

University of Miami Law School

## University of Miami School of Law Institutional Repository

---

Articles

Faculty and Deans

---

5-2013

### Inherent Human Rights: Philosophical Roots of the Universal Declaration

James W. Nickel

Follow this and additional works at: [https://repository.law.miami.edu/fac\\_articles](https://repository.law.miami.edu/fac_articles)



Part of the [Human Rights Law Commons](#), and the [International Law Commons](#)

---

activities," taking vast tracts of land under their real political control.<sup>59</sup> Adolescents involved in these gangs fall, in every sense, within one of the four images Drumbl promotes for reimagining child soldiers. One major six-country study provides disturbing and extensive evidence on the rise of violent international gangs that heavily recruit children.<sup>60</sup> The authors of this study formed a coalition calling itself COAV, or Children and Youth in Organized Violence.<sup>61</sup> The etymology of the group is itself recognition of the proximity between international gangs and child soldiers. This adopted terminology is remarkably close to that used by the international community who identify child soldiers more precisely as *children associated with armed forces or armed groups*. Perhaps we all would benefit from closer study of the growing merger of these dangerous and precarious worlds where childhood is survival, not joy.

**Richard J. Wilson\***  
Washington College of Law

\* Richard J. Wilson is Professor of Law and founding director of the International Human Rights Law Clinic at the Washington College of Law, American University, in Washington, DC, where he has taught since 1989. He has been a visiting professor at law schools in the Netherlands, Japan, and Peru, a Fulbright Scholar in Colombia, and during spring semester, 2010, he was the Tillar House Fellow at the American Society of International Law. His litigation work includes representation of Omar Khadr and other detainees at Guantá-

namo Bay, Cuba in federal courts and military commissions; several US capital cases at the Inter-American Commission on Human Rights; three cases in the Inter-American Court of Human Rights; and counsel for the European Union in friend-of-court briefs in the US Supreme Court, cited by the majority in striking down the death penalty in *Atkins v. Virginia* (2002) (persons with mental retardation), and *Roper v. Simmons* (2005) (juveniles under eighteen).

**Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration*, (Philadelphia: University of Pennsylvania Press 2009), 319 pages, ISBN 978-0-8122-4162.**

Johannes Morsink has written an impassioned defense of viewing today's human rights as direct descendents of the Enlightenment conception of natural rights. According to this conception, "human rights are *inherent* in all human beings who have or possess them from birth."<sup>1</sup> It holds that people are born with a protected moral status that is not a human construct and that cannot be taken away. Morsink argues not just that this sort of view was common among the authors of the Universal Declaration of Human Rights (UDHR), but also that we ought to believe it today.

The first two chapters of the book set out Morsink's views on inherent rights

- 
59. John P. Sullivan, *Maras Morphing: Revisiting Third Generation Gangs*, 7 GLOBAL CRIME 487, 491 (2006).
60. LUKE DOWDNEY, COAV, NEITHER WAR NOR PEACE: INTERNATIONAL COMPARISONS OF CHILDREN AND YOUTH IN ORGANISED ARMED VIOLENCE (2005). See also MAX G. MANWARING, STREET GANGS: THE NEW URBAN INSURGENCY (2005), produced by the Strategic Studies Institute of the United States Army War College.
61. See COAV website at <http://www.coav.org.br>.

---

1. JOHANNES MORSINK, *INHERENT HUMAN RIGHTS: PHILOSOPHICAL ROOTS OF THE UNIVERSAL DECLARATION* 14 (2009) [emphasis in original].

and how people can know them. Chapters three and four switch from metaphysics and epistemology to normative ethics; they explain the shortcomings of the Golden Rule as a basis for human rights and defend Martha Nussbaum's capabilities approach to human rights. Chapter five defends human rights against a charge of "unrealistic utopianism" and chapter six concludes with a defense of democratic participation as a key part of the "organic tapestry of human rights."<sup>2</sup>

There are several reasons to welcome Morsink's defense of the Enlightenment view of human rights. One is that it will stimulate readers to rethink whether and to what extent they can reclaim such a view for themselves today. Another is that it provides a clear version of a philosophical view that many people hold and that philosophers and political theorists should and surely will continue to teach as one possible account of how human rights exist. Although Morsink does not appeal to religion in explaining or justifying human rights, the idea that human rights are inherent will resonate with religious people who would explain these rights as the result of divine decree, and our knowledge of them as deriving at least partly it being written in our consciences by our creator.

