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## Response to Nicholas Boyle

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## *Response to Nicholas Boyle*

BY O. CARTER SNEAD<sup>+</sup>

Professor Boyle's essay is both interesting and highly provocative. His thesis is that the absence of a common morality is attributable to "the coincidence of a great increase in the degree of human productive and affective interactions with a corresponding, but unfulfilled, need for the interaction to be controlled by a state-like deployment of force."<sup>1</sup> That is, the global economy moves forward unchecked and unmediated by any political institution, which leads, in turn, to gravely deleterious consequences for the world community—particularly for its most vulnerable members.<sup>2</sup> Further, the chief obstacle to the establishment of such a necessary political body is the "great theological fiction"<sup>3</sup> of universal human rights—i.e., "God-given rights prior to the existence of governments that protect or abuse them"<sup>4</sup>—invented from whole cloth by Thomas Jefferson as a post-hoc rationale for what was, in truth, simply a tax revolt by American colonists, who aspired to seize mercantile power from the government of England. Indeed, according to Boyle, it is this fiction of universal human rights that has contributed to the "growth of the global market" while undermining "the significance of the global political and military constraints on which the permanence of the market depends."<sup>5</sup>

These are strong and controversial claims about deeply complex and contested matters. Much of the argument rests upon a particular application of the theories of Freud and Hegel, as well as a provocative reading of the work of Thomas Jefferson and the conceptual origins of human rights. I am not in a position to evaluate these claims—that is far beyond the ken of my expertise—but it is worth noting that Boyle's thesis depends on the soundness of these premises. I leave it to scholars in the relevant fields to evaluate these claims.

For my part, I would like to express some sympathy with Boyle's project and then move on to what I take to be a point of serious disagreement between us. First, I appreciate Professor Boyle's critique of the elevation of autonomy as a singular, overriding norm. He is quite right to point out the deeply impoverished state of a moral anthropology<sup>6</sup> that conceives of persons as *simply* rational self-actualizers and

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<sup>1</sup> Nicholas Boyle, *God, Sex, and America: The Decline of the Common Morality, Power, and the Emergence of a Global Ethical Life*, ante, p. 268.

<sup>2</sup> *Id.* at 267 ("[L]eft to themselves, [the institutions of civil society which grow out of the economic process] impoverish and marginalize a section of the population, which takes on the role of a mob, and like a mob (*pöbel*), and, like a mob, has no interest in the prevailing order except to overthrow it.")

<sup>3</sup> *Id.* at 268.

<sup>4</sup> *Id.* at 271.

<sup>5</sup> *Id.* at 272.

<sup>6</sup> Whether this was Thomas Jefferson's moral anthropology, as Boyle claims, is not a question that I am

that understands “all social arrangements between human beings [as simply] agreements between freely contracting parties seeking mutual benefits.”<sup>7</sup> It is a vision that understates the profound vulnerability of persons and misconceives them as atomized units disconnected from one another. It is a worldview that gives no account of the interconnectedness and interdependence of persons and leaves insufficient room for a robust principle of solidarity. I agree further that a promiscuous and exclusive reliance on “rights talk” can promote such problems. In my field of public bioethics, overemphasis on autonomy to the exclusion of other grounding goods can lead to the “abandon[ment] of people to their rights”<sup>8</sup> at the moment that they most need the care and assistance of others, their community, or their government.

Second, there is truth in Professor Boyle’s assertion that the government plays a crucial role—especially in the enactment and enforcement of laws—in shaping the ethical life of the polity. The law mediates relationships and implements and reflects both the goods that society aims to pursue and the harms that it seeks to avoid. Moreover, the law is not simply reflective of the grounding goods held by society; it also shapes and forms the consciences of the people through its pedagogical function. In Justice Brandeis’s memorable phrase: “Government is the potent, omnipresent teacher.”<sup>9</sup> Government is indeed necessary to the moral flourishing of a society, and Boyle is right to call our attention to this fact.

Nevertheless, I believe that Professor Boyle makes a serious error if he means to denigrate and discard the notion of universal human rights as merely an instrumental fiction meant to clear the way for an unfettered global market that has crushed the weakest and most vulnerable among us. To the contrary, the principle that human beings are intrinsically the bearers of fundamental, pre-political rights, which the state can neither confer nor abrogate, is indispensable to the protection of the voiceless, marginalized, and powerless in the world. Contrary to Professor Boyle’s suggestion, in my view, the example of American slavery does not undermine this proposition; it confirms it. It is certainly true that many of the proponents of such human rights at the American founding were themselves slaveholders—and that is to their shame. But one could also argue that the grave contradiction of simultaneously professing universal human rights while abiding the enslavement of fellow human beings became, over time, unsustainable for the American people. Indeed, Abraham Lincoln regularly invoked the Declaration of Independence in opposition to the defense and expansion of slavery. In a speech in 1854, Lincoln said:

prepared to answer. Again, this is a matter for experts in the field to adjudicate, though much of Boyle’s thesis depends on the truth of this assertion.

<sup>7</sup> Boyle, *supra* note 1, at 269.

<sup>8</sup> See Carl E. Schneider, *Bioethics in the Language of Law*, 24 THE HASTINGS CENTER REP., Jul-Aug 1994, at 16, 21.

<sup>9</sup> *Olmstead v. United States*, 237 U.S. 438, 485 (1928) (Brandeis, J. dissenting).

