, *supra* note 42, at 107.

<sup>95</sup> SINGER, PRACTICAL ETHICS, *supra* note 40, at 21.

<sup>96</sup> SINGER, *supra* note 15, at 4.

<sup>97</sup> See SINGER, PRACTICAL ETHICS, *supra* note 40, at 40, 44 (noting that inequalities create a divided society when the inequalities coincide with obvious differences between ethnic or racial groups).

<sup>98</sup> SINGER, EXPANDING CIRCLE, *supra* note 42, at 84.

<sup>99</sup> *Id.* at 64.

<sup>100</sup> SINGER, PRACTICAL ETHICS, *supra* note 40, at 21; see also SINGER, *supra* note 15, at 20–21.

<sup>101</sup> SINGER, PRACTICAL ETHICS, *supra* note 40, at 57; see also SINGER, *supra* note 15, at 7–8.

<sup>102</sup> See SINGER, EXPANDING CIRCLE, *supra* note 42, at 108–09, 165 (denying the validity of “conventional moral rules”).

<sup>103</sup> SINGER, *supra* note 15, at 7; see also SINGER, PRACTICAL ETHICS, *supra* note 40, at 57.



exceptionless norm appears to be both at once. Whether Singer is coherent at this point is not decisive.<sup>104</sup> He could pick either and find himself in the company of moral theologians who are either intuitionists (Scheler) or naturalists (Hittinger). Nevertheless, since for Singer pain is an intrinsic moral evil, might there not be others, such as to kill the innocent? If it is true that the experience of pleasure is "intrinsically valuable"<sup>105</sup>—and it is worth noting that at least one intuitionist (Von Hildebrand) has denied this<sup>106</sup>—then perhaps to safeguard innocent human life, even if that life does not experience pleasure or pain, is "intrinsically valuable?" For Singer, innocence cannot be an original value, and concepts essential to jurisprudence like guilt and innocence are derived from what does and does not create suffering. Singer is certainly adamant that innocence is not a matter of helplessness, poverty, brokenness, or vulnerability since we are told explicitly to "put aside feelings based on the small, helpless . . . infants."<sup>107</sup> Since innocence is not a primitive value, the direct killing of the innocent cannot be an intrinsic evil. I now want to argue that the dismissal of the doctrine of intrinsic evils is decisive against Singer. Intrinsic evils diversify the moral world, discriminate amongst actions, and simultaneously limit action and conserve eccentricity. What is decisive against Singer then is not the peculiarity of his naturalistic intuitionism but his identitarianism which exposes the totalitarian logic of his humanitarianism.

Whilst leftists and rightists have had ready recourse to totalitarian government in the past, I take it that today a thinker shown to be a totalitarian thinker is a failed thinker, although I now state a limit to my argument. Every historical instance of totalitarianism has been homicidal. Camus argued that what he called the Age of Rebellion, the history of the West since the

---

<sup>104</sup> Singer would reject the option of being either a naturalist or an intuitionist and insist, I imagine, on being a rationalist. At this point Singer is like Finnis, who also insists he is neither naturalist nor intuitionist. I find both Singer and Finnis completely unconvincing on this point.

<sup>105</sup> SINGER, PRACTICAL ETHICS, *supra* note 40, at 121; see generally SINGER, EXPANDING CIRCLE, *supra* note 42, at 64 (explaining the utilitarian belief of happiness).

<sup>106</sup> See AUREL KONAI, *The Concept of Hierarchy*, in ETHICS, VALUE, AND REALITY, *supra* note 44, at 180.

<sup>107</sup> SINGER, PRACTICAL ETHICS, *supra* note 40, at 170.

Middle Ages, was homicidal and therefore its own refutation.<sup>108</sup> Disturbingly, it is obvious to every reader of Singer that he envisages an *increase* in the number of killings of humans as part of a social project overall to reduce the number of killings of sentient creatures. And yet clearly the homicidal character of the theory is not a refutation for many readers. I will show that Singer's theory is totalitarian; but to close the argument, I have to hope that refutation is found in the reader's sense that Singer's work is a formal recommendation for an increase in the number of killings of humans *and also a decrease in human liberty*. If a reader accepts that a just cost for reductions in the amount of suffering is an increase in homicides and a loss of liberty, my argument fails.

Famously, Thomas Aquinas does not rely on a rights-based theory of political order, but a law-based conception. Rights are nowhere mentioned in his question on homicide. The discussion about who can be killed, by whom, and when, is conducted entirely free of rights talk. How can this be plausible? How does Aquinas build restraint into law itself? Strangely, but not paradoxically, he does so in part by insisting upon the privilege of public authority.<sup>109</sup> In restricting to government the authority to kill intentionally, Aquinas affirms an Augustinian tradition of politics. In dividing the city into two, oftentimes hostile, cities, Augustine immediately separated Christianity from any political logic of identitarianism.<sup>110</sup> The term belongs to Aurel Kolnai: identitarianism, for him, is the metaphysical heart of totalitarianism.<sup>111</sup> Insisting upon the privilege of public authority to intentional homicide, Aquinas rejects a private use of lethal force—he even rejects intentional killing in self-defence—and thereby an identitarianism that would abolish political pluralism. Identitarianism finds a place inside humanitarianism because an animating principle of humanitarianism is its hatred of privilege. Self-consciously

---

<sup>108</sup> See ALBERT CAMUS, *RESISTANCE, REBELLION, AND DEATH* 163 (Justin O'Brien trans., 1988) (discussing Western society's attributes as a totalitarian society).

