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# The World(lessness) of Human Rights

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Mark Antaki\*

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The language of human rights has captured our imaginations. But despite its predominance, the presuppositions, and limits of the language of human rights have been subject to little scrutiny. In *The End of Human Rights*, Costas Douzinas aims to take up this task. The present essay focuses on key aspects of Douzinas' critique of human rights so as to further Douzinas' path of questioning—a path leading toward a proper critique of human rights.

In Part I, the author begins with Douzinas' key question: should we give up on human rights? Though Douzinas does not believe that we ought to give up on human rights, he does believe that they need to be saved from "human rights triumphalism" and, ultimately, from metaphysics. Douzinas attempts to save human rights by defending his version of transcendence: the idea that human rights, by acting as a negative "utopia", that is, as a negative pre-figuration of an impossible better future, allow for the possibility of critical judgment of the here and now. Douzinas is keen to avoid "metaphysical thinking" in his attempt to find a "place for transcendence in a disenchanting world." The author questions Douzinas' attempt to present a "non-metaphysical" approach to human rights. Despite attempting to be non-metaphysical, Douzinas' search for a new ground of human rights turns out to be animated by metaphysics, the essence of which is a denial of this world in the name of a better and truer world.

In Part II, the author explores Douzinas' ambivalent relation to metaphysics by turning to Douzinas' reading of Kant and Heidegger, his treatment of the relation between morality and power, and his understanding of the relation between goodness and being. The author draws on Nietzsche and others in order to highlight potential problems and avenues for further reflection. In light of Douzinas' entanglement with metaphysics, the author focuses on the extent to which, and the ways in which, Douzinas' account of human rights as negative utopia leads to an impoverished understanding of world. In the end, the author suggests that the subordination of duty to the production of a better world misapprehends both duty and world. It is perhaps by recovering duty as duty that we will be able to recover the world.

Le discours des droits de l'homme domine l'imagination. Mais en dépit de son importance, les présupposés et limites de ce discours ont été peu examinés. L'ouvrage de Costas Douzinas, *The End of Human Rights*, se consacre à cet examen. Cet article porte sur des aspects clés de la critique des droits de l'homme par Douzinas et prolonge le questionnement de celui-ci afin de permettre une critique véritable des droits de l'homme.

Dans la première partie, l'auteur commence avec la question centrale de Douzinas : faut-il en finir avec les droits de l'homme? Si Douzinas ne croit pas à leur abandon, il soutient toutefois que les droits de l'homme doivent être sauvés du « triomphalisme des droits de l'homme » et ultimement de la métaphysique. Douzinas tente de sauver les droits de l'homme en proposant sa propre version de la transcendance. Il soutient qu'en agissant comme une sorte d'utopie négative (une préfiguration négative d'un futur meilleur et impossible), les droits de l'homme permettent un jugement critique du présent. En tentant de trouver « une place pour la transcendance dans un monde désenchanté », Douzinas s'efforce d'éviter la pensée métaphysique. L'auteur remet en question la tentative de Douzinas de présenter une approche « non-métaphysique » des droits de l'homme. Alors que Douzinas s'efforce d'être non-métaphysique, sa quête d'un nouveau fondement des droits de l'homme est motivée par la métaphysique dont l'essence même est la négation de ce monde au nom d'un monde meilleur et plus vrai.

Dans la deuxième partie, l'auteur explore le rapport ambivalent que Douzinas entretient avec la métaphysique. À cette fin, il examine la lecture que fait Douzinas de Kant et Heidegger, son traitement de la relation entre la morale et le pouvoir, et sa compréhension de la relation entre le bien et l'être. S'inspirant de Nietzsche et d'autres penseurs, l'auteur relève des problèmes potentiels et propose des pistes de réflexion. Compte tenu de l'empêchement de Douzinas avec la métaphysique, dans quelle mesure et de quelle façon sa conception des droits de l'homme comme utopie négative mène à une vision appauvrie du monde? L'auteur suggère en conclusion que la subordination du devoir à la production d'un monde meilleur ne rend pas justice au devoir et au monde à la fois. C'est peut-être en retrouvant le devoir comme devoir qu'on pourra retrouver le monde.

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## Introduction: Human Rights as a Question

The language of human rights has captured our imaginations. Talk of justice, the good, and most especially, human dignity is carried out more and more in the idiom of human rights. In such an intellectual climate, to question the turn to the language of human rights is tantamount to presenting oneself as an enemy of humanity. However, such a climate demands that serious attention be given to the language of human rights—its presuppositions, its limits, its capacity to speak to the human condition. In *The End of Human Rights*,<sup>1</sup> Costas Douzinas, Professor of Law at Birkbeck College, University of London, takes up this task as he aims to provide “a critique of legal humanism inspired by a love of humanity” (vii).

Douzinas describes his book as “an advanced textbook of legal theory and human rights” (vii). He characterizes the vast array of thinkers and approaches he turns to as a “cornucopia of philosophical thought ...” He explains that given such a vast array and the little “common ground” that obtains between the chosen thinkers, no “grand synthesis can arise ...” Douzinas’ work is also almost part manifesto as this textbook is one “for the critical mind and fiery heart” (4).

The task of reading this work is made difficult by this chosen manner of proceeding and of conceiving the project: summaries of the thought of great thinkers abound—but sustained engagements are rare and usually give way to suggestive remarks. The habit of summarizing can leave the reader unsure as to where Douzinas himself stands on key issues: there sometimes arises a problem of voice.<sup>2</sup> Further, because Douzinas spends so much time demonstrating the relevance of a vast array of scholarly literature, he leaves much less space to clarify and expand key moments in his own critique. His aim of ‘firing hearts up’ also leads to a moralistic and combative tone that often obscures the matter at hand. This tone also leads to a shifting use of language and, sometimes, to a lack of care and rigour.

Despite these limitations, Douzinas is one of few contemporary theorists who recognize the need for a critique of human rights. Rather than engage in a one-sided attack on, or defense of, human rights, *The End of Human Rights* seeks to confront them in their complexity. The account of human rights provided is one of the few that even begins to let the matter itself emerge into visibility. Douzinas’ *The End of Human Rights* is welcome not because of the questions it answers but because of the questions it raises.

This essay attempts to go to the crux of the matter by focusing only on key moments or aspects of Douzinas’ account. By taking very seriously Douzinas’ own manner of proceeding—including the language to which Douzinas turns in his attempt to bring the matter to visibility—this essay aims to further his own path of

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<sup>1</sup> Costas Douzinas, *The End of Human Rights* (Oxford: Hart, 2000). All page numbers in parentheses in the text and in the footnotes are to *The End of Human Rights*.

<sup>2</sup> For two examples, see *infra* notes 12 and 29.

questioning. Moreover, the account of human rights Douzinas provides is also the outline of a task for thinking, for *our* thinking as moderns. How does the language of human rights hold sway in our world? Is it a language that frees us to our own humanity? Is it a language that imprisons us in a disenchanted world? Is it both?

