

# THE TRAGIC FOUNDATIONS OF HUMAN RIGHTS

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## I. PREPARING FOR THE JOURNEY

In these pages, an attempt will be made to think philosophically about a phenomenon that precedes all possible foundations for human rights. I refer to a persistent longing, in the hearts of those who seek to realize the so-called “Rights of Man,” for a foundation that would ground the passage from the idea of universal human rights to their enactment in practice. If modernism is defined as a continuation of the Enlightenment project of progress grounded in reason,<sup>1</sup> then the longing to put human rights on top of a secure foundation (from the Latin *fundus*, meaning “bottom”) is a quintessentially modernist desire. Contrariwise, if postmodernism is defined as waging war on totality and bearing witness to the unrepresentable, then the readiness to deconstruct any foundation that reason offers to support its human rights practices is an undeniably postmodern stance.

Given the framework that is established by these definitions, it must be admitted that this essay is not modernist in inspiration, for it questions the very idea of foundations. On the other hand, it would also not be right to call the essay postmodern, for it is not interested in proving what has already been amply demonstrated, over and over again: that, given the right context and enough ingenuity, any textual foundation can be made to lead just about anywhere that humans are inclined to take it. As I see it, the obdurate denial of formal lawfulness in the abstract is just as senseless as hoping to bypass one’s presuppositions in order to “discover” the existence of formal lawfulness. “What opposes unites,” says Heraclitus,<sup>2</sup> and even famous anti-foundational statements such as “Deconstruction is justice”<sup>3</sup> betray a longing

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<sup>1</sup> Jean-François Lyotard, *Answering the Question: What is Postmodernism?*, in THE CONTINENTAL PHILOSOPHY READER 428, 437 (Richard Kearney & Mara Rainwater eds., 1996).

<sup>2</sup> HERACLITUS, FRAGMENTS 15 (T.M. Robinson trans., 1987).

<sup>3</sup> Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority”*, 11 CARDOZO L. REV. 919, 945 (Mary Quaintance trans., 1990).

to move to a better world on the *basis* of something. For if a better world can be attempted by those who are courageous enough to leave all textual foundations behind, in favor of a style of thinking and talking that is careful to avoid mentioning foundations, then that style—that way of being—itself becomes a kind of foundation.

Every thinking is a mode of possession that has its *what* and its *how*; that is, to think is both to intend what-is-thought and to intend it *in a certain way*.<sup>4</sup> The “what” of the problem of foundations for human rights is not adequately grasped, however, if it is conceived in terms of the development or refutation of a particular foundational theory. Foundation-laying and foundation-destroying are both modes of possession of their object that begin and end in the sphere of the merely epiphenomenal. Before thought thinks a foundation, it feels the need to think it. Likewise, the deconstruction of a particular foundation can never touch the phenomenon of longing that led to the foundation being constructed in the first place. Genuine thought always begins by proceeding towards the beginning. Thus a mode of access to the primordial problem of foundations that would be sufficiently penetrating and radical requires us to think the *longing* for foundations all the way down to *its* origin.

But how? Regrettably, modern science (including social science) cannot even experience our problem *as* a problem, for it is itself a quintessential expression of the longing for foundations. Science encounters and secures beings and events according to the stipulation that they obey general laws that are either known or capable of becoming known. In particular, all scientific accounts of the “human being” (whether psychological, sociological, anthropological, or historiological) are *genetic*: they explain human behavior in terms of a well-ordered method, given in advance, that links cause and effect, and motive (either conscious or “unconscious”) and action. To borrow an image from the great French phenomenologist Gaston Bachelard, the scientist “explains the flower by the fertilizer,” and is always predisposed to abandon ontological investigation in favor of “dig[ging] into

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<sup>4</sup> MARTIN HEIDEGGER, PHENOMENOLOGICAL INTERPRETATIONS OF ARISTOTLE 16 (Richard Rojewicz trans., 2001).

the past of man.”<sup>5</sup> Freud’s attempt to understand the mystic’s “oceanic feeling” as a mere effect of certain childhood experiences is a good example of this sort of account,<sup>6</sup> for the imputation of an experience to its physical or psychological causes leaves the nature of the experience itself—the experience *as lived*—completely un-thought. As Wittgenstein puts it, “People who are constantly asking ‘why’ are like tourists who stand in front of a building reading Baedeker and are so busy reading the history of its construction, etc., that they are prevented from *seeing* the building.”<sup>7</sup> The scientific way of thinking always tries to make the unexplained explicable in terms of something else that *is* understandable (and hence beyond questioning)—something else that the unexplained phenomenon itself is not. In imputing every flower to its fertilizer, science (including the kind of thinking that conceives of law as a science) manifests an acute longing for a state of affairs in which every natural and social “fact” or “process” has come to rest securely on the bottom of its *explanandum*.

The longing for foundations in its deepest sense therefore poses a problem that is philosophical and not scientific. At one level it manifests what Spinoza calls *conatus essendi*: the tendency of any being, in this case thought itself, to persevere in its being.<sup>8</sup> When thought thinks “A Y B,” it *clings* to a movement from ground to grounded that circumscribes it *as* a unity, *as* the thought that it is. Launched on its fateful course by Descartes, modernity conceives of the thinking subject as a stable and self-certain identity.<sup>9</sup> All truth is then established *as* true according to the ultimate criterion of the subject’s self-certainty. The truths of the human sciences are so thoroughly embedded in the idea of the thinking subject’s self-certain grounding of truth that the questionability (in the sense of being thought-worthy) of the practice of grounding itself remains regrettably invisible to them. Thus, the longing for foundations should never be interpreted as

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<sup>5</sup> GASTON BACHELARD, *THE POETICS OF SPACE* xxvi (Maria Jolas trans., 1969).

<sup>6</sup> SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* 19 (James Strachey trans., 1961).

<sup>7</sup> LUDWIG WITTGENSTEIN, *CULTURE AND VALUE* 40e (Peter Winch trans., 1984).

<sup>8</sup> BENEDICT [BARUCH] DE SPINOZA, *ETHICS* 135 (James Gutmann ed., 1955).

<sup>9</sup> 1 RENÉ DESCARTES, *THE PHILOSOPHICAL WRITINGS OF DESCARTES* 127 (John Cottingham et al. trans., 1985) (“I am thinking, therefore I exist”).

a mere “psychological content,” to be explained by psychological mechanisms or even by the all-too-glib anthropological hypothesis of a universal “need for meaning” that precedes the construction of particular meanings. These modes of social storytelling look away from the longing for foundations to the antecedent conditions of its possibility, and thus unknowingly manifest the very longing they purport to explain without having clarified it in its own phenomenality.

Traditional metaphysics evades the problem of the longing for foundations by ossifying longing’s results in the form of the Principle of Sufficient Reason. Leibniz was the first to make a rigorous formal statement of this principle, which has nevertheless been a fundamental presupposition of Western thought since antiquity.<sup>10</sup> At the level of ontology, Leibniz’s Latin expression of the Principle of Sufficient Reason is *nihil est sine ratione cur potius sit quam non sit* (“nothing is without a reason why it exists rather than does not exist”):<sup>11</sup> this represents the law that nothing *is*, in the sense of being an existing being, unless there is a sufficient reason for why it is. In other words, every being and event (B) must have its reason (A)—a reason that is not the *same* as it is, but rather something that is different from it and yet a kind of source or origin for it. At the level of language and logic, Leibniz transformed the Principle of Reason into what he called the *principium reddendae rationis*: the “principle of rendering reasons.”<sup>12</sup> Under this conception of the way humans relate to truth, men and women become the beings who render reasons for their assertions: for every truth it claims, the faculty of reason must be prepared to render a reason. A philosophical anthropology wherein “A Y B” is taken to be the metaphysically predetermined form of all thought and speech obviously lacks much interest in questioning what lies *before* the laws of thought and all particular accounts of ground and grounded.<sup>13</sup> Traditional metaphysics, like the scientific method that it underwrites, therefore

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<sup>10</sup> GOTTFRIED WILHELM LEIBNIZ, PHILOSOPHICAL WRITINGS 8-9 (Mary Morris trans., 1934).

<sup>11</sup> MARTIN HEIDEGGER, THE METAPHYSICAL FOUNDATIONS OF LOGIC 114 (Michael Heim trans., 1984).

<sup>12</sup> MARTIN HEIDEGGER, THE PRINCIPLE OF REASON 22-23 (Reginald Lilly trans., 1996).

<sup>13</sup> EDMUND HUSSERL, CARTESIAN MEDITATIONS 7, 13 (Dorion Cairns trans., 1988).

cannot give us any access to the phenomenon of longing for foundations to support universal human rights.