<sup>109</sup> See ST. THOMAS AQUINAS, *supra* note 47, at 1467–68.

<sup>110</sup> See AUGUSTINE THROUGH THE AGES: AN ENCYCLOPEDIA 199–200 (Allan D. Fitzgerald ed., 1999) (describing Augustine's "city of God" and "earthly city").

<sup>111</sup> AUREL KOLNAI, *Privilege and Liberty*, in *PRIVILEGE AND LIBERTY AND OTHER ESSAYS IN POLITICAL PHILOSOPHY* 19–61 (1999).

humanitarian,<sup>112</sup> Singer's work is eloquent on this point. One of Singer's most famous egalitarian claims is that non-human animals have a moral claim upon us prior to some humans.<sup>113</sup> Resistance to this claim is blamed on "the deep-seated Western belief in the uniqueness and special privileges of our species."<sup>114</sup> As Kolnai noted sixty years ago, the destruction of privilege is also the advocacy of equalitarianism and therewith the conceptual heart of totalitarianism, identitarianism.<sup>115</sup> The close connection between these ideas is everywhere in Singer's work.

It is no surprise at all that Singer wonders at the fact that the idea "that human life has unique value . . . and is enshrined in our law."<sup>116</sup> Singer's equalitarianism must be hostile to whatever is unique<sup>117</sup> or what has "special status,"<sup>118</sup> lest it break free of being placed inside an equation.<sup>119</sup> Discussing a court case about medical treatment given to a handicapped child, he notes that the "treatment cost \$104,000, at 1977 cost levels—today it could easily be three times that."<sup>120</sup> This commodification of human life is an essential aspect of Singer's work; he explains that every life is monetary, that is, explainable in units that can be set in a calculus about worth.<sup>121</sup> For Singer, these units establish the sameness of every life. Singer points out that "Christianity brought into the Roman world the idea of the uniqueness of the human species."<sup>122</sup> In his assessments of the kinds of human life, Singer asks repeatedly whether all the humans in a particular calculus are "normal" humans.<sup>123</sup> This fascination with normality is a fascination with identity, the root of totalitarian thinking. Singer's utilitarianism, and most

<sup>112</sup> See generally SINGER, *supra* note 15, at 220–21.

<sup>113</sup> See SINGER, PRACTICAL ETHICS, *supra* note 40, at 76–77.

<sup>114</sup> *Id.* at 89.

<sup>115</sup> See generally EXPLORING THE WORLD OF HUMAN PRACTICE: READINGS IN AND ABOUT THE PHILOSOPHY OF AUREL KOLNAI 179–80 (Zoltan Balazs & Francis Dunlap eds., 2004) (discussing Kolnai's theory of "privilege").

<sup>116</sup> SINGER, PRACTICAL ETHICS, *supra* note 40, at 84.

<sup>117</sup> See SINGER, *supra* note 15, at 198.

<sup>118</sup> See SINGER, PRACTICAL ETHICS, *supra* note 40, at 77.

<sup>119</sup> See SINGER, *supra* note 15, at 8.

<sup>120</sup> SINGER, PRACTICAL ETHICS, *supra* note 40, at 84.

<sup>121</sup> "Worth" as used here, of course, does not mean worth in the original sense of dignity. For a discussion of this original sense, see Aurel Kolnai, *Dignity*, 51 PHIL. 251, 251–71 (1976).

<sup>122</sup> SINGER, *supra* note 15, at 191.

<sup>123</sup> See SINGER, PRACTICAL ETHICS, *supra* note 40, at 75, 108, 149, 182; SINGER, *supra* note 15, at 16, 19–21.

