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THE GROUNDS OF HUMAN RIGHTS

Brian Slattery*

14 May 2021†

What is the rational foundation for the doctrine of universal human rights? Some philosophers, such as Alan Gewirth, argue that it may be discovered simply by reflection on certain essential features of the human constitution. However this approach has significant problems, achieving its ends by smuggling certain tacit premises into the argument. A better approach is one that appeals to the communal practices and traditions within which doctrines of human rights have evolved historically. It is here that Alasdair MacIntyre's work becomes relevant, because it maintains that traditions have a rationality of their own, and that all rationality is in some sense traditional. That MacIntyre himself has used these ideas to dismiss the doctrine of universal human rights only shows the extent to which MacIntyre (like many others) has misunderstood the true character of that doctrine.

Introduction

Robert Coles tells the story of a boy he met while working in the American South with black and white children involved in the conflicts over the integration of white schools.¹ The boy was just fourteen years old – a white from a 'redneck' background, a tough athlete, and a poor student. He was initially against any blacks coming to his school. However, one day he had a strange experience. Here is the boy's story in his own words, followed by some comments by Coles:

‘I didn't want any part of them here. They belong with their own, and we belong with our own – that's what we all said. Then those two kids came here, and they had a tough time.

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† This is a revised version of an article entitled “Rights, Communities, and Traditions”, which first appeared in (1991) 41 University of Toronto Law Journal 447-67. I have clarified and recast some of the arguments but the basic structure of the original piece remains intact. I am indebted to Professors Hans Mohr and Kent McNeil for their comments on an earlier draft.

¹ *The Moral Life of Children* (Boston: Atlantic Monthly Press 1986) 27-29. The racial slurs found in the original passage have been abridged.

They were all by themselves. The school had to get police protection for them. We didn't want them and they knew it. But we told them so, in case they were slow to get the message. I didn't hold back, no more than anyone else. I said, "Go, n-----, go," with all the others. I meant it. But after a few weeks, I began to see a kid, not a n----- – a guy who knew how to smile when it was rough going, and who walked straight and tall, and was polite. I told my parents, "It's a real shame that someone like him has to pay for the trouble caused by all those federal judges."

Then it happened. I saw a few people cuss at him. "The dirty n-----," they kept on calling him, and soon they were pushing him in a corner, and it looked like trouble, bad trouble. I went over and broke it up. I said, "Hey, cut it out." They all looked at me as if I was crazy, my white buddies and the n-----, too.

But my buddies stopped, and the n----- left. Before he left, though, I spoke to him. I didn't mean to, actually! It just came out of my mouth. I was surprised to hear the words myself: "I'm sorry." As soon as he was gone, my friend gave it to me: "What do you mean, 'I'm sorry'!" I didn't know what to say. I was as silent as the n----- they stopped. After a few minutes, we went to basketball practice. That was the strangest moment of my life.'

His life had, in fact, changed [comments Robert Coles]. In no time, it seemed, he was beginning to talk more consciously (more self-consciously, actually) to the black youth. Soon, he was championing him personally, while still decrying 'integration.' Finally, he would become a friend of the black youth's and advocate 'an end to the whole lousy business of segregation.' Meanwhile, it was for me to explain that shift – in an ordinary, fourteen-year-old boy just starting high school; a boy who, by the way, had to endure lots of scorn himself from the many others who were not as swift as he to show a change in racial attitudes. Press and press that youth, and what does one find? He told me: 'I'd be as I was, I guess,

but for being there in school that year and seeing that kid – seeing him behave himself, no matter what we called him, and seeing him being insulted so bad, so real bad. Something in me just drew the line, and something in me began to change, I think.'

A striking feature of this story is the fact that the white youth – let us call him Jim – was moved to do something that seemed inexplicable to him at the time, and that went against his basic convictions and those of his friends. Not that his move to defend the black youth – let us call him Martin – came totally out of the blue. Clearly Jim had been pondering the troubles at his school and discussing them with his parents and friends. And he had already observed it was a shame that Martin should have to suffer for troubles stirred up by others. But his decision to intervene apparently did not flow from any dramatic change in his earlier views about the rights of blacks in general.