In Part I, this essay provides an overview of *The End of Human Rights* and attempts to lay out both the intellectual task Douzinas sets out for himself and the manner in which he goes about setting it out. Recognizing that human rights are associated with the tradition of liberal humanism that he decries, Douzinas asks whether we should give up on human rights (A). Although Douzinas is more than reluctant to do so, believing they can be saved, he recognizes that we must also face the possibility that human rights must be saved from themselves (B). Ultimately, however, the reader discovers human rights must be saved not from themselves but from (what Douzinas understands or takes to be) metaphysics (C). Part II, in turn, consists of a more sustained engagement with the question of metaphysics.<sup>3</sup> Part II is less concerned with providing an overview of *The End of Human Rights* than with subjecting it to a more careful and rigorous reading.

## I. Saving Human Rights

### A. *Should We Give Up on Human Rights?*

Douzinas opens his book with a dual observation. On the one hand, “[h]uman rights have won the ideological battles of modernity.” On the other hand, “[o]ur age has witnessed more violations of their principles than any of the previous and less ‘enlightened’ epochs.” This dual observation leads to a question—a question of some importance to Douzinas for it is posed twice in the first seven pages: “should our experience of the huge gap between the theory and practice of human rights make us doubt their principle and question the promise of emancipation through reason and law when it seems to be so close to its final victory?” (2 and 7).

Douzinas’ answer is subtle and complicated (and book-length). The short answer is: no, we ought not to give up on the language of human rights. The long answer is that to understand human rights in a certain way, that is, according to the tradition of liberal humanism, is to have given up on the spirit that animates or ought to animate

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<sup>3</sup> See *infra* note 35 and accompanying text. In metaphysics, we can hear *meta ta physika*, after or beyond *physis*. The Greek *physis* is translated as the latin *natura* (though not without great loss or change of sense). So, the metaphysical (Greek) is the supernatural (Latin). Metaphysics, then, involves an understanding of this world, this world of nature, this sensory world, as being grounded in a world beyond this one. For the most part, in our history, metaphysics is inseparable from *Christian* metaphysics. Even if we “moderns” claim to be post-metaphysical, we often think metaphysically, that is, we exhibit the tendency to constantly look behind things and the will to justify every thing by something else. (Originally, metaphysics did not point to all of this: metaphysics was simply the name given to the works of Aristotle that were placed “after” his *Physics*).

them. Accordingly, to remain faithful to the spirit that animates or ought to animate human rights is to question liberal humanist presuppositions regarding the “universality of law”, “the imperialism of reason” (see e.g., 8), and the very possibility of a “final victory”.

It is precisely against this backdrop of “final victory” that the title of Douzinas’ book is to be understood. The sense of the title is derived from a play on the word “end”. As he writes in the conclusion: “[t]he end of human rights comes when they lose their utopian end.” The “end of ideology, of history or utopia” does not “mark the triumph of human rights” but rather brings “human rights to an end” (380). What does this mean? To paraphrase Koskenniemi, human rights are uncomfortably situated between apology and utopia.<sup>4</sup> As Douzinas explains, on the one hand, the widespread acceptance of human rights in official discourse points to their increased use in legitimating state power. On the other hand, human rights are, or ought to be, animated by a spirit of rebellion against power and point, or ought to point, to the denunciation of injustice by ordinary people. However, and paradoxically, the final ideological victory of human rights could signify the collapse of the difference between apology and utopia, it could signify the taming of moral rebellion by the forces of power (see e.g., 340). How could this be?

For Douzinas, the “true victory” of human rights, if one may put it this way, lies in their non-victory, in the impossibility of their full actualization. Human rights “remain necessarily and radically negative both in their essence and in their action.” Indeed, “[t]o the extent that they become positivised legal discourse and join law’s calculation, thematisation and synchronization, they share the quest for subjecting society to a unique and dominant logic which necessarily violates the demand of justice” (368). For Douzinas, the “symbolic importance” of human rights is “that they inscribe futurity in law” (369). However, the future promised by human rights is never to be achieved (337). The utopia they promise is not an actual place and, for that reason, cannot be conceived of as a destination: “all utopias, when they arrive, turn out to be the negation of their promise. Utopia’s vocation is never to become a *topos* but to act as a negative prefiguration of the future which helps understand and judge the infamies of the present” (292).<sup>5</sup> In an important sense, “justice is not fully of this world” (45, 331).

Thus, as we can see, Douzinas sets out for himself the (un)enviable task of saving human rights from their own victory (or defeat). But why exactly do human rights

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<sup>4</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Finnish Lawyers’ Publishing Company, 1989).

<sup>5</sup> Cf. Simone Weil, *Gravity and Grace*, trans. by Emma Craufurd (London: Routledge and Kegan Paul, 1952) at 154: “[a] future which is completely impossible ... degrades us far less and differs far less from the eternal than a possible future. It does not degrade us at all, except through the illusion of its possibility. If it is conceived of as impossible, it transports us into the eternal.” Some of the present essay raises the question of whether Douzinas can genuinely assert the impossibility of the future he espouses while at the same time refusing to embrace the “eternal”.

need to be saved? How does Douzinas believe this saving can be accomplished? What are the principal obstacles to this saving? To whom does Douzinas turn in his effort to save human rights from themselves? And, what are we to make of Douzinas' efforts in this regard? These questions are addressed below. However, it is of great importance that the possibility of moving beyond the language of human rights is not one Douzinas explores in any significant manner. Rather, as he states at the outset, "[h]uman rights are the fate of postmodernity ... " And, "[w]e have been blessed—or condemned—to fight the twilight battles of the millennium of Western dominance and the opening skirmishes of the new period under the dual banners of humanity and right" (1).

### **B. Saving Human Rights from Themselves?**

According to Douzinas, human rights need to be saved from human rights triumphalism so as to allow (moral) criticism and judgment of the here and now in the name of a better future that will never arrive. To this possibility of critical judgment of the here and now, Douzinas gives the name "transcendence" (10, 12, 14). Human rights triumphalism denies transcendence in its threatened reconciliation of apology and utopia, power and right, is and ought, fact and value, real and ideal. Human rights triumphalism is marked by the philosophical vice of historicism according to which history validates its own truths such that, following Leo Strauss, "no ideals or standards exist outside the historical process and no principles can judge history and its terror" (10). Human rights, to retain their utopian purchase on reality must, somehow, not be "infected" with the "transience" of history (10). Human rights must not be reducible to their specific, contemporary manifestations. Thus, Douzinas aims to save human rights by defending the idea of transcendence. He aims to do so in order to escape historicism yet without, at the same time, falling into an ahistorical universalism (14).