What then *is* the nature of this phenomenon, and how can it be grasped in a manner that is most befitting its nature? By way of a preliminary answer to the “what” question, and in preparation for what is to come, permit me to say, rather cryptically, that the longing for foundations manifests itself ontologically within what I will call the phenomenon of *distress*. Unlike Heidegger’s *anxiety*,<sup>14</sup> which is anxious about, and on account of, *Dasein*’s own being-in-the-world (and not anything in particular),<sup>15</sup> distress is unmistakably other-regarding, and hence is altruistically deflected away from the self’s concern for itself. It is linked intimately and essentially to the phenomenon of ethical responsibility that arises in the *I*’s relation with others. Indeed, ethical responsibility and distress are locked together like the opposite poles of a magnetic bar, forming a unitary phenomenon. Their mode of temporality is the present in its ecstatic mode of standing outside itself towards the future, unlike the past-oriented, and ultimately self-regarding, practices of defending and justifying what the *I* has already done. Distress arises on the hither side of a responsibility that threatens to overflow the bounds of reason and become radical and all-encompassing. It manifests the obsessive worry that, without foundations for a practice that ignores universal suffering and even creates new suffering in the name of ameliorating the old, finite human action would always bring with it an infinite and self-contradictory responsibility that threatens the very possibility of action.

As for the “how” question, I will say, likewise only preliminarily, that phenomenological reflection can provide an initial mode of access to the phenomena of distress and the longing for foundations. I will therefore provide a phenomenological interpretation of distress and longing. In the end, however, only a

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<sup>14</sup> MARTIN HEIDEGGER, *BEING AND TIME* 393 (John Macquarrie & Edward Robinson trans., 1962).

<sup>15</sup> In *BEING AND TIME*, Heidegger appropriated the German word for existence, *Dasein*, to refer to the existential determination of the human being—its “howness.” *Id.* at 67. As he said later, *Dasein* is simply a “title for the Being of man.” MARTIN HEIDEGGER, *PLATO’S Sophist* 256 (Richard Rojcewicz & André Schuwer trans., 1997).

radicalized kind of compassion can complete the task of understanding these phenomena. As Heidegger remarks, a genuine journey of thought is always a new beginning that commences in unclarified passion (from the Latin *passus*, “having suffered”) on the basis of a kind of pre-possession of its object.<sup>16</sup> Without passion, thought is content to calculate in the realm of what is merely useful to attaining ends that remain unquestioned; and without pre-possession in some manner, a problem cannot be encountered *as* a problem in the first place. The task of a philosophical journey is to bring thought’s passion to maturity and clarity, so that what is pre-possessed, albeit unthematically, can be re-appropriated in the end in a more radical and genuine way. With any luck, the unclarified passion of our thought will, at the close of this essay’s journey, become the clarified com-passion of suffering-with, and on account of, the suffering of those poor souls (myself included) who long to have foundations for what they do in the arena of international human rights.

## II. UNIVERSAL HUMAN SUFFERING

The word “suffering” comes from two Latin terms: *sub* (under) and *ferre* (to bear). To be borne under by what bears upon one in the course of existing is to suffer. It is no accident that the Buddha put the truth of suffering at the very top of his famous list of the “Four Noble Truths.”<sup>17</sup> Whether by chance or design, all of us suffer because all of us crave, and in craving we let the here-and-now become a disappointment to us. In truth, we hardly ever get what we really want, and even when do, we are left with new things to want or desire. Meanwhile, we feel the lack of the wanted as if it were gnawing at us like a physical hunger. Even our persistence in being, as Emmanuel Levinas says, can become a source of torment, leading us to feel guilty for existing at all: “My ‘being in the world’ or my ‘place in the sun,’ my home—are they not a usurpation of places that belong to the

<sup>16</sup> HEIDEGGER, *supra* note 4, at 20.

<sup>17</sup> The “noble truth of suffering” comes first, followed by three others: “the noble truth of the origin of suffering,” “the noble truth of the cessation of suffering,” and “the noble truth of the way leading to the cessation of suffering.” *Saccavibhanga Sutta (The Exposition of the Truths)*, in MAJJHIMA NIKĀYA: THE MIDDLE LENGTH DISCOURSES OF THE BUDDHA 1097, 1098 (Bikkhu Bodhi ed., Bhikkhu Nanamoli & Bodhi trans., 1995).

other man who has already been oppressed or starved by me?"<sup>18</sup> Willie Loman's suicide, in *Death of a Salesman*, is preceded by his anguished calculation that the proceeds of his life insurance are worth more to his family than he is: thus does art warn thought that there are some forms of suffering that make nonexistence look like a blessing.<sup>19</sup>

Please do not mistake the intention behind the previous paragraph. These gloomy remarks about the ubiquity and strange persistence of human suffering are offered not as a jeremiad, after the fashion of Schopenhauer,<sup>20</sup> but as a *cri de coeur*, after the fashion of someone who reports, sincerely and in good faith, what he has seen and experienced in life, over and over again. Most people notice and are moved by their own suffering first of all, and only thereafter do they pay attention to the sufferings of others. Even then they tend to care only about suffering that they believe to be unjust or unnecessary by some normative criterion. Just and necessary suffering, if it is noticed at all, appears in the guise of a natural occurrence, and it seems to assert no greater claim on the conscience than do the deaths of the animals that we eat, wear, and turn into exchange values. To be sure, altruists and saints tend to cast the net of compassion farther than do egotists and sinners. However far the net may be cast, though, it almost always falls considerably short of the whole.

Fortunately, it remains possible for critical thought to go where convention does not. In Walter Benjamin's image of the "revolutionary killing of the oppressor,"<sup>21</sup> for instance, can be glimpsed an ordinarily-overlooked feature of the problem of suffering. His image of self-righteous slaughter reminds us that

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<sup>18</sup> EMMANUEL LEVINAS, ON THINKING-OF-THE-OTHER: ENTRE NOUS 130 (Michael Smith & Barbara Harshav trans., 1998).

<sup>19</sup> ARTHUR MILLER, DEATH OF A SALESMAN 125-26 (1949).

<sup>20</sup> For example:

The unspeakable pain, the wretchedness and misery of mankind, the triumph of wickedness, the scornful mastery of chance, and the irretrievable fall of the just and innocent are all here presented to us; and here is to be found a significant hint as to the nature of the world and of existence.

<sup>1</sup> ARTHUR SCHOPENHAUER, THE WORLD AS WILL AND REPRESENTATION 253 (Eric F.J. Payne trans., 1969).

<sup>21</sup> WALTER BENJAMIN, REFLECTIONS 298 (Peter Demetz ed., Edmund Jephcott trans., 1978).

even the just and necessary deserts of “bad” people are engines of suffering for someone. Consider the anguish and privation of those “innocents” who love or otherwise care about the punished one. Where is the justice in the tears of the parents, spouse, and children of those who are justly repressed or destroyed? There is also the intractable problem of those unfortunates who, caught in a web of circumstantial evidence, delay, defensive inadequacy, or prosecutorial excess, fall unfairly under the wheels of a judicial system that is inevitably less than perfect. One might even say that convention counts the suffering of both classes of innocents as unavoidable “collateral damage” in the war that justice wages on injustice. As for the guilty, the case could be made that the justly punished suffer *more* than the unjustly punished for every increment of pain they endure. Martyrs can dilute their torment by entertaining the sublime belief that justice will some day be done on their account. But the just suffering of those who are guilty of injustice remains, like the supposed pain of those in hell, completely unmitigated by any prospect of a better justice to come.

The not-infrequent claims made against the Western idea of human rights, primarily on account of its posing as both *universal* and universally the possessions of *individuals*, reveal another aspect of the problem of suffering. Certain uncomfortable questions arise. For example, could it be that some forms of “human rights” are, at bottom, simply new labels for the old phenomenon of Western cultural and political imperialism? Does the military and economic enforcement of human rights norms by powerful states purporting to wear the mantle of universal humanity betray a certain particularity of interest on account of that enforcement’s shameless partiality and selectivity? Do human rights norms that reflect the Enlightenment ethic of individualism ignore the conflict between a constitutionalized individual right of self-determination and local conditions that may prefer social values over the will of the individual? Should the negative conception of rights contained in many human rights declarations (freedom *from* certain forms of coercion) give way to a more positive conception of rights (freedom *to enjoy* certain economic, social, or cultural entitlements)? Should minority groups enjoy



certain rights *qua* groups that are equal or superior to the universal rights of individuals? Does the unprecedented threat of terrorism to the many in the post-9/11 era permit a certain relaxation of vigilance when it comes to protecting the human rights of the alleged terrorist few? Given that political and economic resources are limited, even in developed countries, why does the protection of individual human rights devour so much of our attention, while so little of it goes to remedy the many other pressing problems of humanity, such as poverty, hunger, and disease? In asking these questions the suspicion arises that not every person of good faith agrees that the gains of human rights enforcement are always completely free from any offset on account of social and cultural losses.