Morsink's first book, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*,<sup>3</sup> is an excellent history of the deliberations leading to the drafting of the UDHR. It showed the very large role that the experience of the Holocaust and other horrors of World War II had on the content of the UDHR.

Much material from this earlier work reappears in this book. By my lights this material is used excessively and is often distracting. In the middle of discussing "classical moral intuitionism," for example, we suddenly find a substantial section discussing the UDHR drafting debates.<sup>4</sup> Morsink's conclusions are not supported by this material. The fact that many of the drafters of the UDHR held a particular human rights philosophy in no way commits us today to that philosophy. Those drafters have no special philosophical authority. We are free to try to find ways of endorsing or criticizing human rights that fit our own worldviews and philosophical commitments.

Although Morsink insists that human rights are inherent, he gives up on the idea that we can specify one or more properties such as agency, rationality, self-consciousness, or experiencing pleasure and pain as the grounds of human rights or the properties on which the normative status supervenes. Morsink has two reasons for giving up on this idea. One is a worry about "essentialism," about committing oneself to some fixed human essence.<sup>5</sup> The other is a practical worry: if we say that rights inhere in some feature of humans then people who arguably lack that feature will lack rights.<sup>6</sup> I doubt that abandoning the idea that human rights are rooted in the possession of one or more of these characteristics is a good move. If one is going to defend the idea that rights are somehow inherent in all humans one will be better able to do so if one can say something about what it is about humans that makes them wor-

2. *Id.* at 277.

3. JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* (2000).

4. MORSINK, *INHERENT HUMAN RIGHTS*, *supra* note 1, at 61–77.

5. *Id.* at 35–38.

6. *Id.* at 32–34.

thy of rights. Surely the fact that people are capable of self-consciously *leading* their lives, of choosing their own course and shaping their own characters, has something to do with their having inherent rights.

Morsink's targets are not mainly theorists who totally reject moral human rights, but rather theorists like Charles Beitz, Michael Ignatieff, Thomas Pogge, and John Rawls who either give a pragmatic justification for human rights or attempt to derive them from some deeper conception of justice or equality. In the current jargon, Morsink defends a "moral" or "humanistic" conception of human rights while the theorists just mentioned defend a "political" conception.<sup>7</sup> In his discussion of the transition from the language of natural rights to the language of human rights, Morsink welcomes this change in how we talk about inherent rights but accuses Pogge of throwing out "the baby of inheritance with the bathwater of natural rights."<sup>8</sup>

For someone who gives great emphasis to the metaphysical commitments that he finds in the UDHR, Morsink does not really get into the metaphysics of moral realism in any detail or discuss whether they can find a place within secular and naturalistic world views.<sup>9</sup> What he says is

that "there exists in the world a realm of objective moral values"<sup>10</sup> and that moral truth is "objective."<sup>11</sup>

Morsink holds that all normal humans have the "epistemic equipment" needed to recognize that people all have rights.<sup>12</sup> We can enter the realm of objective moral values through our "moral sentiments"<sup>13</sup> and "our shared moral sense, faculty, or conscience."<sup>14</sup> Moral intuitionism is currently enjoying a renaissance within the epistemology of ethics, but Morsink does not draw on the work of contemporary intuitionists such as Robert Audi and Michael Huemer.<sup>15</sup> W. D. Ross is the only intuitionist he cites.