Part 1 of the book, "The Genealogy of Human Rights", undertakes a critique (in the Kantian sense<sup>6</sup>) of human rights so as to identify their "conditions of existence" (3). In this genealogy, Douzinas tells the story of the decline of natural law from its beginnings in Ancient Greece (with the Sophists, the Stoics, Plato, and Aristotle). Two points are to be noted here. First, the emergence of human rights is integrally related to the decline of natural law and, hence, to the transformation of objective right, (what is right) to subjective right, (right as *my* right). They emerge at the conclusion of the disenchantment of the world whereby (after the positivization of

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<sup>6</sup> In the Preface to the first edition of the *Critique of Pure Reason*, Kant explains that by critique of pure reason, he does "not mean ... a critique of books and systems, but of the faculty of reason in general" (Immanuel Kant, *Critique of Pure Reason*, trans. by Norman Kemp Smith (Toronto: Macmillan, 1965) at 9). Douzinas mischaracterizes Kantian critique (and is too liberal in his use of contemporary theoretical vocabulary or jargon such as "practice" and "discourse") when he writes that "[critique's] original Kantian aim was to explore the philosophical presuppositions, the necessary and sufficient 'conditions of existence' of a particular discourse or practice" (3).

nature) sanctified individual human will, following Strauss again, takes the place of nature as the “standard of right” (11). Precisely because their story is bound up with the decline of natural law, human rights have “only paradoxes to offer” (21)—and these paradoxes are “built-in”. For example, “[h]uman rights are internally fissured: they are used as the defence of the individual against a state power built in the image of an individual with absolute rights” (20).<sup>7</sup>

Second, the spirit that animates or ought to animate human rights is to be found in the Ancient world, before the decline of natural law, under the banner of “radical natural right” and in the “rebellion of philosophy against the weight of custom and the past” (44). Here, Douzinas asserts, we find “a non historicist but deeply historical and cultural standard for judging the world” (45).<sup>8</sup> Nevertheless, he recognizes the impossibility of “a return to a pre-modern Aristotelian universe” (15). The aim of the genealogy, then, can only be to recover the animating spirit of human rights, to recover the “critical potential” lost when “[n]atural right was written out of modern law” (15). In modern times, however, the ground and possibility of human rights, animated by such a spirit, must be sought elsewhere.

Part II of the book, “The Philosophy of Human Rights”, aims to undertake a critique (in the Marxian sense: a critique of ideology) of human rights, and more specifically of the legal humanism that, in Douzinas’ opinion, too often animates human rights talk today. Two points are to be noted here. First, Douzinas subjects legal humanism to a series of seemingly devastating critiques beginning with the more familiar critiques of Burke and Marx, then turning to critiques drawn from Hegel, Heidegger, semiotics, and psychoanalysis. The bringing together of these critiques is intended to demonstrate the poverty of “liberal rights theory” (371) and to paint in its place a more complex picture—one in which the very subjectivity and boundaries of humanity are constructed through the discourse of human rights.

Second, each of these critiques is also part of a search for a ground of human rights. Thus, finally, in his last chapter, Douzinas turns to Levinas: “[I]f the futural aspect of human rights is to be reinforced, it must be anchored in an ethical interpretation of the (desire for the) other which the weak ethics of psychoanalysis cannot support” (379). Pitting Levinas against Heidegger, Douzinas outlines an “ethics of alterity”. Human rights “become the postmodern version of the idea of justice or rather the expression of the sense of injustice” (354). The “infinite

<sup>7</sup> In the introduction to *The Rights of War and Peace*, Richard Tuck makes a similar point. For Tuck, however, it is not simply that the state is built in the image of the individual. Rather, and conversely, the modern, liberal agent can be imagined and understood out of the behaviour of states in international relations (Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999) at 8-9).

<sup>8</sup> Though he discusses Aristotle and Plato, he finds them lacking in the critical potential for moral rebellion against established authority and “dominant relations”. In so doing, Douzinas distinguishes radical natural right from justice: “[f]rom the perspective of radical natural right, justice was not a critique but a critical apology of positive law” (44).

responsibility” for the other “in a face-to-face encounter” becomes “concretised” and “diluted” into a finite responsibility “to save many others whom I have never faced” (354). According to Douzinas, the “experience of otherness can perhaps provide [the] historically grounded transcendence” which international law and theories of human rights cannot provide as “they vacillate between ahistorical universalism and historicist localism” (355).

Throughout his attempt to find “a place for transcendence in a disenchanted world” (15), Douzinas is keen to avoid “metaphysical thinking”. Following Heidegger, Douzinas recognizes that “[m]etaphysical humanism lies at the heart of an unprecedented colonization of nature in its various meanings, as territory and physical landscape, as human or animal nature or, as the nature of the ‘naturals’, the indigenous people” (209). Douzinas even points to the “obvious continuity between metaphysics and historicism,” (though the “obvious” continuity is not explicated<sup>9</sup>) and asserts that “legal humanism is part of the same process” (244). For Douzinas, “[m]etaphysics remains the plaything of the powerful and law, the will to eternalize momentary relations of power” (249). Thus, Douzinas is brought to ask: “how would a non-metaphysical approach to human rights look?” (215).

His answer is one to which we shall return below. For the moment, let us emphasize that Douzinas recognizes that saving human rights from themselves ultimately involves saving them from metaphysics. Indeed, whereas rights are irremediably tied to (the metaphysics of) “humanism and subjectivity”, Douzinas follows Ernst Bloch in asserting that *human* rights “hail also from another tradition, that of critique of power, convention, and law ... ”<sup>10</sup> Human rights, as opposed to rights *simpliciter*, do not simply point to the *dominium* of man. Human rights themselves are not metaphysical: it is their positivization that makes them so (244). But is it proper to think of human rights as not metaphysical?

### C. Saving Human Rights from Metaphysics?

But what is metaphysics? Douzinas takes up this question most directly in his summary of “Heidegger’s ontological critique” of legal humanism (201). Douzinas recognizes that “[m]etaphysics believes in the existence of an ideal, transcendent world over against which everyday reality must measure itself.” He also recognizes that “[b]ehind metaphysics lies a simple and urgent desire: to make sense of the disorder that surrounds us, to master finitude” (202). Thus, metaphysics is “a type of knowledge obsessed with mastery and control. Positing an ideal meta-being and

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<sup>9</sup> Douzinas explains that “when human rights undermine the distinction between the real and the ideal, they become the foundation of modern historicism” (242). But, as we shall see in the section below, metaphysics is predicated on that very distinction between real and ideal. Perhaps, Douzinas means to say that historicism is, somehow, the consummation of metaphysics.