These questions should not be interpreted as an argument against the vigorous enforcement of human rights norms, as if the questions are secretly intended to make the case for more torture and oppression in the world. This essay seeks to uncover a deeper level for thinking than the level of a heated debate about “values.” Genuine thought enjoys the rare privilege of questioning things in depth—a privilege that mere opinion forfeits on account of the haste of its delivery and the defensiveness of its stance. When Levinas uttered the shocking opinion that “[e]ven the S.S. man has what I mean by [an ethical] face,”<sup>22</sup> he meant to draw attention to a realm of suffering that transcends the categories “just/unjust” and “necessary/unnecessary.” The point is breathtakingly simple: the moral imperative to mount a defense against evil (including the evil of certain human rights abuses) does not imply that a successful defense causes no pain. Nor is there any eternal balance wherein the weight of one man’s agony and death is cancelled out by the happiness of thousands. “[R]eal history is woven out of a real suffering that is not lessened in proportion to the growth of means for its abrogation,” say Horkheimer and Adorno.<sup>23</sup> This does not suggest that people’s lives cannot be “improved,” at least according to certain conventional measures of progress. Rather, to cancel all of mankind’s real suffering we would literally have to awaken the dead,

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<sup>22</sup> LEVINAS, *supra* note 18, at 231.

<sup>23</sup> Max Horkheimer & Theodor Adorno, *The Concept of Enlightenment*, in THE CONTINENTAL PHILOSOPHY READER, *supra* note 1, at 199, 210.

as Benjamin puts it, and make whole what history has irretrievably smashed.<sup>24</sup> The sufferings and deaths of innocent bystanders in times of a just struggle against evil are therefore but the tip of an iceberg. Henceforth I will use the term “universal human suffering” to indicate the suffering of a suffering humanity considered without discrimination on account of any division that would separate it into categories tending to comfort the heart or the mind. Thus, the sufferings of the just and the unjust are both included in this category, and sufferings thought to be necessary sit squarely alongside those that are felt to be unnecessary.

This radicalized conception of universal human suffering puts the theory of human rights in an awkward position. Aimed at ending some of mankind’s worst outrages and brutalities, modern human rights practices conceive of human beings as allegorical, moral persons—formally co-equal citizens of the world. According to Article 1 of the Universal Declaration of Human Rights, for example, both George W. Bush and the lowliest peasant in the shabbiest village in the poorest country on earth are “free and equal in dignity and rights,” even though their real access to the wherewithal to achieve and maintain their dignity and rights is radically unequal.<sup>25</sup> As this example begins to suggest, human rights cannot declare war on suffering as such—universal suffering, that is—without attending to what Marx calls “*authentic man* . . . man in his sensuous, individual and *immediate* existence.”<sup>26</sup> Yet the minute they begin to notice the plenitude of real sufferings experienced by men and women conceived as concrete social beings, liberal human rights practices have to worry about becoming a self-defeating tyranny. As Levinas puts it: If the requirements of the Rights of Man extend across the entire field of life-in-the-world—if they go so far as to guarantee “‘weekends’ and ‘paid vacations,’” not to mention “the right to well-being and the beautiful, that makes life bearable”—then “the validity of that charter would continually clash with what we

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<sup>24</sup> WALTER BENJAMIN, *ILLUMINATIONS* 257 (Hannah Arendt ed., Harry Zohn trans., 1968).

<sup>25</sup> Universal Declaration of Human Rights, G.A. Res. 217A, art. 1, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

<sup>26</sup> KARL MARX, *EARLY WRITINGS* 30 (T.B. Bottomore ed. & trans., 1964).

may call the mechanical necessities of the social reality known to the positive sciences, which are mainly attentive to causal laws.”<sup>27</sup>

In other words, mainstream thinking imagines that to devote “too much” in resources to helping the poor and downtrodden is to threaten the health of the socio-economic goose that lays the golden egg of material progress for everyone. It is little wonder that the many economic and cultural rights guaranteed in Articles 22 through 27 of the Universal Declaration of Human Rights are so seldom honored and enforced.<sup>28</sup> Conservative social science is always eager to remind liberal humanism about the law of unintended consequences, which suggests that well-meant measures to reduce present suffering can actually increase future suffering owing to the perverse incentives created by the reversals of fortune they enact. Nor can the tender of heart fail to notice a rather dismal lesson that is taught by the history of revolutions during the past two centuries: namely, that the “logic of the oppressed goodwill,” as Julia Kristeva puts it,<sup>29</sup> so often kindles the kind of anger that leads to massacres. History teaches us to suspect optimists. For as Sorel says, it always seems to be the optimist, driven mad by the unforeseen obstacles that his projects encounter, who dreams of bringing about the happiness of future generations by slaughtering existing egoists.<sup>30</sup>

Thus it is that mainstream human rights law is always on guard lest it go “too far” in the direction of disturbing the present equilibrium of forces. It always seeks to strike a more-or-less Hobbesian “wise balance” between state power seen as a threat to human flourishing and state power seen as a condition of that flourishing. In practice, this balance allows any state that honors basic human rights norms to be ideologically cleansed of the taint of illegitimacy in its use of necessary force within its proper sphere. The law of property, which, as Proudhon states, has so often been used to grind people down through the privileges to

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<sup>27</sup> EMMANUEL LEVINAS, *ALTERITY AND TRANSCENDENCE* 146-47 (Michael B. Smith trans., 1999).

<sup>28</sup> Universal Declaration of Human Rights, *supra* note 25, arts. 22-27.

<sup>29</sup> Julia Kristeva, *Women's Time*, in *THE CONTINENTAL PHILOSOPHY READER*, *supra* note 1, at 380, 393.

<sup>30</sup> GEORGES SOREL, *REFLECTIONS ON VIOLENCE* 11 (Jeremy Jennings ed., Thomas Hulme & Jeremy Jennings trans., 1999).

exclude and dominate that it bestows on private property owners,<sup>31</sup> is never seen as a human rights violation, at least so long as the police and the courts exercise suitable restraint in the way they enforce the rights of property owners. On the contrary, property rights and the right to an effective remedy for their violation are written into the Universal Declaration (Articles 8 and 17) as fundamental human rights.<sup>32</sup> Indeed, they sit alongside other rights, like freedom of movement (Article 13) and the right to life, liberty, and security of person (Article 3), that can contradict them in practice.<sup>33</sup> Human rights institutions generally leave to state power the task of working out the subtle relations between property rights and human dignity. Moreover, as a matter of principle, they *must* leave to state power the job of line-drawing within the vast sphere of social interaction that human rights norms leave completely untouched. International human rights practices thus work hand in hand with positive and natural law at the local level to allocate and redistribute pain within a sphere of universal human suffering that always remains invisible to them.

For positive law, the task of dividing suffering into the just and the unjust, or the necessary and the unnecessary, belongs to politics and its primary instrument, law; in contrast, natural law sees this task as already having been accomplished by God or nature. Despite their differences, however, positive law and natural law are united in the way they conceive the appropriate stopping point for reason and responsibility: Reason's labors are ended, and with them all social and individual responsibility, once the lines of division between the just and the unjust, the necessary and the unnecessary, are drawn or ascertained. Thereafter just and necessary suffering, if it is seen at all, is thought to be for the individual to manage in the best way he can. Redemption, atonement, and stoic acceptance are the possible fruits of a lonely project undertaken by the justly suffering individual on the basis of religion, good works, and philosophy. The righteous others—at a minimum, the powerful ones who have drawn or found the line on the other side of which the justly suffering

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<sup>31</sup> PIERRE-JOSEPH PROUDHON, WHAT IS PROPERTY? 16 (Donald Kelley & Bonnie Smith eds. & trans., 1994).

<sup>32</sup> Universal Declaration of Human Rights, *supra* note 25, arts. 8, 12.

<sup>33</sup> *Id.* arts. 3, 13.

stand—wash their hands of the matter once justice is done. Social thought thus ends where just and necessary suffering begins, so much so that those rare thinkers who explicitly think the realm of violence and suffering *in its entirety*, like Sorel and Benjamin,<sup>34</sup> are barely understood at all when they speak. Nevertheless, the thinking in this essay will *not* play the role of Pontius Pilate to those whom history has condemned or forgotten. Like Benjamin's "angel of history," we will wonder at, and lament, the spectacle of the wreckage upon wreckage that history continues to throw at our feet.<sup>35</sup> In short, we will seek out the innermost relation between our human rights practices and the vast ocean of human suffering in its entirety.