Oddly, Morsink combines his moral intuitionism with the idea that our knowledge of moral human rights comes from experiencing or learning about great injustices: "We must first be introduced to them by someone or some situation (such as a gross violation of human dignity), but once that introduction has taken place, our moral sense often speaks with a single and clear voice."<sup>16</sup> A better role for learning about great injustices, I think, would be to help us to identify *specific* human rights that are worth identifying, advocating, and protecting through law. Following John Locke and Thomas Jefferson, one might think of moral intuitionism

7. On this contrast see Pablo Gilibert, *Humanist and Political Perspectives on Human Rights*, 39 *POL. THEORY* 439 (2011).

8. MORSINK, *INHERENT HUMAN RIGHTS*, *supra* note 1, at 24.

9. On moral realism see Geoff Sayre-McCord, *Moral Realism*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2011), available at <http://plato.stanford.edu/archives/sum2011/entries/moral-realism/>, and the bibliography therein.

10. MORSINK, *INHERENT HUMAN RIGHTS*, *supra* note 1, at 98.

11. *Id.* at 102.

12. *Id.* at 58.

13. *Id.* at 59.

14. *Id.* at 98.

15. ROBERT AUDI, *THE GOOD IN THE RIGHT: A THEORY OF INTUITION AND INTRINSIC VALUE* (2004); MICHAEL HUEMER, *ETHICAL INTUITIONISM* (2006). See also the following collections: *ETHICAL INTUITIONISM: RE-EVALUATIONS* (Philip Stratton Lake ed., 2002); *THE NEW INTUITIONISM* (Jill Graper Hernandez ed., 2011).

16. MORSINK, *INHERENT HUMAN RIGHTS*, *supra* note 1, at 110.

as yielding abstract moral principles or rights and then use the experience of injustices to guide the derivation of specific moral and legal human rights from these abstract principles.<sup>17</sup>

According to Morsink, believing that human rights are inherent has some good consequences for human rights practice. One is that it will help us resist downsized lists of human rights such as those offered by Ignatieff<sup>18</sup> and Rawls.<sup>19</sup> Another is that it will help us resist the sorts of easy trade-offs that a utilitarian view of rights might permit: "A commitment to inherence can be of enormous help in various implementation battles where computations of the public welfare are matched against the notion of inherent rights."<sup>20</sup>

As I understand him, Morsink offers three main reasons why we should believe that human rights are inherent. First, many of the authors of the UDHR believed this. Second, human rights documents and treaties continue to use language suggesting that humans are born free and equal and are endowed with reason and conscience. Third, the international human rights project will go better if those who work with human rights as activists, lawyers, and diplomats have beliefs of this sort. All of these strike me as very weak reasons for thinking that a philosophical view of human rights is worthy of belief.

**James W. Nickel\***  
**University of Miami**

\* James W. Nickel teaches and writes in human rights law and theory, jurisprudence, and political philosophy. He is the author of

*Making Sense of Human Rights* (2d ed. 2007) and more than seventy articles in philosophy and law. Nickel has a joint appointment in Philosophy and Law at the University of Miami.

**Galit A. Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford University Press 2012), 200 pages, ISBN 978 0 8047 6352 3.**

In *Values in Translation: Human Rights and the Culture of the World Bank*, Galit Sarfaty, an assistant professor at the University of British Columbia, brings a unique perspective combining anthropology and law to the study of one of the world's most prominent international organizations. Sarfaty explains why the World Bank remains reluctant to integrate human rights considerations into lending practices. Sarfaty's consideration of the political, legal, and bureaucratic barriers to the Bank's adoption of a human rights policy is an insightful critique and provides much needed guidance for reform.

The main problem Sarfaty addresses is that, despite the Bank adopting various social and environmental policies, an overarching operational policy on human rights remains absent. Although the Bank engages in human rights rhetoric, it fails to include human rights concerns systematically in its decisions concerning lending. Any consideration of human rights is ad hoc and many employees consider it taboo to discuss human rights in everyday conversation or project documents. Specifically, the Bank resists adopting

17. See JAMES W. NICKEL, *MAKING SENSE OF HUMAN RIGHTS* 70–91 (2d ed. 2007).

18. MORSINK, *INHERENT HUMAN RIGHTS*, *supra* note 1, at 10–12.

19. *Id.* at 125–28.

20. *Id.* at 26.