Near eighty years ago we began by declaring that all men are created equal; but now from that beginning we have run down to the other declaration, that for some men to enslave others is a “sacred right of self-government.” Our republican robe is soiled and trailed in the dust. Let us repurify it . . . . Let us re-adopt the Declaration of Independence, and the practices, and policy, which harmonize with it . . . . If we do this, we shall not only have saved the Union; but shall have saved it, as to make, and to keep it, forever worthy of the saving.<sup>10</sup>

The alternative model (which Boyle seems to support), in which the state holds the exclusive power to define, expand, and contract the circle of personhood (and, by extension, the protection of the laws) according to its whims, poses profound dangers. History provides no reason for confidence that the weak and defenseless will flourish in regimes where their very existence depends entirely on meeting criteria established by the strong and according to the latter’s interests. Indeed, the record clearly points to the opposite conclusion. As Philip Abbott has observed, “there are very few general laws of social science but we can offer one that has a deserved claim: the restriction of the concept of humanity in any sphere never enhances respect for human life.”<sup>11</sup>

The indispensability of universal human rights is readily seen in the context of public bioethics. In the face of abuse and exploitation by biotechnological means, wielded by either the state itself or those whom the law fails (or refuses) to restrain, the invocation of universal human rights are often the last resort of the powerless. The most potent arguments against such dehumanizing and destructive treatment are often a final appeal to the unconditional and uncontingent equal worth of every human being, regardless of her age, size, location, race, sex, usefulness (or burdensomeness) to others, possession or lack of certain favored physical or mental capacities, or worth assigned to her by others. The strongest claims on behalf of the marginalized and voiceless are grounded in the notion that they are entitled to maximal moral respect simply by virtue of *who* they are as members of the human family.

This is true across a diversity of contexts within public bioethics. It is the intrinsic right to self-determination that precludes the conscription of unwilling (or unwitting) participants in human subjects research. This right serves as a necessary counterweight to what Daniel Callahan has called “the research imperative” and to the claims by eminent figures such as Dr. Francis Moore, past Chair of the Department of Surgery at the Harvard Medical School, who said “[b]y protecting the individual patient, [the researcher] is subjecting society to the hazard of a static rather than dynamic medicine.”<sup>12</sup> The inherent equal worth of every human being is invoked

<sup>10</sup> Abraham Lincoln, Address in Peoria, Ill. (Oct. 16, 1854), in *LINCOLN ON DEMOCRACY* 77-78 (Mario M. Cuomo & Harold Holzer eds., 2004). Further, in response to Stephen Douglas’s claim that the phrase “all men are created equal” only applied to white men, Lincoln retorted that “[he] had thought the Declaration contemplated the progressive improvement in the condition of all men everywhere.” *Id.* at 91.

<sup>11</sup> PHILLIP ABBOT, *THE FAMILY ON TRIAL* 145 (1981).

<sup>12</sup> Francis D. Moore, *Therapeutic Innovation: Ethical Boundaries in the Initial Clinical Trials of New Drugs and Surgical Procedures*, in *EXPERIMENTING WITH HUMAN SUBJECTS* 358, 365 (Paul A. Freund ed.,

against state-sponsored programs of eugenics, implemented through forced sterilization or, worse, wholesale extermination of those deemed to be feeble or unfit. Similarly, the “equality” and “matchless worth” of all human beings ground the claims of protection for those at the embryonic and fetal stages of development. Claims of human equality also undergird efforts to craft legal regimes that prevent unjust—and sometimes lethal—discrimination against the profoundly disabled, or others whose lives are deemed by those in power to be “not worth living.” In short, appeals to universal human rights are the last refuge against invidious discrimination and abuse for the voiceless and defenseless—those living at the margins of life or in severely diminished cognitive or physical conditions.

Appeals to the inherent equality of all human beings do not merely undergird claims for negative protections. They also support arguments for positive entitlements as well, such as access to health care, essential medicines, and adequate nutrition and water. For example, President George W. Bush defended the President’s malaria initiative, which was intended to ameliorate and ultimately eradicate the disease in Africa, as rooted in the principle that “[e]very life matters to the American people. Every life is precious.”<sup>13</sup> Similarly, President Bush defended the President’s Emergency Plan for AIDS Relief (PEPFAR), meant to fight the global AIDS pandemic in Africa and the Caribbean. Upon signing the Tom Lantos and Henry Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis and Malaria Reauthorization Act of 2008, President Bush noted that “[w]ith this legislation, America is showing its tremendous regard for the dignity and worth of every human being.”<sup>14</sup> Similarly, concerns about the fundamental equality of all human beings underlie the United Nations Education, Scientific, and Cultural Organization’s [UNESCO] 2005 Universal Declaration on Bioethics and Human Rights—particularly its provisions regarding social responsibility, which asserted that “the promotion of health and social development for their people is a central purpose of governments that all sectors of society share,” and, accordingly, “progress in science and technology should advance: access to quality healthcare and essential medicines, especially for the health of women and children . . . access to adequate nutrition and water; improvement of living conditions and the environment” and the like.<sup>15</sup>

In short, while I am sympathetic to some aspects of Professor Boyle’s thesis, I regard his suggestion that the notion of inherent, pre-political human rights for all people ought to be abandoned to be ill considered. Moreover, I believe that Professor Boyle’s prescription represents a profound danger for the patients that he most seeks to help—namely, the weakest and most vulnerable members of the human family.

1969).

<sup>13</sup> Remarks on the Observance of Malaria Awareness Day, 43 WEEKLY COMP. PRES. DOC., Apr. 25, 2007, at 525.

<sup>14</sup> Remarks on Signing the United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, 44 WEEKLY COMP. PRES. DOC., July 30, 2008, at 1045.

<sup>15</sup> U.N. Educ., Scientific & Cultural Org. [UNESCO] General Conference, Oct. 19, 2005, *Universal Declaration of Bioethics and Human Rights*, art. 14, U.N. Doc. SHS/EST/BIO/06/1 (2005).