<sup>10</sup> This essay emphasizes Douzinas’ path and not the thought of authors whom he claims to be most influenced by. Ernst Bloch, however, does provide much of the “negative” utopianism that pervades Douzinas’ account.



measuring everything against its transcendent principles is an attempt to manipulate the world” (204). The rise of human rights is intimately tied to metaphysics because in modern times (after Descartes and Kant), humanity comes to occupy the position of this transcendent ground of reality: man is taken to be the *subjectum*<sup>11</sup>. Humanity’s ascendancy to the status of subject is part and parcel of the positivization of nature, of the reduction of beings to objects invested with “value” only by human beings.<sup>12</sup>

Douzinias asks whether human rights are not “a defensive shield against the self-destructive horrors of metaphysical arrogance?” (209). He recognizes that human rights “have not been successful in resisting the endless objectification of humanity.” Further, “[w]hen [human rights] move from their original aim of resistance to oppression and rebellion against domination, to the contemporary end of total definition and organization of self, community and of the world, according to the dictates of endless desire, they become the effect rather than the resistance to nihilism” (214). Douzinias even notes that “from a strict Heideggerian position, the concept of rights may be irredeemably associated with metaphysical humanism.” Nevertheless, Douzinias attempts to outline a non-metaphysical approach to human rights (which anticipates the later chapter on Levinas) by way of “some guesses” since “[s]uch predictions cannot escape the metaphysical horizon” (215).

According to Douzinias, a non-metaphysical approach to human rights would “reject the attempt to interpret ‘all beings as a whole’, as if some common essential denominator lies under the historical differences and the myriad of groups and individuals.” It “would not treat people as synthetic entities for which the prosthetic operation of fragmentary rights satisfies disconnected wants.” And, “[c]ommunity would not be constructed by the following of the past or obedience to tradition but by the exposure to the other person, whose trace creates the self.” And, it “would reverse the arrogance of subjectivity and assign rights, if at all, because, as humans, we have been destined to be near Being and to care for the human as well as the other entities in which Being discloses itself” (215).

Indeed, though

[s]ome human rights may be consistent with non-metaphysical humanism ... the overall form of the social bond would change from rights and principles to being-in-common, to the public recognition and protection of the becoming-human with others, a dynamic process which resists all attempt to hold humanity to an essence decided by the representatives of power. To coin a term,

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<sup>11</sup> *Subjectum* is the Latin translation of the Greek *hypokeimenon*. As in grammar, the subject is “what underlies ...”

<sup>12</sup> Douzinias notes Heidegger’s critique of (what Douzinias calls) “[t]he value system” (207), that is to say, the manner in which value-thinking cannot understand beings in their own being but, rather, understands them out of the projection of value onto them by a subject. Nevertheless, Douzinias continues to use the word “value” throughout his work. Does Douzinias continue to use the word “value” because he disagrees with Heidegger? This is not at all evident from a reading of *The End of Human Rights*. Perhaps, as we shall see below, Douzinias himself remains wedded to the metaphysics of subjectivity. In any case, an explanation is required.

this would be a process of 'righting' and not a series of rights, and, like writing, it would open Being to the new and unknown as a condition of its humanity (216).

Here we see Douzinas flirting with a move beyond the language of human rights. But it is only a flirtation: human rights, at least for now, constitute our fate. For, as we have seen and shall see further below, Douzinas sometimes recognizes that the attachment to the language of human rights may also be an imprisonment in metaphysics. Even his brief and suggestive reference to "righting" comes close to the kind of metaphysical arrogance he so passionately denounces when "Being" itself is to be opened to the "new and unknown as a condition of its humanity" (216). If it is anything, metaphysics is the forgetting of the ontological difference, that is, the difference between being (the capitalization of which usually leads to misunderstanding<sup>13</sup>) and beings. Being is no being that could be opened (or closed) to the new and unknown. To conceive of opening or closing being to the new and unknown is precisely to wish to turn being into a being, and thus, to begin to lose sight of the temporality of human being-in-the-world (and of being itself—if one may speak this way). Only by turning being into a being can humanity begin to conceive of a mastery over beings. For example, only as a being can God be held to account for this world. In some ways, the search for (ultimate) responsibility—the urge to hold some being responsible, answerable for our finite existence—is metaphysics. Such a search can also be nothing other than a desire to be done with our own responsibility.

Of course, Douzinas' aim is clearly not to allow us to be done with our responsibility *via* the legitimating device of human rights language. To the contrary, his insistence on the negative character of human rights points to the very important appreciation that we can never be done with our responsibility: the burden of (in)justice is always ours to bear. As he notes, human rights fail to live up to their potential when they begin "to relieve the burden of ethical life" (213). Nevertheless, metaphysics, including the redemption of this world or even the desire for total justice in *this* world, may still animate his project insofar as the negative character of human rights must somehow point to a better, even perfect, future—albeit never to be attained. The "function" of this negative future is precisely to provide some critical leverage so that *this world* can be better manipulated. In Nietzschean terms, this comes rather close to world-denying, even world-hating, *ressentiment*.<sup>14</sup> We shall return to this world-demia in the section below.

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<sup>13</sup> As Heidegger explains, "The being of beings 'is' not itself a being" (our modification of the translation "The Being of entities 'is' not itself an entity") and "being is in every case the being of some being" (our modification of the translation "Being is in every case the Being of some entity"). Martin Heidegger, *Being and Time*, trans. by John Macquarrie & Edward Robinson (New York: Harper & Row, 1962) at 26, 61. In German, all nouns are capitalized. In English, capitalizing "being" (a) leads one to think that being is a being, and (b) tends to deify being. In German, being is "Sein" whereas a being is "ein Seiendes".

<sup>14</sup> See *e.g.* Friedrich Nietzsche, *The Genealogy of Morals and Ecce Homo*, trans. by Walter Kaufmann (New York: Random House, 1967). See Wendy Brown, *States of Injury: Power and*

Indeed, Douzinas himself later asserts that though

[t]he approach to the discourse of rights adopted so far has been resolutely anti-metaphysical ... the persistence of the gap between humanity and (legal) rights, or between the utopian moment in human rights and law, indicates that their force and rebelliousness may be related to a metaphysical or redemptive urge which lay dormant but has acquired renewed significance in postmodernity (344).<sup>15</sup>

A few pages later, Douzinas states that “[i]f there is something truly ‘universal’ in the discourse of human rights, if a metaphysical trait survives their deconstruction, this could perhaps be the recognition of the absolute uniqueness of the other person and of my moral duty to save and protect her” (348). And, Douzinas even states that “[t]he ethics of alterity is as powerful a metaphysics as any humanism” (351). Thus, it becomes easier to understand Douzinas’ earlier statement that, since “the old grounds, the good, God, transcendental man or abstract humanity, no longer command wide acceptance ... [t]he postmodern condition seeks foundations that do not look foundational” (246). Could it be that we have never abandoned metaphysics after all, that we have been lying to ourselves, that we still seek foundations but merely want them not to *look* foundational? Put in another way, and to follow Heidegger’s account of Nietzsche, can an *anti*-metaphysical account or position ever be non-metaphysical?