especially his attack upon the privilege of speciesism,<sup>124</sup> absolutely requires identity, for otherwise no calculus about worth can be made. "Killing them [defectives], therefore, cannot be *equated* with killing normal human beings."<sup>125</sup> Singer's *normal* human beings have the "morally relevant characteristics, like rationality, self-consciousness, awareness, autonomy, pleasure and pain,"<sup>126</sup> and without these characteristics a human being is best thought of as "an existence that is of no 'intrinsic' value at all."<sup>127</sup> Singer confirms Scheler's claim that no culture has advocated the direct killing of those who exhibit personality.<sup>128</sup> According to Singer, "if human life does have special value . . . it has it in so far as most human beings are persons."<sup>129</sup> Here, however, it is well to recall Kolnai's claim that modern humanitarian love shows "signs of shifting towards a totalitarian or 'identitarian' loss of liberty and personality."<sup>130</sup> Identitarianism robs the eccentric of personhood and so makes the stranger a fit object of homicide. Furthermore, Singer's fascination with the normal is also an appeal to an identitarianism that destroys liberty. For, like innocence, personality is not basic and controlling. This implication is obvious given his universal moral rule. He defines his preference utilitarianism when he writes: "an action contrary to the preference of any being is, unless this preference is out weighed by contrary preferences, wrong. Killing a person who prefers to continue living is therefore wrong, other things being equal."<sup>131</sup> When Singer writes "other things being equal," he bespeaks his position that, given that there is no absolute prohibition on the direct killing of persons and no mention in this definition whatsoever of innocence as a protection against being killed, determining the morality of killing a person is a matter of

---

<sup>124</sup> See SINGER, *supra* note 15, at 19 (discussing Singer's theory of how one would avoid speciesism).

<sup>125</sup> SINGER, PRACTICAL ETHICS, *supra* note 40, at 182 (emphasis added).

<sup>126</sup> *Id.* at 151.

<sup>127</sup> *Id.*

<sup>128</sup> See MAX SCHELER, FORMALISM IN ETHICS AND NON-FORMAL ETHICS OF VALUES 313 (Manfred S. Frings & Roger L. Funk trans., 1973) (stating "the sacrifice of the being and life of a man for *any* utilitarian needs or for the sake of convenience was always proscribed by *every* ethos").

<sup>129</sup> SINGER, PRACTICAL ETHICS, *supra* note 40, at 117.

<sup>130</sup> Kolnai, *supra* note 29, at 443.

<sup>131</sup> SINGER, PRACTICAL ETHICS, *supra* note 40, at 94.

assessing what threat to happiness is posed by suffering.<sup>132</sup> Thus, the problem with newborn defectives is that they are “a threat to the happiness of the parents.”<sup>133</sup> Singer argues that “if we are preference utilitarians[,] we must allow that a desire to go on living can be outweighed by other desires.”<sup>134</sup> So, a preference utilitarian takes seriously the wish of someone about to be euthanized who does not want to be killed “as an important reason against killing” but not a final reason.<sup>135</sup> Being a person, innocent and free, is not a definitive restraint on killing if a killing can reduce suffering. Unlike Thomas’s philosophy of law, people are not killed because of crime but on account of tort. They are killed because their lives harm others whose lives would be more pleasurable without them.

Equalitarianism thus drives Singer’s theory of killing. The eccentric or strange resists collapse into a unit of exchange. The stranger is an exemplar of privilege, shielded by the doctrine of intrinsic evils which generates an inequality and priority amongst moral objects. Singer refuses to tolerate the moral selection proposed by this doctrine, and so we look in vain to him for justice for the disabled. Singer’s theory of homicide is all of a piece with his commitment to Progressive Democracy,<sup>136</sup> Kolnai’s term for humanitarianism with a dialectical relationship to communism. Singer is a statist with a fondness for the Greek law of homicide.<sup>137</sup> This is no surprise. Greek law did not recognize the legal existence of private associations.<sup>138</sup> Corporate existence was unknown, and there was then nothing like the medieval *commenda* which diversified the social sphere and limited political power.<sup>139</sup> Private association is always the establishment of certain privileges for some but not all, just as every human life is an eccentricity negating identity. Singer’s egalitarianism compels him to deny the sovereignty of the object,

---

<sup>132</sup> See *id.* at 182–83.

<sup>133</sup> *Id.* at 183.

<sup>134</sup> *Id.* at 99.

<sup>135</sup> *Id.* at 194.

<sup>136</sup> See SINGER, EXPANDING CIRCLE, *supra* note 42, at 119 (sketching out Singer’s view of the dialectical progression from the humanitarian perspective of equality to the ideal of the brotherhood of humanity).

<sup>137</sup> See SINGER, PRACTICAL ETHICS, *supra* note 40, at 88–89 (discussing Singer’s view of Greek law concerning homicide).

<sup>138</sup> EDWARD E. COHEN, ANCIENT ATHENIAN MARITIME COURTS 120 (1973).

<sup>139</sup> *Id.*

the felt primacy of a field of moral prohibitions evident in ordinary moral consciousness, and therewith God, in favour of the sovereignty of needs that must have no restraint or order placed upon them. Not even the traditional jurisprudential categories of innocence and guilt should prejudice us to which needs are to be fulfilled. The only legitimate order is that required by the imperative to decrease suffering. Homicide can be a means, a most effective means, to realizing that imperative. Wrongful life tort is an illustration of humanitarian love: the appetite to resolve “the conflict between . . . the sanctity of human life, and the goal of reducing suffering”<sup>140</sup> by application to homicide.

---

<sup>140</sup> SINGER, PRACTICAL ETHICS, *supra* note 40, at 182.