### III. UNIVERSAL HUMAN RIGHTS AND THE WILL TO POWER

The concept of universal human rights, a child of the Enlightenment, is conventionally taken to signify that certain minimum entitlements belong to individual human beings solely by virtue of the fact that they are human. Such entitlements, once their appropriate expression is determined, are thought to be unaffected by all accidents of status and nationality. Whether American or Iraqi, man or woman, Muslim or Jew, *all* people begin life equally endowed with fundamental human rights, at least according to the usual interpretation. On this view, human rights become what ought to be respected by those who owe their bearers a duty of respect (the officials of nation-states, by most definitions), and what ought to be meaningfully enforced by institutions, local or international, in the event they are violated.

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<sup>34</sup> SOREL, *supra* note 30, at 10-12; BENJAMIN, *supra* note 21, at 277-300.

<sup>35</sup> Eyes staring, mouth open, and wings spread, the angel's face is "turned toward the past," Benjamin says. BENJAMIN, *supra* note 24, at 259. The description continues:

Where we perceive a chain of events, he sees one single catastrophe which keeps piling wreckage upon wreckage and hurls it in front of his feet. The angel would like to stay, awaken the dead, and make whole what has been smashed. But a storm is blowing from Paradise; it has got caught in his wings with such violence that the angel can no longer close them. The storm irresistibly propels him into the future to which his back is turned, while the pile of debris before him grows skyward. This storm is what we call progress.

*Id.* at 257-58.

In the international movement to expand the vigor, reach, and scope of human rights enforcement—the trial of Slobodan Milosevic by the International War Crimes Tribunal is a good example—one can detect the emergence of a certain will to power, even if it is only a power that runs counter to certain exercises of power by the state. What Pascal says about people's attitude towards justice—"Justice without might is helpless. . . . We must then combine justice and might, and for this end make what is just strong, or what is strong just"<sup>36</sup>—also seems an apt description of the usual stance towards universal human rights. In a nutshell: rights on paper are useless without the ability to marshal enough force to back them up in practice. The will to power (in the Nietzschean sense) that is increasingly displayed in the arena of international human rights enforcement represents no less than a frontal assault on the monopoly of the use of legitimate force that nation-states have enjoyed *vis-à-vis* their citizens ever since the first emergence of nation-states in the sixteenth century.

As a metaphysical determination of the manner in which human beings exist in time, the will to power feeds on resistance, and its voracious movements to enhance itself against resistance are ever and always *for* itself.<sup>37</sup> For people who desperately seek to defend themselves against the illegitimate claims of legitimate power, or who seek to overcome that power's abuse by means of a counterattack, it is enough that the concept of universal human rights is *accepted* by people in a position to help them. The mere custom of respecting and enforcing human rights, if it is sufficiently widespread and institutionalized, constitutes a reservoir of counter-power that can be interposed against the power of those officials who would cause (or have caused) certain forms of suffering. A drowning man will grasp at any straw that happens to float by. So too the oppressed will be glad to agree with Pascal that custom is the source of all right,<sup>38</sup> if only there actually exist institutions whose custom it is to relieve their kind of oppression on the ground that it is a human rights violation. For the truly

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<sup>36</sup> BLAISE PASCAL, *PENSÉES AND THE PROVINCIAL LETTERS* 103 (W.F. Trotter & Thomas M'Crie trans., 1941).

<sup>37</sup> FRIEDRICH NIETZSCHE, *THE WILL TO POWER* 261-453 (Walter Kaufmann & R.J. Hollingdale trans., 1968).

<sup>38</sup> PASCAL, *supra* note 36, at 101.

desperate and their advocates, the concept of human rights is a weapon that, like all such instruments, is located first and foremost in the sphere of the merely useful, which is to say the sphere of history and its causal forces. As a weapon, human rights practices are “lawmaking violence,” as Benjamin puts it.<sup>39</sup> Claiming to represent a universal humanity in the persons of those who enforce human rights, they stand alongside all other such claims made in the course of history. For when history delivers a sword to human rights practices they enter the sphere of positive law, which is none other than law posited *by* the sword. Thereafter, if it is at all conscious of its roots, the “legitimate” practice of human rights enforcement will seek to represent and preserve the order “imposed by fate,” as Benjamin puts it,<sup>40</sup> for it is the wheel of fate that has finally put human rights in a respected institutional position. Those who attack particular laws in the name of justice never attack law’s *authority*, for they always wish to appropriate a share of that very authority for their own ends. So it is with the phenomenon of universal human rights enforcement, *if* it is seen as a mere manifestation of will to power.

One could say, however, that the concept of will to power has an “image problem.” It comes across as such a brutal and disillusioning idea. Will to power seems to draw no distinction between “destroying a village to make it free,” as some American military officers used to say during the war in Vietnam, and putting war criminals on trial for their acts of genocide. In their less desperately instrumental hours, therefore, supporters of universal human rights long for an account that *grounds* their practice in a manner that yields an undoubtedly secure foundation instead of a contingent series of causes and effects. That the actual creation and enforcement of human rights are subject to causal forces is insufficiently reassuring to reason, for history’s march is erratic. History is notorious for randomly delivering perplexing admixtures of happiness and sorrow, and those islands of human rights protection that exist today could easily decline into barbarism tomorrow, thus leaving the age of human rights behind like the age of the dinosaurs. A mere prediction

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<sup>39</sup> BENJAMIN, *supra* note 21, at 295.

<sup>40</sup> *Id.* at 285.

that human rights will be honored in fact always rests on the shifting sands of a guess and never on the bedrock of what the scholastics used to call a *fundamentum absolutum et inconcussum*. Reason yearns not for a probabilistic causal account of human rights, but for an account that portrays them as logically and morally necessary consequences of their absolute and unshakable ground. For it is felt that ground and grounded will endure whole and undisturbed in the pure realm of Truth regardless of what happens to them here on earth: Even if history does happen to ignore them in a moment of crisis or forgetfulness, so far as the theory of human rights is concerned the unity that is ground-and-grounded always lies ready to be *rediscovered* by the exercise of right reason.

Without the feeling of justification that comes from belief in a secure foundation, the use of human rights as a weapon would seem to fall into the same category as calculated human rights violations: both would show themselves as mere instruments of war in a ceaseless and ultimately meaningless series of historical struggles between peoples. Reason thus searches for a foundation on which its movements may rest securely and in good conscience. The tripartite form of this movement is  $A \ Y \ B$ , where  $A$  is the foundation and origin of a movement, symbolized by  $Y$ , to the action or outcome that is  $B$ . In the syntax of enjoying or claiming universal human rights, this movement is usually described in terms of certain foundational texts—the *Déclaration des droits de l'homme et du citoyen*, to name a notable one from history<sup>41</sup>—that “give” people some bundle of rights, privileges, or immunities.

If human rights are denied or violated, the origin remains the same, but the grammatical direction changes. Beginning from the human rights text as foundation, thought and action move to the sphere of corrective justice, wherein those who deny human rights are forced to uphold them and those who have violated human rights are punished or forced to make amends. The foundation of human rights, conceived by modernism in terms of

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<sup>41</sup> A notable achievement of the French Revolution, the original text of the *Déclaration des droits de l'Homme et du citoyen* 26 août 1789 can be found at Mines-tère de la Justice, Les Droits de l'Homme, <http://www.justice.gouv.fr/textfond/ddhc.htm> (last visited May 30, 2006).



the constant presence of that-which-grounds, is ultimately Kantian. It is seen to stand within human affairs as a universally present prohibition and warrant, as if general textual references like “human dignity” had pre-wired their correct and necessary applications to every particular circumstance into the faculty of judgment of every reasonable subject. Alternatively, postmodern thought can seek to discover what Douzinas and Warrington call the “ethical non-foundational foundation of the law”—one that would relocate the foundation of human rights from the abstract sphere of malleable texts to the concrete sphere of “new forms of living.”<sup>42</sup> This kind of reaction against modernism’s textual formalism does not let go of the craving for foundations, however, for it imagines that certain ethical attitudes and ways of being (A) can ultimately lead to a kind of justice (B) that does not miscarry. The postmodern aspiration for a better justice to come on the basis of a better way of behaving in the now thus re-inscribes the movement *A Y B* without ever saying so explicitly.

We have, however, already spent enough time investigating the ideological nature of foundation-laying as such, for we seek what lies before ideology and before any particular foundation. Prior to reason’s *search* for a foundation that would satisfy the criterion *A Y B* is a phenomenon that sets the search in motion. As we shall see, this original and originating phenomenon consists of two “moments” held together in tension: *ethical responsibility* and *distress*.