## II. Metaphysics as World Denial

Our own so-called “post-metaphysical times” are often understood, as Douzinas explains, out of the disappearance of “old grounds” that “no longer command wide acceptance” (246). For much contemporary theory, therefore, the goal has become to present normative accounts of the structure of our basic institutions (whether national or international) that do, would, or could secure “our” assent, and, therefore, command wide acceptance—but without resort to the “old grounds”.<sup>16</sup> Douzinas understands this will-centered and “atomocentric” approach to be “cognitively limited and morally impoverished”—and even boring (4). Nevertheless, as we have seen, the failure of wide acceptance to constitute adequate grounds that could replace the “old grounds” does not mean that Douzinas has abandoned the search for ground altogether. For example, he asserts that “the voluntarism of modern natural law cannot provide a sufficient foundation for human rights” (68).<sup>17</sup> But, in an important way, the modern search for ground *is* metaphysics, the essence of which is the denial or the misapprehension of the world into which we are all thrown.

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*Freedom in Late Modernity* (Princeton: Princeton University Press, 1995) for an insightful and explicitly political account of *ressentiment*. See also note 28 and accompanying text.

<sup>15</sup> Earlier, Douzinas asserts that “[i]n a strange almost metaphysical way, human rights ‘exist’, even when they have not been legislated” (344). This is quite unclear and confusing.

<sup>16</sup> The classic example of this “normative theory” is John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

<sup>17</sup> Though Douzinas, too, finds it difficult to resist the appeal of “wide acceptance” as ground as he notes the “admittedly contested” character of his own “ground” (351).

The challenge for post-metaphysical thinking then, is not the replacement of “old grounds” with “new grounds”—for that would only replicate the problem—but something like the “recovery of the world”.<sup>18</sup> As Arendt explains, “[m]odern man, when he lost the certainty of a world to come, was thrown back upon himself and not upon this world; far from believing that the world might be potentially immortal, he was not even sure that it was real. ... [M]odern man at any rate did not gain this world when he lost the other world ... ”<sup>19</sup> Arendt here is following Nietzsche, who in the sixth step of his “How the ‘True World’ at Last Became a Myth” notes that the abolition of the true world—the other world that is the ground of this world—is, in our history, also the abolition of this world.<sup>20</sup> Too often “post-metaphysical” thinking turns out to be the consummation of metaphysics: abolishing the other world does not, in itself, save this one.

Where does Douzinas’ account leave us in relation to this understanding of metaphysics as world denial (which includes the modern search for grounds, even those that do not *look* foundational)? Does Douzinas’ portrayal of the utopia of human rights as merely a negative prefiguration of the future—and hence not a blueprint—mean that this utopia is not, in the end, to be understood as *another world* (even if unattainable)? (A) Can Douzinas insist, in the manner that he does, on the utopian elements of human rights, and hence on a strict separation of morality and power, without denying the being of *this world*? (B) Does the inability to dwell in *this world* in the name of a *better world* never to come presuppose a moralistic understanding of being, goodness, and philosophy? (C) The aim below will be to provide possible—not definitive—avenues for answering these questions. Our attempt to do so will revolve around Douzinas’ own ambivalent (though not always explicitly so) relation to metaphysics. Each of the sections below will highlight potential problems as well as avenues for further reflection. Each section will also

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<sup>18</sup> This way of putting the matter is inspired by the title of Elisabeth Young-Bruehl’s biography of Hannah Arendt (Elisabeth Young-Bruehl, *Hannah Arendt: For Love of the World* (New Haven: Yale University Press, 1982)). “World” is a key word in Arendt’s thought. On page 324, Young-Bruehl recounts how Arendt originally wished to call her *The Human Condition* “Amor Mundi” (Love of the World).

<sup>19</sup> Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1998) at 320.

<sup>20</sup> Friedrich Nietzsche, *Twilight of the Idols and The Anti-Christ*, trans. by R.J. Hollingdale (New York, N.Y.: Penguin Books, 1990) at 50-51 [Nietzsche, *Twilight of the Idols*]. We have stuck to a literal translation of Nietzsche’s title, whereas Hollingdale translates the title as “How the ‘Real World’ at last Became a Myth”. While he translates *wahre Welt* as “real world,” he notes that *Wahreit* is truth. In “How the ‘True World’ at Last Became a Myth”, Nietzsche points to how the abolition of the true world entails the abolition of the apparent world as well. Elsewhere, he emphasizes the converse: “[I]et at least this much be admitted: there would be no life at all if not on the basis of perspective estimates and appearances; and if, with the virtuous enthusiasm and clumsiness of some philosophers, one wanted to abolish the ‘apparent world’ altogether – well, supposing *you* could do that, at least nothing would be left of your ‘truth’ either” (Friedrich Nietzsche, *Beyond Good and Evil*, trans. by Walter Kaufmann (New York: Random House, 1966) at 46). For a keen account of the social scientification of law based on Nietzsche’s “How the ‘True World’ at Last Became a Myth”, see Marianne Constable, “Genealogy and Jurisprudence: Nietzsche, Nihilism, and the Social Scientification of Law” (1984) 19 *Law & Soc. Inquiry* 551.

point to one or more potential interlocutors—interlocutors with whom a deeper engagement could further Douzinas’ project and implicit account of “world”.

### A. *Utopia: Negative or Unattainable?*

Throughout *The End of Human Rights*, Douzinas’ relation to Kant—and especially neo-Kantianism—is often hostile. Espousing a Hegelian and predominantly epistemological reading of Kant, Douzinas finds more than problematic Kant’s “exclusion of passions and desires from rule-following” as well as the “excessive formalism” of both Kant’s moral law and the “universal community” which it presupposes (195). Ultimately, this “universal community” is of “limited usefulness” in international human rights law because its formalism can lead it to act “as a rationalising and legitimising device for state laws largely devoid of ethical content” (195). Douzinas also tends to “modernize” Kant too quickly either by, mistakenly, asserting the Kantian subject’s “transparency” to itself (189) or by pushing Kant toward (what Douzinas seems to understand as) a Nietzschean “will to will” (195).<sup>21</sup> The point here is not to disparage Douzinas’ reading of Kant.<sup>22</sup> Rather, it is to see how a less epistemological (and possibly more ontological) reading of Kant might reveal much affinity with Douzinas’ own Levinasian project.

First, Douzinas’ criticism of the limited “usefulness” of Kant’s account of the moral law and universal community may reveal more about Douzinas’ own project than about Kant’s. The central practical concept in Kant’s critical project is that of duty. As Douzinas well knows, as is evident in his account of Levinas (e.g., 348 ff.), duty always calls me in the first person and singles me out as subject to its demands. The “point” of an account of duty cannot be to make room for moralistic judgments of others—and especially not of the present or world as a whole.<sup>23</sup> Duty brings me back to my own finitude and to my own constant need to surpass myself in rising to its demands—it does not bring me back to the finitude or imperfection of others or the world so that I can judge them. In this manner, it is quite fitting that the Kantian project is of “limited usefulness” or “unrealistic practically”. Further, in no way could an ontological reading of Kant lead one to understand “the universal community” as a “legitimizing device for state laws largely devoid of ethical content” (195). To read Kant (on the moral law) as providing (purely formal) “tests” for the propriety of

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<sup>21</sup> Douzinas explains that “[b]efore modernity, will was subordinated to the ends it was supposed to pursue within the teleological scheme of the world” (195). In modern times, then, the will becomes its own end, hence the “will to will”. Douzinas needs to say more, however, about the complicated ways in which teleology figures in Kant.