To the contrary, Jim seems to have acted on the spur of the moment, in response to a particular set of facts. Only later did he work out the broader implications of his actions, and then in stages. At first he restricted himself to championing the cause of one particular black student, while still supporting racial segregation. But later he began calling for an end to the 'whole lousy business.' His decision to intervene became for Jim an occasion of moral insight, with ramifications extending far beyond what he consciously realized at the time.

Jim originally denied any ties of community with blacks: 'I didn't want any part of them here. They belong with their own, and we belong with our own – that's what we all said.' This rejection of communal bonds released Jim and his friends from normal social constraints, so that they felt free to insult the black students, to corner them and beat them up, with the aim of driving them from the school. What made Jim change was his spontaneous empathy with Martin, his identification with him as a human being: 'But after a few weeks, I began to see a kid, not a n----- – a guy who knew how to smile when it was rough going, and who walked straight and tall, and was

polite.' In a sense, Martin demonstrated by his actions and manner the validity of the moral point he was making. He displayed qualities of courage and grace that Jim, despite himself, could not help admiring – qualities that were recognized as virtues in Jim's own circle. So, Jim's empathy with Martin was not simply a spontaneous act of personal insight; it had a strong basis in existing communal standards by which moral status and personhood were defined.

This feeling of empathy prompted Jim to defend Martin and, unexpectedly, to blurt out, 'I'm sorry.' Jim's buddy was quick to realize the significance of the apology, quicker, it seems, than Jim himself. You only apologize to someone you have wronged; but you cannot wrong someone to whom you owe nothing. From a spontaneous feeling of empathy there flowed a tacit recognition of communal bonds. And Jim's identification with Martin did not remain just at a personal level; eventually it led him to accept the justice of blacks' demands to be treated as full members of the community, with the rights that membership entailed. Martin stood in for the group to which he belonged. To accept Martin as a friend and fellow student was in the end to recognize blacks as fellow citizens. So, not only are basic rights grounded in the recognition of community, they also have a communal aspect, spreading out from the individual to the group.

Jim and Martin did not act in a vacuum, of course, but in a particular social and historical context. Martin was being persecuted, not for any individual attributes, but because he belonged to an excluded group, with a history rooted in slavery, segregation, and discrimination. And Jim originally joined in persecuting him, not for personal reasons, but to defend the interests of the white community. Society had assigned definite roles for people like Jim and Martin to play. The interest of the drama lies in the fact that the actors ultimately refused to play their allotted roles. Martin defied the racial barriers surrounding white schools, and Jim, put to the test, could not stomach the sanctions supporting those barriers.

To enlarge a little on this point, Martin came to the school, not just on his own initiative, but as a participant in a broadly-based social

and political movement, in which black demands for equality and basic rights were concretely manifested in the actions of a wide variety of individuals, groups, officials, and institutions. These ranged from the black students actually 'integrating' the schools, to various civil rights organizations, to the judges of the federal courts. The latter in turn acted in a context of well-established judicial practices and doctrines, stemming in part from the American Bill of Rights but also from certain ancient traditions of the common law. In a parallel way, Jim's act of intervention, although revolutionary for a person of his upbringing and social situation, followed a path prepared for him in advance. It was presented to him as a concrete possibility only because of the acts of innumerable other people, representing years of agitation, organization, debate, theorizing, and litigation. Jim's individual act of conscience had strong social dimensions; it responded to an opportunity made ready by an ongoing social movement.

Indeed, the conflict as a whole took a form largely moulded by existing social practices. Martin's goal was not just to establish an abstract point about black rights but more concretely to obtain the full benefits of an existing social institution – the public school system – which were being denied to him and his fellows. The matter in dispute was defined by a broad range of social arrangements already in place, whereby a certain level of education was provided at public expense to children – the question being the manner in which it was to be provided. What was at root a general issue of human rights assumed a very particular shape due to the local social and political environment.