#### IV. INFINITE ETHICAL RESPONSIBILITY AND AN INITIAL INDICATION OF DISTRESS

To Emmanuel Levinas belongs the high praise of having made what is one of the most important discoveries in phenomenology during the past century. Levinas exhibits, as ethics, a phenomenon of care for the other person that surpasses being—that is “otherwise than being” in a manner that is even more radical than Plato’s *epekeina tēs ousias*.<sup>43</sup> The latter, in Book VI of the

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<sup>42</sup> COSTAS DOUZINAS & RONNIE WARRINGTON, *JUSTICE MISCARRIED: ETHICS, AESTHETICS AND THE LAW* 309 (1994).

<sup>43</sup> EMMANUEL LEVINAS, *BASIC PHILOSOPHICAL WRITINGS* 114-15 (Adriaan T. Peperzak et al. eds., 1996).

*Republic*, determines “the good” as that which “transcends [*ousias* (being), translated insipidly as “essence”] in dignity and surpassing power.”<sup>44</sup> Plato’s idea of the good can (but need not) be sought by the mind, however, whereas Levinas’s phenomenological research finds in the face of the other person a haunting opacity that at once excludes the light of knowledge and kindles the heat of a radically asymmetrical responsibility—a debt of hospitality and generosity that is due without any prior loan or trespass.

In facing the Other, the *I* encounters another being behind whose face lurks the mystery of a freedom like its own. The temptation to kill this Other confronts a “Thou shalt not kill” written in the heart before it was ever written on a tablet. In the realm of facing begins a responsibility that Levinas discovers, using the phenomenological method, to be “prior to deliberation and to which I was . . . exposed and dedicated before being dedicated to myself.”<sup>45</sup> Levinas’s other person is not a knowable something, but neither is it an unknowable nothing: this Other transcends the categories “being/non-being” and “known/unknown,” and its face marks the site of the *I*’s encounter with an otherness that is absolute. Levinas’s notion of responsibility is not reducible to a universal animal instinct of man, but comes into view somewhere between observation and aspiration. It finds its confirmation (and its hope) in the countless small acts of kindness that are exchanged daily between neighbors—each one a “‘small goodness’ from one person to his fellowman that is lost and deformed as soon as it seeks organization and universality and system.”<sup>46</sup> Ethical responsibility born of the everyday sociality of the face-to-face encounter is *the* primordial datum in Levinas’s thought: it precedes all egoism, all rational calculation, all thought, and all affective states. Like all genuine phenomenological findings, ethical responsibility offers and constitutes its own evidence, and it requires no “argument” to establish itself. The world’s more-than-ample historical record of murders,

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<sup>44</sup> PLATO, *THE REPUBLIC*, collected in *THE COLLECTED DIALOGUES OF PLATO* 575, 744 (Edith Hamilton & Huntington Cairns eds., Paul Shorey trans., 1961).

<sup>45</sup> LEVINAS, *supra* note 18, at 170.

<sup>46</sup> *Id.* at 230.

frauds, oppressions, and outrages is therefore not properly conceived of as “counter-evidence.” Rather, these modes of being show themselves as privations of a phenomenon that always precedes them in daily life. The universal phenomenon of individual conscience shows that the impulse to harm the Other generally requires *work* in order to overcome a prior sense of ethical responsibility, thus betraying the unethical’s status as a derivative and secondary phenomenon.

The Other whose face the *I* encounters in responsibility has *always* been there, and he lets the *I* be an *I* for the first time. This letting-the-*I*-be-itself is not to be understood, in Hegelian terms, as the process whereby the subject first knows itself *as* itself by putting itself into opposition to what it is not. A mere identity that is known by means of difference is not the same as the phenomenon of *individuation* that is discovered through ethical responsibility for the Other. As Levinas says, “The Other individuates me in my responsibility for him. The death of the Other affects me in my very identity as a responsible I.”<sup>47</sup> The phenomenal irrationality of the ubiquitous small kindnesses that pass between strangers, before reason has “explained” them by reducing them to calculations based on short- or long-term reciprocity, signifies that economic rationality is a secondary phenomenon. Even speech, the very means and expression of reason, is not ultimately explicable by reason. In the encounter between Same and Other, the quintessential form of which is speech, the “sovereign *I*”—so proud of its accomplishments and knowledge—speaks to the Other in a saying that is irreducible to any said. The messiness of speaking with another is confirmed by the surprise of the unanticipated cues that he gives us, and the uneasiness and suspense we feel in finishing what we have to say, only to hear the Other respond to us in his own idiom. Speech upsets the *I*’s complacency and discomfits its sense of self-sufficiency and control. In speaking to the Other, the *I* is concerned to *reach* the Other before trying to know him. Even if the *I* has decided to speak to the Other in order to get something from him, the *I*’s motive recedes in the moment of speaking itself: it explains the approach, but does not adequately describe the consummation.

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<sup>47</sup> EMMANUEL LEVINAS, *DIEU, LA MORT ET LE TEMPS* 199 (1993).

The ethical is not properly described in terms of a discrete relation between two separate beings that first encounter one another and then rationally calculate what rights they possess and what duties they owe. “Knowledge is a relation of the *Same* with the *Other* in which the Other is reduced to the Same and divested of its strangeness,” writes Levinas.<sup>48</sup> But what Levinas discovers in the face-to-face ethical encounter, as such, is unencumbered by the co-emergence of any ego, self, or subject who could conquer the Other’s strangeness by knowing it and bringing it back into consciousness in the form of an adequate representation. Hence, Levinas will repeatedly characterize the moment of the ethical encounter as such in terms of transcendence: the *I* goes out of itself in care towards the Other, but does not return to itself with the image of the Other subdued, as it were, in the form of knowledge. Transcendence thus formally indicates a phenomenological category that Levinas characterizes as “the fact of human fellowship, prior to freedom.”<sup>49</sup> Among other things, fellowship means that humans are always social beings *before* they are “individuals,” or rather, that individuation without prior birth into a world of meaningful social interaction is unthinkable; one might even go so far as to say that Levinas’s notion of “responsibility” is but another name for this primordial truth of philosophical anthropology.

The phenomenon of human fellowship, and the ethical responsibility that is its meaning, are visible in the relation between the *I* and exactly *one* Other. The Other most proximate to the *I*, at any given moment, is not the only one in the *I*’s world, however. Along can come—indeed, sooner or later there *always* comes—a *third person* to disturb the original intimacy of the ethical relation between Self and Other. This third person disturbs and threatens the original ethical relation because he is “another other” who has just as great a claim on the *I*’s ethical responsibility as the first Other:

[T]he third person is himself also a neighbor, and also falls within the purview of the *I*’s responsibility. Here, beginning with this third person, is the proximity of a human plurality. Who, in this plurality, comes first? This is the

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<sup>48</sup> LEVINAS, *supra* note 43, at 151.

<sup>49</sup> *Id.* at 91.

time and place of the birth of the question: of a demand for justice! This is the obligation to compare unique and incomparable others; this is the moment of *knowledge* and, henceforth, of an objectivity beyond or on the hither side of the nakedness of the face; this is the moment of consciousness and intentionality.<sup>50</sup>

“The third man (or person)” in Levinas’s writings represents an entire society of others, any one of whom could be the *I*’s Other in the face-to-face encounter of ethics. Since Levinas wants to conceive of sociality as independent of the “‘lost’ unity” represented by being as a whole,<sup>51</sup> these other Others are not conceived collectively, but as singularities that are just as unique, ineffable, and needy as the original ethical Other. Injustice is annulled by forgiveness within the circle of the ethical relation, but it demands redress when the ethical situation is ruptured by the entrance of the third person. “Hence,” Levinas says, “it is important to me to know which of the two takes precedence.”<sup>52</sup> In any conflict between two or more Others in which the *I* is involved, Levinas claims, “all the excess of generosity that I must have toward the [first] Other is subordinated to a question of justice.”<sup>53</sup>

In subordinating the generosity that originally characterizes the ethical impulse, however necessary this may be for justice, a certain darkness eclipses universal suffering, as if the *I* needed a deep shadow to fall on the consequences of its actions. Because Levinas stops short of giving a rigorous phenomenological description of the moment of justice as such, he fails to address the connection between responsibility and distress, and hence he fails to see that this distress is connected *essentially* to the phenomenon of longing for a secure foundation to support the enforcement of human rights.

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<sup>50</sup> LEVINAS, *supra* note 18, at 166-67.

<sup>51</sup> *Id.* at 112.

<sup>52</sup> *Id.* at 104.

<sup>53</sup> LEVINAS, *supra* note 27, at 102.