<sup>22</sup> In many ways, Nietzsche is nothing but a radicalization of Kant. For example, with Nietzsche, “In that it wills first and foremost to empower itself to command, the will attains absolute freedom from all laws other than those it posits for itself: it may then lay claim to an unconditioned power to legislate— and thus give a radically new sense to the kantian principle of autonomy” (Philippe Nonet, “What is Positive Law?” (1990-1991) 100 *Yale L.J.* 667 at 670).

<sup>23</sup> Douzinas writes of “judging the world” and of judging “reality” (see e.g., 45).

action or political orders is to seek to deprive the Kantian account of duty from the futurity which properly belongs to it (my duty always lies ahead of me, always calls me to myself) and, indeed, is to displace the always first-person question of duty by the need to judge others. On these sorts of points, Kant's kinship with Levinas may be worth exploring further.

Second, as can be seen in step three of Nietzsche's "How the 'True World' at Last Became a Myth", the never-to-be-attained better future of Douzinas' account is already to be found in Kant. As Nietzsche writes: "[t]he [true] world, unattainable, undemonstrable, cannot be promised, but even when merely thought of a consolation, a duty, an imperative."<sup>24</sup> If one maps Douzinas' story onto Nietzsche's, step three is followed by the rise of positivism, and hence the positivization of human rights. But in the end, this positivization of human rights (which is inherent in their ideological triumph) leads to the abolition of the truer and better world toward which they pointed. We have seen that Douzinas recognizes that a return to the world of the ancients is not possible. Could it be that Douzinas' story requires a kind of "freezing" of the history of metaphysics (for that is what Nietzsche is describing here) at the Kantian stage? At the stage of absolute duty without hope of attainment of the true world?

Douzinas does sometimes gesture in this direction. He writes of "the human ability to disrupt the empirical world and pass beyond the given," of how utopia's "inevitable failure" and "inescapable betrayal" shows "humanity to be an incomplete project fired by the injustices and infamies of this world but unable to reach the state of grace" (377). It is as if no duty, no individual action, no historical "change" would be possible without at least the "thought" of this better, yet never-to-be-attained, world and "state of grace". Thus, "what is", "what is given", "the present", "this world" are all demigrated in the name of an impossible future. Indeed, future *as future* cannot possibly belong to the present. Future must present itself as a constant interference "from the outside" as it were. Similarly, *this world* is understood in terms of a kind of empiricism of the given that needs to be disrupted by human action. Does this mean that proper human action belongs to this world only to the extent that it denies or disrupts it? The next section, then, considers a little further the question of the extent to which Douzinas is susceptible to the kind of criticism he makes of Kant, that is, does Douzinas' espousal of (an albeit negative) two-worlds theory lead to a potentially impoverished understanding of the idea of *a world*, and hence of *this world*? We will thus be in a better position to ask whether Douzinas' neglect of the question of being leads him to adopt an impoverished understanding of "what is", "what is given", "the present", "this world".

### **B. The Immorality of Power as the Empowerment of Morality**

Though Douzinas is keen to avoid the (Kantian) separation of reason and desire by linking his account of human rights with a (Levinasian) desire for the other, his

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<sup>24</sup> Nietzsche, *Twilight of the Idols*, *supra* note 20 at 50.

account often embraces the same kind of Kantian dualisms he seeks to avoid. Particularly apposite is his treatment of “power”. Douzinas writes of the “cynicism and self-serving nihilism of power and power-holders” (13), of the “hypocrisy of power” (122), of “the apologists of power”, of “the impositions of power” (340), of the manner in which “metaphysics remains the plaything of the powerful and the law” (249). Power appears, from the outset, as rotten to the core, even as evil incarnate. References to positive senses of power are rare (but see c.g., 162).<sup>25</sup> Power is generally reduced to an unspecified combination of the will to violence and self-interest that exists separately from a pure realm of morality. Rarely is power understood as indispensable to understanding the human capacity “to act in concert”—as Arendt sometimes seeks to understand it.<sup>26</sup> Always, power needs to be redeemed by right. More to the point: there is no right that belongs to power *as power*.

Early on, Douzinas notes:

the claim that power relations can be translated fully into the language of law and rights was never fully credible and is now more threadbare than ever. We are always caught in relations of force and answer to the demands of power which, as Foucault argued forcefully, are both carried out and disguised in legal forms (7).

What is worrisome is that Douzinas’ tone often suggests that power (now confounded or entangled with force) can almost *never* be “translated” into the language of law and rights. Indeed, “convention” and “law” are themselves almost irredeemably associated with power (244). That in German or French, law *is* right (*Recht* or *droit*) is mostly ignored. Law tends to be reduced to positive law (to *Gesetz* or *loi*) and right ends up being a standard external—not internal—to law. Thus, we are led to believe that no right belongs to law as law. We are led to denigrate law, convention, and power simply because they have always already been understood—in a reductive way—as almost necessarily opposed to morality.

Indeed, Douzinas turns to striking language in his pitting of morality against power. For example, he asserts “the prophesying of a future not yet and not ever present helps in the self-purification of moral ideas contaminated by the powerful”

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<sup>25</sup> Here, Douzinas explicates what a “real” Marxian revolution would entail. He writes: “Freedom will stop being negative and defensive, a boundary and limit separating self from other, and will become a positive power of each in union with others.”

<sup>26</sup> Arendt is careful to distinguish power, strength, force, authority, and violence. Power is not inherently “bad”. Further, those “in power” need to be “empowered” by others. As Arendt explains, “[p]ower is never the property of an individual; it belongs to a group and remains in existence only so long as the group keeps together” (Hannah Arendt, *On Violence* (New York: Harcourt, Brace & World, 1969) at 44). Foucault, too, is careful to distinguish power from violence—and even, to an important extent, from domination. Like Arendt, Foucault points to the belonging together of power and freedom: “[p]ower is exercised only over free subjects, and only insofar as they are free” (Michel Foucault, “The Subject and Power” in Hubert L. Dreyfus & Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics*, 2d ed. (Chicago: University of Chicago Press, 1982) 208 at 221). Thus, both Arendt and Foucault point to the manner in which power is “shared” and never “owned”.

(177). Too often, power is personified or reified rather than understood as an inescapable part of being with others. To put the matter metaphysically: only if power is a being, can we somehow subjugate it and hold it responsible before the tribunal of morality. Indeed, despite their numerous and built-in problems or paradoxes, human rights remain the “main tools we have” against power (245).