## V. A PHENOMENOLOGICAL INTERPRETATION OF DISTRESS ON ACCOUNT OF RESPONSIBILITY

If Levinas is credited with having discovered, through phenomenological reflection, a pre-gnostic and pre-original phenomenon of care for the Other, he may be excused for overlooking a phenomenon that is co-original with the ethical responsibility that is that care's formal indication. By means of the suspension (*epoché*) of the natural attitude that is required for all rigorous phenomenological research, it is possible to detect, in the moment of care for the Other, the co-emergence of a different yet connected phenomenon—one that I will call *distress*. What phenomena require of thought, as Heidegger states, “is only to see and accept them as they show themselves.”<sup>54</sup> The point of this essay's phenomenological research is to elucidate distress as a phenomenon, and not to draw any hasty conclusions from it. To be sure, Levinas himself was aware of the phenomenon of distress, albeit in a vague and general sort of way. In the essay *Peace and Proximity*, for example, he describes (or prescribes) an “anxiety of responsibility that is incumbent on everyone in the death or suffering of the other,” and he writes of this anxiety in terms of the ethical *I*'s being “troubled at the prospect of committing violence—albeit necessary for the logical unfolding of history . . . [and] the march of truth.”<sup>55</sup> But nowhere does Levinas make distress on account of responsibility into a *theme* that is suitable for phenomenological interpretation.

Taking “life” as a fundamental phenomenological category,<sup>56</sup> one must first clarify and delimit that particular region of life wherein the twin phenomena of *distress* and the *longing for foundations* for human rights show themselves. It bears noting that this region is *not* the adversarial moment of fighting for the human rights of this or that person or group, for as we have seen already, this moment is completely filled up with the burning

<sup>54</sup> MARTIN HEIDEGGER, ZOLLIKON SEMINARS 62 (Franz Mayr & Richard Askay trans., 2001).

<sup>55</sup> LEVINAS, *supra* note 43, at 164.

<sup>56</sup> HEIDEGGER, *supra* note 4, at 61. The category “life” in this early Heideggerian text reveals the influence of Dilthey on Heidegger's early thought; nevertheless, nothing of importance depends here on whether we use this category or Heidegger's later category of *Dasein* as the point of departure for our reflections on the phenomenon of distress.

concern that the thrusts and parries of human rights strategies and discourse will be causally effective. Nor is this region to be found in that rather common (if not ubiquitous) mode of being wherein one unreflectively “drifts along,” content to accept and reiterate unthinkingly what “they” say about the content and nature of foundations for human rights. If we stay rigorously within the moment of longing as such, those who long for foundations dwell outside the comfortable zone of indifference to any questioning or understanding that might hamper their action or enjoyment. In the region of life that we seek, the *I* holds itself at a distance from the fray of particular human rights struggles, and it draws back, even if only momentarily, from the leveled-down discourse of everyday talk about why the protection of human rights is a “good thing to do.”

Sorel’s remark that “philosophy is only a recognition of the abysses which lie on each side of the path that the vulgar follow with the serenity of sleepwalkers” gives an initial formal indication of the region sought here.<sup>57</sup> The usual disposition of life is to encounter and be occupied with what is nearest to hand in its care. Care need not, and usually is not, explicit *as* care to a thematizing consciousness. It is a fundamental phenomenological category, first discovered by Heidegger, and it indicates formally that life is always concerned with or about *something or other*.<sup>58</sup> Even in boredom, which is best characterized as a privation of care about anything in particular, care finds itself filled up with *some* matter to be concerned about: namely, the uncomfortable fact that it is bored. In the region of human rights practice to be delimited here, care encounters an Other towards whom it feels an ethical pull: as the previous exposition of Levinas’s thought has shown, the *I*’s care upsurges towards this original Other in the form of *responsibility*. Co-present in this encounter, however, is *distress* on account of this very responsibility, owing to the presence of *other* Others who will or may be affected by the *I*’s responsible actions. Distress, which is itself a form of suffering, is a kind of making-present of the actual and possible suffering of others. In distress (from the Latin *dis-* and *strangere*, “to bind tight”) the Other and other Others are bound tightly

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<sup>57</sup> SOREL, *supra* note 30, at 7.

<sup>58</sup> See HEIDEGGER, *supra* note 14, at 225-73.

together in a care that stands immobilized before a decision. The impending decision (from the Latin *de-* and *caedere*, “to cut off”) is distressful because it will sunder care into a living portion and a dead remainder, cutting its superabundance of generosity in two. These two phenomena—*responsibility* and *distress*—are equiprimordial in the *I*’s encounter with the Other in the region of life with which we are concerned, and any thought aspiring to uncover the phenomenal relation between ethics and justice must take care to account for both.

This region of life can be called *the moment of justice*. This moment is characterized by the more-or-less conscious awareness of an impending decision within the context of a care that remains other-directed at all times. Here the “decision” is not to be grasped anthropologically, as a “free choice of man,” but ontologically, as a fateful cutting-off of possibilities. Distress is therefore distressed in the face of an un-decided that *will in all events be decided*, for in distress the *I* is caught in the maelstrom of a care that renders the comfortable stance of indifference impossible. The decision must (and will) decide between the original Other, to whom the *I* is ethically indebted, and other Others, to whom the *I* is also ethically indebted. For Levinas, the moment of justice is filled up with trying to *know* which Other takes precedence, and the procedures and immanence of the knowledge that is required to effect justice give affront to the uniqueness of *both* Others by making them into abstractions, or, as Levinas puts it, by leaving them “de-faced [*dé-visagés*].”<sup>59</sup> However, since Levinas does not identify the phenomenon of distress that *precedes* the de-facing and violence of justice, he is unable to assess the meaning of this phenomenon, or its significance for his project. Levinas yearns to perfect justice against its own harshness by taking the quest for justice back to its source, “my obligation to other men.”<sup>60</sup> “Ultimately it is a question of founding the justice that offends the face on the obligation with respect to the face,” he writes.<sup>61</sup> But if, in the moment of justice, distress arises equiprimordially with ethical responsibility itself—if the two are locked together in such a way that the longing for foundations is

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<sup>59</sup> LEVINAS, *supra* note 27, at 170.

<sup>60</sup> *Id.* at 170.

<sup>61</sup> *Id.* at 103.



an inevitable modification of them—then Levinas’s project is a chimera. For then the “obligation with respect to the face” would *mean* that distress will always seek escape from the torment of a decision between Others by means of a collapse into foundationalism.

However, in order to grasp the true nature of this collapse it is first necessary to delimit the phenomenological meaning of “distress” with greater care. In particular, it must be stressed that although distress is always *on account of* something, this phenomenon should not be conceived as a psychological “feeling” that arises within a human being whose being and essence have been otherwise determined. For a long time psychology has limited distress to a “condition” that is caused by such “mechanisms” as cognitive dissonance, and that can (and perhaps should be) subjected to therapeutic transformations.<sup>62</sup> Ontic psychology considers and construes the psycho-physical only.<sup>63</sup> Attuned to life *in* a world that is itself taken for granted, it does not investigate what appears *as* the world.<sup>64</sup> In its existential signification, therefore, distress shakes off all purely psycho-physical references and takes on the raiment of a genuine *foreboding*. This foreboding is one of the very determinations of being human in the moment of justice, and never merely a “symptom.” It is an existential comportment: a Heideggerian *Mir-Sein* (“Being-to-me”) of distress on account of others that may or may not be explicitly present to cognition.<sup>65</sup>

Distress should never be confused with what I will call *fear*. In fear the fearing one fears for *itself*. To be sure, in the moment of justice there may also arise fear that the suffering Other’s voracious needs will make too great an ethical demand on the *I*, even to the point of exhausting or destroying it. It would be a mistake to underestimate the fear that the *I* feels in the presence

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<sup>62</sup> See HEIDEGGER, *supra* note 54, at 199.

<sup>63</sup> See *id.*

<sup>64</sup> *Id.* at 281 (noting that to someone for whom the “true world” has been reduced to scientific objects, the paired phenomena of worldliness (*Welthafte*) and worldlessness (*Weltlosigkeit*) “can be shown as little as color [can be shown] to the color-blind.”); see also EDMUND HUSSERL, *THE CRISIS OF EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY* 211-13 (David Carr trans., 1970) (tracing “the failure of psychology” to its “dualistic and physicalistic presuppositions”).

<sup>65</sup> HEIDEGGER, *supra* note 4, at 103.

of the Other when it lapses from ethical responsibility into the mode of caring for what Heidegger calls “the ‘myself,’ for which I care.”<sup>66</sup> The phenomenon of fear undoubtedly gives evidence for Sartre’s famous epigram, “Hell is—other people!”<sup>67</sup> Whether or not fear for the self emerges in the moment of justice, however, it is not what I mean by the phenomenon of distress. If *fear* is the phenomenological basis of the truth of egoism, and *ethical responsibility* is the phenomenological basis of the truth of altruism, then it must be said that *distress* yields a truth that stands outside—and bestraddles—the age-old opposition between these two points of view.

Distress announces itself before action in the urgency of that searing question we sometimes ask ourselves, “Am I doing the right thing?” It is illustrated by the anguish of Jacob in *Genesis* 32, who, when told that his brother Esau was marching to meet him at the head of four hundred men, is described in verse 8 (verse 7 in the Christian Bible) as being “greatly afraid and anguished.” According to the great tenth-century rabbinical commentator Rashi, Jacob was afraid for his own death, but he was also *anguished* at the possibility of having to kill.<sup>68</sup> Anguish here is for the Other, or rather, for Jacob’s complicity in the Other’s fate. According to Jewish tradition, the Decalogue’s command “Thou shalt not kill,” though absolute in form, does not bear a message of truth that is absolute enough to condemn killing in self-defense. Yet there is always the chance that a killing believed to be in self-defense will be interpreted as an aggression, and hence an affront to the Law. The chance of this interpretation-to-come means that “[n]o judgment of the deed can be derived from the commandment,” as Benjamin puts it, “and so neither the divine judgment, nor the grounds for this judgment, can be known in advance.”<sup>69</sup> Jacob’s anguish is a perfect symbol of the phenomena of distress and longing—phenomena that know their bearer is about to overbear others and cause

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<sup>66</sup> *Id.* at 71.

<sup>67</sup> JEAN PAUL SARTRE, *HUIS-CLOS* [NO EXIT] 47 (Stuart Gilbert trans., 1949) (1946).

<sup>68</sup> LEVINAS, *supra* note 27, at 135.

<sup>69</sup> BENJAMIN, *supra* note 21, at 298.

them to suffer or die, and that seek a sign that what the *I* is about to do is justified by an authority outside of itself.

Distress shows itself as co-present whenever the *I*'s ethical responsibility for the Other involves other Others. Distress is not yet a *value* orientation: it is not yet the posing of the question of which of these two (or more) Others is "most worthy" of the *I*'s intervention, a question that is to be decided according to some calculus of worthiness "known" to the *I*. Value-thinking thinks *after* distress has surfaced, and transforms the latter into the procedures of justice that are the concrete consequences of distress and longing. Whereas distress, like responsibility itself, is pre-gnostic, and shows itself in the form of uneasiness or anxiety on account of the *I*'s responsibility being pulled in opposite directions. In the moment of justice the *I*'s sense of responsibility undergoes a kind of rupture. In the mode of caring for others, the *I* now encounters both an anxious Other for whom it feels the ethical pull of a responsibility to *do something to help*, and more-or-less concrete other Others who will or may also suffer on account of the *I*'s very act of intervening in the situation. In a previous section I have already identified some of these other Others, including those whom reason will subsequently call "collateral damage," as well as alleged human rights violators themselves. Ethical responsibility to these other Others *presses upon* the *I*'s responsibility to the original Other. Other others confront responsibility with spectral images of, or vague stirrings of foreboding on account of, what reason will later call "just" or "necessary" suffering. The direction of the *I*'s care thus splits, and it is as if caring came up against itself arriving as an enemy from the opposite direction. The body of universal suffering *slips in* and threatens to cut short the hyperbole of responsibility that the *I* feels for the original Other. In the phenomenon of distress the Same does not return to itself, as in knowledge and fear, but rather remains transcendent, outside itself in a care that has lost its way among many suffering Others.

Nothing is to be gained from trying to decide which is more original, responsibility or distress, for what shows itself in the temporal moment of justice as such is not a sequence. Responsibility and distress arise *together* in the moment of justice, united in the form of a field of forces, as it were, that makes the *I* pause in doubt before acting in a world swarming with many suffering

Others. Neither ethical responsibility nor distress should be conceived as something detached and rigidly autonomous from the concrete mode of temporality that is the moment of justice. Distress and responsibility abide together in a synthesis with its own peculiar form of intentionality: the *cogitatum* of this synthesis is neither this Other nor the other Other, but the *emptiness of a freedom that confronts the decision between them*.

Distress and responsibility, taken together in their synthesis, “mean” a freedom that is always concretely empty of all content. Although this freedom stands on the hither side of the temporal present in the form of its “possibilities,” it remains powerless to avoid what springs forth *in* the present as it seizes one possibility to the exclusion of others. In the moment of justice, freedom as origin folds back on itself in the form of motive, as if freedom were but a flickering shadow cast by the decision just before it arrives. In having a motive the *I* loses its freedom to a ground that it understands and follows so completely that it *becomes* its motive. Prior to motive, yet always finding itself eclipsed by its deeds, freedom becomes what Heidegger calls “the ground of ground”: a gaping “abyss of ground” whose destiny it is to be constantly filled-up by the present *whatever* it does.<sup>70</sup> “You can *do* what you *will*,” writes Schopenhauer, “but at any given moment of your life you can *will* only one definite thing and absolutely nothing else but this one thing.”<sup>71</sup> The intuition of responsibility that Levinas finds in the phenomenon of the two-person ethical relation would become a kind of mechanistic compulsion were it not for the evidence given by the phenomenon of distress. This phenomenon thus makes comprehensible Heidegger’s idea that life *is* its possibilities.<sup>72</sup> For even if distress offers no solution to life’s dilemmas, at least it confirms that they *are* dilemmas.

The longing for foundations is a modification of responsibility and distress. It is a flight from freedom, taken not merely in the sense of the capacity to exercise and resist power, but in the far deeper sense of what Barthes calls the “capacity to subjugate

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<sup>70</sup> MARTIN HEIDEGGER, *PATHMARKS* 134 (William McNeill ed., 1998) (1967).

<sup>71</sup> ARTHUR SCHOPENHAUER, *PRIZE ESSAY ON THE FREEDOM OF THE WILL* 21 (Eric F.J. Payne trans., 1999).

<sup>72</sup> HEIDEGGER, *supra* note 4, at 64.

no one.”<sup>73</sup> *For the moment of any justice that is effective is always a moment of someone’s subjugation!* This is what Foucault meant when he said, inverting Clausewitz’s famous epigram, that “politics is the continuation of war by other means.”<sup>74</sup> In founding its own acts of justice in the sphere of human rights the *I* lets that which is attached to it already—namely that in which it is imprisoned as what “they” expect—run its course. What “they” want (and expect) is the violence of state force—whether in the form of legal remedies or humanitarian military interventions—in the service of what convention calls justice. Freedom recedes so that the “correctness of derivation and of fitting into an established . . . order” may hold sway.<sup>75</sup> The decision becomes decided, as if the *I* had nothing to do with it. All descriptions of what the *I* has done begin to adopt the passive voice: the oppressor and those who comfort him are imprisoned or executed; the “shock and awe” of military force is unleashed. Thereafter, reason comforts itself by the undeniably correct “psychological” argument that compassion for universal suffering must be suffocated so that compassion for particular sufferings may breathe.

“All necessity is rooted in distress,” writes Heidegger.<sup>76</sup> The longing for foundations is the anterior portion of a movement into *collapse*—into what Heidegger calls *die Ruinanz* (from the Latin *ruo*, “collapse”).<sup>77</sup> In collapse, life forms itself out of the movements it makes within the comfort of a dream world in which *A Y B* seems more real than do *A* and *B* themselves, taken in their own right as phenomena. Collapse collapses onto what is said to be the “basis” of this or that movement, but what in fact shows itself phenomenally as “*the nothingness of factual life*”: the empty, the foundationless abyss of a freedom that must always betray itself as unfree whatever it does.<sup>78</sup> For whichever bell

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<sup>73</sup> Roland Barthes, *Inaugural Lecture at the Collège de France, 7 January 1977*, in THE CONTINENTAL PHILOSOPHY READER, *supra* note 1, at 364, 366.

<sup>74</sup> MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED” 15 (David Macey trans., 2003) (1997).

<sup>75</sup> MARTIN HEIDEGGER, CONTRIBUTIONS TO PHILOSOPHY (FROM ENOWNING) 46 (Parvis Emad & Kenneth Maly trans., 1999) (1989).

<sup>76</sup> *Id.* at 32.

<sup>77</sup> HEIDEGGER, *supra* note 4, at 98.

<sup>78</sup> *Id.* at 108.

freedom chooses to ring, that bell can never be un-rung. Collapse is seductive, especially for those who long to end the torment of distress. Collapse allows universal suffering to depart and then re-enter the scene metamorphosed into just and necessary suffering. Collapse allows the questioning of foundations to cease: it is an unwillingness to wait, an agitated impatience with all further thinking.