However, for Douzinas, power proves to be operative in morality as well. As Koselleck has shown, the immorality of power is nothing but the flip side of the empowerment of morality.<sup>27</sup> Douzinas’ search for “moral principles” underlying human rights is, as he recognizes, inseparable from his attempt to discover “political strategies” (8). Indeed, the Ancient discovery of nature was also a “tactical move motivated by the need to combat the claims of authority which ruled early Greek society” (32). And, “[t]urning nature into norm or into the standard of right was the greatest early step of civilization but also a cunning trick against priests and rulers” (28). Natural law too needs to draw “its power” from somewhere (“the great thinkers of the past”) (179). The sense of rebellion or reform needs to be “powerful” (201). Even the turn to Levinas is bound up with the need for power (to fight power): “[t]he ethics of alterity is as powerful a metaphysics as any humanism” (351). And, the search for ground and the search for power (or force) turn out to be the same. As we have seen, “if the futural aspect of human rights is to be reinforced, it must be anchored in an ethical interpretation of the (desire for the) other which the weak ethics of psychoanalysis cannot support” (379). But whence the priority of the “if”, of the “futural aspect of human rights”? How can such a hypothetical imperative be permitted to command so categorically? Is it proper to think that ethical “positions” can be “reinforced”—can sheer force buttress right? If Douzinas refuses to see the possibility that right belongs to power *as power* how can he so easily see that power belongs to right *as right*? Could it be that it is the (im)possibility of a final victory—rather than the demands of right *as right*—that guides his account?

Indeed, morality’s always-already-achieved-victory over power may reside in the impossibility of its victory, in the “purity” of its speech, perhaps even in its refusal to dwell in *this world*, to let itself be “contaminated”. The “occasional” need for “a remote satellite in order to get the best view of our own earth” (45) can easily lead to a refusal to live in this world. The rebellion against power *as power* (and not merely against power as violence or domination) is part of what Nietzsche refers to as a morality of *ressentiment*, a “slave morality”.<sup>28</sup>

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<sup>27</sup> See Reinhart Koselleck, *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society* (Oxford: Berg, 1988) for an account of the hypocrisy of the morality that claims power by denying that there ought to be power *as power*.

<sup>28</sup> See e.g. Friedrich Nietzsche, *Beyond Good and Evil*, *supra* note 20 at 207, where Nietzsche explicitly links the modern tendency to moralize (clearly pejorative, not to be confused with morality in general) with the suspicion of power and, moreover, with the suspicion of “the whole condition of man”—indeed, “perhaps” even with “a condemnation of man along with his condition.”



All of this may too easily sound like precisely the apology Douzinas seeks to avoid. Must we merely accept the injustices of the present and give up on the (unrealizable but necessary) hope of a better (though impossible) future? At this point, we must take a step back and ask: how have we already understood “the world”, “the present”, “what is given” such that we see the demands of being-in-this-world as coterminous with the surrender of our capacity to judge and even to act? One must emphasize that what is at stake here is not the possibility of judgment but, rather, the world-denial that accompanies the need not simply to judge but to judge “the present”, “the world”, to judge absolutely.

### C. *The Identity—or Not?—of Being and Goodness*

*The End of Human Rights*' entanglement with metaphysics comes to the fore in the account's acceptance of the stark dualisms of apology and utopia, power and right, is and ought, fact and value, real and ideal. Douzinas recognizes the manner in which one of the terms can easily collapse into the other: how utopia can collapse into apology, how right can collapse into power and so forth. Nevertheless, holding on to these dualisms—or at least holding on in the stark manner in which Douzinas wishes to do so—is evidence of metaphysical thinking. When it comes to the possibility of letting go of metaphysics, the fear is precisely that we will be left with no ground on which to stand, no standpoint from which to judge: the fear is precisely that of “ek-sisting”: of standing “out” in the openness of being.<sup>29</sup> World-denial is manifest when we understand “the identification of what exists with the good or the true” as “the blockage, the disease” (379).

Though he does not note it, Douzinas' account of the birth of radical natural right (which he links to the birth of philosophy) doubles as an account of the birth of metaphysics. For metaphysics is manifestly marked by the stark separation between the power, “is-ness”, factuality, and reality of this world and the right, ought, values, and ideals of the other world that grounds this one. Is not Douzinas beginning to follow the Plato of Platonism, that is, a Plato made metaphysical, when he implies that what exists, namely *is*, cannot be *good* or *true*? That what *is* is deficient merely because it *is*? But Douzinas also recognizes that the identity of being and goodness is one that belongs to the Ancient world. Thus, he appears to recognize the inseparability of is and ought, of being and goodness. Nevertheless, he insists that

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<sup>29</sup> Douzinas understands existence, quoting Ferry and Renault, as the “ability to break away, to ‘wrench oneself free of codes’” (199). (Luc Ferry & Alain Renault, *Heidegger and Modernity*, trans. by F. Philip (Chicago: University of Chicago Press, 1990) at 4.) Though this may, arguably, be entailed by existence it is not existence's primary sense in Heidegger. The problems of voice and summarizing manifest themselves here with Douzinas turning to Ferry and Renault rather than to Heidegger himself. As Heidegger writes, “ek-sistence means standing out in the truth of being.” In Heidegger, ek-sistence is “thought in terms of ecstasis” and out of the belonging-to-one-another of the human being and truth: Martin Heidegger, “Letter on ‘Humanism’” in Martin Heidegger, *Pathmarks*, ed. by William McNeill (Cambridge: Cambridge University Press, 1998) 239 at 249.

natural right is “transcendent” to “reality” and, in that sense, is an “ideal” (30). Indeed, it is precisely the “possibility of judging the real in the name of the ideal” that is born with natural right and philosophy (32). What are we to make of this?

Though the Greek *physis* and our *future* can be properly heard, and hence understood, as saying the same, Douzinas seems to push the ancients in our direction, as if turning their *physis* into our *future* and imputing to them a “teleological” conception of history. Thus, his account requires an Ancient “ideal” justice “which promises a future perfection and judges reality in its name” (45). The introduction of a historical teleology—even if negative—into the ancient world pushes it toward a specific kind of Christian metaphysics where *is* and *ought* can no longer belong to the same world, where their separation is a stark one. Perfection begins to be impossible, perhaps because it begins to be ascribed to the fate of humanity as a whole, whereas perfection, in the Greek world (as opposed to, say, with Kant), is possible—at least for some (although few) individuals.<sup>30</sup>

This particular introduction of history also constitutes an introduction of moralistic understandings of goodness (and hence of being) in which *this world* is in need of redemption by the true world. The stark separation of *is* and *ought* allows one to begin to conceive of this world as, somehow, *immoral*. The power and rule that necessarily belong to this world come to be seen as irreparably tainted. Being and goodness can no longer be understood together precisely because it is beings as a whole—the world, the present, what is given—that we feel compelled to judge. This need to judge *absolutely* contributes to the positivization of nature that Douzinas points to (though he points to this positivization as part of the decline of radical natural right). In this manner, Douzinas does not wish to depict philosophy as being born out of wonder, out of wonder that there *are* beings rather than nothing, out of the wonder of being.<sup>31</sup> Rather, philosophy needs to be born as *political philosophy*, as (imperious) moral rebellion, as a kind of “act of resistance” (25). In this way, the