Distress and longing arise in the same other-regarding sphere of life as the phenomenon of the Face. They are the latter's counterweights, and they explain why the passage from ethics to justice (much spoken of as an aspiration by Levinas himself) is not merely difficult, but impossible. The word "passage" is ambiguous: it signifies both a *going* and a *way* of going. While going (in a spatio-temporal sense) is undoubtedly an existential imperative for human beings, it is logically impossible that a *way* of going could precede the movement from infinite ethical responsibility to justice. Such a "way" would have to underlie the actual going in the manner of a path to which the one who goes surrenders himself in advance. A way between ethics and justice thus would be a kind of foundation for going that would betray the very idea of *infinite* (unbounded) ethical responsibility. Such a betrayal is inevitable because a truly unbounded responsibility could never find even the first step on a way that is pre-bounded in principle: a way that ineluctably leads to remedies for one person's suffering in the domain of a justice that is always the engine of suffering for someone else.

In the sphere of international human rights, the passage from ethical responsibility to justice must always occur by means of a kind of bad faith. It must always be accompanied by a certain evasive turning-away, not entirely innocent, from the phenomenon of *universal* human suffering to the phenomenon of this *particular* Other's *particular* eruption of suffering. Although universal suffering departs from the *I* during and after its collapse into foundations, it must also be said that it departs in the mode of *staying away* rather than disappearing altogether. The absence of universal suffering in the collapse into foundations is, as it were, a peculiar mode of holding sway: universal suffering is present in its absence from "official" (well-founded) discourse

and practice. It is like the faint sound of moaning that can sometimes be heard on the wind if you open your window, tune out the din of daily business, and really *listen*.

## VI. BY WAY OF CONCLUSION: THE APORIA OF OUR QUESTIONING

In an *aporia* a question is never answered, only restated in other forms. The problem of the longing for foundations has not been “solved” in these pages, but rather clarified and restated to illuminate certain deeply tragic aspects of human existence that are obscured whenever social thought hypostatizes a well-founded movement corresponding to the grammatical form “*A Y B*.” If the journey that we have taken has accomplished its task, then we should be in a position to see what I will describe metaphorically by a figure drawn from geometry. What is to be seen lies within a vast ellipse that is defined by the foci of two questions. The ellipse itself contains the tragedy of universal human suffering. One of its foci is none other than our first and guiding question: *What is the nature and source of our longing for foundations for universal human rights?* The second foci of the ellipse transforms the guiding question into a kind of plea. I have thought long and hard about how to express it, and the best I can do is put it the way a religious person would: *Will God forgive me for what I feel I must do in the service of a suffering humanity?* A clue to the real nature of tragedy can be found in the difference between these two questions. The tragic does not come from the will being thwarted by destiny, as is commonly thought, but by the inevitable metamorphosis of freedom and responsibility into destiny. However bright the destiny of universal humanity may appear to us when we are at our most optimistic, it is always fraught with tragedy for *someone*.

The only real foundation of human rights is to be found, if at all, in a *world*: namely, a world where human beings behave in such a manner that the criteria for the application of this or that purely conventional concept of “human rights” are taken to be satisfied. Texts creating or guaranteeing human rights, whether national or international in origin, are but means to the end of such a world. As means, these texts bear a contingent relation to their end—they are but one of the many possible conditions for the transformation of this world into another world. Like all

means, they neither are a ground of the end to which they can be directed, nor do they require grounding in their own right. Human rights texts, like the “contents” that they are thought to have, dwell in the realm of the merely factual, which is to say a realm of cause and effect in which ontological foundations do not hold sway. Heidegger’s remark that “[t]he ‘essence’ of Dasein lies in its existence”<sup>79</sup> may be profitably reconfigured in our context to state that the essence of a world where human rights *exist* lies in the very existence of that world: a sort of true (but profound) tautology. Given that respect for human rights characterizes a kind of actual comportment in a real world, to seek foundations for that comportment outside the ways human beings just do and can comport themselves is to chase a mirage. While reason chases this mirage, universal human suffering continues. A human rights practice that does not open its eyes to the ubiquity of concrete human suffering in the here and now is neither fully human nor fully right. A human rights practice that does not put compassion in place of justice as its highest value threatens to sink to the level of ideology and to become an apology for the vast realm of human suffering that it ignores, condones, or causes.

All the world’s great religions begin from the standpoint of *universal* worldly suffering, but human rights practices begin from the standpoint of the otherworldly “content” of an Enlightenment conception of justice. If traditional religion promises otherworldly redemption for worldly suffering, then human rights practices promise a worldly cure for only some suffering on the basis of a text whose “content” is less a pre-given ground than it is the mere sum of its applications. The pitiable man in Kafka’s parable “Before the Law,” like thinkers who yearn for theoretical foundations for human rights, spends his whole life awaiting justice for himself and others on the basis of the idea of the Law.<sup>80</sup> What is needed for human rights thinkers to awaken to the real problem of human suffering is a quasi-religious attention to universal human suffering, and a radicalized compassion that manages to let go of obsessive attachment to textual foundations. When that happens, the reflection that is required for the

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<sup>79</sup> HEIDEGGER, *supra* note 14, at 67.

<sup>80</sup> FRANZ KAFKA, *THE TRIAL* 267-69 (Willa & Edwin Muir trans., 1937).



clarification of foundations will give way to *mindfulness*. In mindfulness, an open, aware, heedful, and careful mode of being supplants the rebounding and recoiling movement that is a reflection bent on nothing more than its own self-refinement. Mindfulness can never be achieved by means of a refinement of reflection. Mindfulness can come only when a radically new kind of compassion at last allows us to open our eyes. This compassion would not be an occasional intentional effect produced by “empathy.” It would be a constant comportment in relation to universal suffering: a constant attunement to the tragic side of law and justice.

Unfortunately, it is the very *uselessness* of mindfulness and compassion for universal suffering that makes them so very difficult for modern humans to appreciate or achieve, for they lead nowhere in particular, and thus do not conform to utility’s unthought yet exclusive criterion, *A Y B*. For mainstream (instrumental) thought, the possibility that one might choose to let go of craving attachment to the discourse of foundations is either extremely threatening or else totally laughable, as is reflected in the poet J.V. Cunningham’s mocking verse, “This Humanist whom no beliefs constrained/Grew so broadminded he was scatter-brained.”<sup>81</sup> What if, however, Spinoza was right when he said that “all noble things are as difficult as they are rare”?<sup>82</sup> What if the utterly useless comportment of mindfulness and compassion turned out to be the rarest and most valuable thing of all? In that case, mindfulness would neither esteem nor despise justice, but would simply see it, stripped of all pretension, as but one of the ways that a deluded and suffering humanity divides the vast ocean of universal suffering into the acceptable and the unacceptable. For mindfulness, all theories and philosophies that describe programs to take human beings from here to there are constructed and received on the basis of a longing that is afraid to confront itself as a form of suffering. Western thought looks within and always *finds something*: the *ego cogito* (Descartes), the transcendental conditions of the possibility of experience and

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<sup>81</sup> J.V. CUNNINGHAM, *THE COLLECTED POEMS AND EPIGRAMS OF J.V. CUNNINGHAM* 117 (1971).

<sup>82</sup> SPINOZA, *supra* note 8, at 280.

of objects (Kant), the negativity of a freedom that drives the dialectic (Hegel), an ineffable and chaotic will (Schopenhauer), the will to power (Nietzsche), a *Dasein* that is always already “thrown” into a world before all cognition (Heidegger)—the list goes on and on. The point is that all these various *As* are supposed to lead somewhere—to the various *Bs* that are, in one way or another, grounded in them as origin. Thought’s craving need to account for the world in this way is a form of suffering. But what if thought were to look within and cease to *be* thought? What if mindfulness found *absolutely nothing* (the absence of all origins, all “somethings”) when it gazed within, and hence nothing that would or could *lead* somewhere else?<sup>83</sup>

How painful it would be to experience the death of illusions in this way, and to let go of the yearning to dominate and control others. Yet how liberating this would be! For the deepest liberation has nothing to do with the will’s capacity to make and justify decisions, and everything to do with the mind’s ability to shed its illusions as if they were a chrysalis, and to become mindful, at long last, of what it always already is.

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<sup>83</sup> Although I am conscious that self-reference by an author can be interpreted as one of the worst forms of arrogance, I will nonetheless take the risk of saying that the reader who wishes to explore further the admittedly enigmatic significance of these questions may be interested in considering my book-length treatment of them in LOUIS WOLCHER, *BEYOND TRANSCENDENCE IN LAW AND PHILOSOPHY* (2005).