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<sup>30</sup> See e.g. Philippe Nonet, “In Praise of Callicles” (1989) 74 Iowa L. Rev. 807 at 808 [footnotes omitted], where Nonet refers to the myth at the end of Plato’s *Gorgias*:

In some, not all, Christian interpretations of Platonic thought, particularly the Augustinian, which inspired the main themes of the Reformation, the supersensible realm is thought almost inaccessible to man in this world. To Augustine, “our justice, although true, is nevertheless in this life only such as consists in the remission of sins [by God’s grace] rather than in the perfection of virtues.” Not so in Plato. The thought that human law is necessarily futile, i.e., that there can be no salvation by good works, is utterly alien to Plato. On this point the myth of judgment speaks quite clearly: some men, and at least one temporal prince, Aristides the Just, reach the Islands of the Blessed, and do so on account of their just life on earth, unaided by the grace of a Redeemer. *The good is hard to reach, but not impossible, on this earth. Only if justice is attainable in this life can there be, at least in principle, such things as a just and true rhetoric and a truthful philosophic refutation.* [emphasis added]

<sup>31</sup> On wonder as a basic attunement or mood (*Stimmung*), see Martin Heidegger, *Basic Questions of Philosophy: Selected “Problems” of “Logic”*, trans. by Richard Rojcewicz & André Schuwer (Bloomington: Indiana University Press, 1994) at 131ff.

question of goodness is understood moralistically and severed from the question of being. But can there be ethics without—or before—ontology?

### Conclusion: In the End—Ontology *and* Ethics?

Ultimately, Douzinas wishes to follow Levinas (*contra* Heidegger) in asserting a priority of ethics over ontology. Nevertheless, we are never truly presented with Heidegger's understanding of ontology. Douzinas remarks that “[t]his is not the place to discuss Heidegger's ontology in detail” (207). Rather, Douzinas points to how Heidegger “famously refused to develop an ethics to complement ontology” (210). Though he notes that Heidegger sought to bring ethics back to the “original Greek meaning of *ethos*” and conceived of this “primordial ethics” as “an integral part of ontology”, Douzinas nevertheless criticizes “Heideggerian ontology” which “by privileging the relationship between beings and Being abandons ethics in favour of the primordial *ethos*” (211).<sup>32</sup> Douzinas prefers a Levinasian priority of the other to what he understands as a Heideggerian preoccupation with “the ‘we’ through which we share the world.” Indeed, “all speculation as to the meaning of Being starts from the examination of my own being and returns to ontology's preoccupation with the self” (346).

Douzinas' account of the “ontology of alterity” (350) leaves the “other” as “ground”. Thus, “[t]he ethics of alterity is as powerful a metaphysics as any humanism.” And, “[i]f one wants to maintain the world-shaping urge that animates the metaphysics of subjectivity, if one wants to find an—admittedly contested—basis for the absolute, non-historical character claimed for human rights, one must turn to the other-dependent kernel of individuality” (351). Indeed, Douzinas goes so far as to assert that “[a]ll humanity and every right proceed from this primacy of ethics over being and of obligation over need or interest” (352).

We will not seek here to resolve the question of the propriety of the manner in which Douzinas reads Heidegger (or adopts Levinas' reading of Heidegger, or even reads Levinas<sup>33</sup>). For example, Derrida has already anticipated some significant ways in which the Levinasian reading of Heidegger is quite pertinent to Douzinas' “subjectivistic” depiction of Heidegger's thought.<sup>34</sup> What is of import here is that the primacy of the other, and hence of duty is—in the end for Douzinas—intimately related to the need to “maintain the world-shaping urge that animates the metaphysics of subjectivity” (351). Douzinas' understanding of transcendence turns out to be

<sup>32</sup> For a careful account of how Heidegger's thought is always already directed toward ethics (properly understood), see Philippe Nonet, “Judgment” (1995) 48 Vand. L. Rev. 987.

<sup>33</sup> Though Douzinas seems to adopt Levinas' reading of Heidegger. Heidegger himself explains that “the thinking that ponders the truth of being” is “neither ethics nor ontology” and prior to the distinction between “theoretical” and “practical” thinking (Heidegger, “Letter on ‘Humanism’”, *supra* note 29 at 271-72). In other words, the pitting of different branches of philosophy (such as ethics and ontology) against one another is not at all consonant with Heidegger's thought.

<sup>34</sup> See e.g. Jacques Derrida, “Violence and Metaphysics: An Essay on the Thought of Emmanuel Levinas” in *Writing and Difference*, trans. by Alan Bass (London: Routledge, 1978) 79 at 97.

metaphysical after all: "world" is not itself understood transcendently (or ontologically). Rather, "world" must be reified or objectified so that we can transcend it, or "shape", or master it. Similarly, the (perhaps proper) privileging of the future in the temporality of human being-in-the-world is tied to (the not so proper) will to master the conditions of human existence. Duty ends up being anchored in the (impossible) human right to remake this world in the image of a better one because this world *is* not—or is not enough.

But, in the end, duty *is* and its being, as Kant understood, cannot be reduced to the production of a world. Similarly, *physis* or nature is not, as we sometimes might wish, reducible to a transcendent ground (even if somehow immanent to history and "reality") on which we can stand and judge this world. Rather *physis* is the self-arising of a world<sup>35</sup> and points us in the direction of the mystery that beings are, and indeed, that there is (*es gibt*) being.<sup>36</sup> The quite understandable fear that leads us to insist on a radical separation of *is* and *ought* is often a demand that the *is-ness* of duty, its very being, be grounded in, or redeemed by, a better world that it might produce for us—and this is so even if that world is understood as impossible and out of reach.

In the end, as in the beginning—and perhaps as with "the other"—duty simply *is*.<sup>37</sup> And with the rediscovery of duty *as duty* perhaps we will recover the world, this world, *our world*, as well.

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<sup>35</sup> See e.g. Martin Heidegger, *An Introduction to Metaphysics*, trans. by Ralph Manheim (Garden City, N.Y.: Anchor Books, 1961) at 11-13.

<sup>36</sup> *Es gibt* can be translated both as "it gives" and "there is" but it is predominantly as "it gives" that it should be heard. Heidegger turns to *es gibt* because "'is' is commonly said of some thing that is. We call such a thing a being. But being 'is' precisely not 'a being'" (Martin Heidegger "Letter on 'Humanism'", *supra* note 29 at 255).

<sup>37</sup> In *Groundwork of the Metaphysic of Morals*, Kant demonstrates the identity of freedom and duty. He also points to the finding of reason (and hence freedom) in oneself as a showing of the being of duty: Immanuel Kant, *Groundwork of the Metaphysic of Morals*, trans. by H.J. Paton (New York: Harper & Row, 1964).