We have emphasized the social and historical dimensions of the incident recounted by Coles. A possible implication of this approach now needs to be considered. Coles tacitly presents Jim's story as one in which a teenage boy transcends his personal beliefs and the moral code of his community. Yet, it could be argued, this theme is fundamentally misleading. For there is another side to the drama that needs to be considered, one that Coles does not emphasize. It is the story of Jim's white friends, who were dumbfounded by what Jim did and presumably kept on harassing the black students. In comparing

their actions with Jim's, can we see any real difference? In each case, it could be said, the boys acted out of a particular mix of the moral code inculcated by their families and communities, broader social influences, and their individual personalities and sympathies. Of course, we may happen to think that Jim's stance was 'better' than that of his friends. However, that is just a matter of subjective preference. Objectively, there is no basis for distinguishing between the two, for in matters of morality there can be no objectivity.

This seems to me a hard lesson to learn. If Coles's story has any meaning, it is one that speaks of the possibility of moral transcendence, albeit a possibility that is both fragile and oddly dependent on chance and circumstance. For the story draws its force from the implication that Jim moved to a position more in tune with some sort of ultimate moral reality. Whatever form that reality might take (and the story is silent on this point), it clearly has a transcendent quality, in rising beyond the racist moral code of Jim's community and also Jim's personal dispositions. I suspect that most readers, like myself, will be attracted by the underlying theme of Coles's story, even if we are puzzled by the notion of an ultimate moral reality or have difficulty in reconciling it with the obvious connections between a person's moral beliefs and social forces.

But if Jim's insight was in some way attuned to an ultimate moral reality, it was, as we have already emphasized, an insight into a concrete situation, the dimensions of which were shaped by existing practices. Moreover, Jim's intervention was prompted by the conviction that Martin deserved to be treated like any other student. Jim simply extended the existing standards of his community to someone previously viewed as an outsider. The equal treatment to be meted out to Martin was implicit in the body of practice Jim already accepted as a just or 'normal' way of treating other members of the community. So, the ultimate moral reality towards which Jim was groping was partially immanent in existing communal practices and standards.

Coles's story, then, suggests a number of interesting points about the character and origins of human rights. Let me try to summarize them.

Human rights doctrines, although often couched in highly abstract terms, are rooted in concrete moral insights into our relations with others. In particular, they draw on our ability to empathize with other people, including those who may traditionally have been viewed as alien or unworthy. So, human rights doctrines are essentially other-directed. They are concerned with what we owe to others by reason of the fact that they are human. Yet, in practice, the recognition of basic rights in others is closely connected with accepting them as members of a community. Human rights do not precede communal ties, they presuppose them. By the same token, while human rights are vested in individuals, they often relate to aspects or dimensions of individuals that stem from their membership in socially defined groups. In vindicating the rights of the individual, we vindicate the rights of the group. Such acts do not occur in a historical vacuum. They are the product of a lengthy evolutionary process involving the development of practices of tolerance and cooperation between different societies and groups, gradually supplanting practices of intolerance and domination. Despite these deep historical roots, human rights doctrines have a revolutionary potential, a potential that lies largely in their claim to be attuned to an ultimate moral reality.

These points cluster around four main themes: (1) the important role played by concrete acts of empathy and insight in the evolution of human rights doctrines; (2) the communal aspects of such doctrines, in both their underpinnings and practical implications; (3) the complex interplay between, on the one hand, established social practices and, on the other, human rights movements as historically rooted, socially embodied forces for change; and (4) the paradoxical fact that human rights are immanent in social practice and yet speak clearly of transcendence. In short, we have portrayed human rights as concrete, communal, historically grounded, and transcendent.

The picture contrasts with the view that human rights flow from highly abstract doctrines that focus on the individual in isolation from the community. According to this view, individuals come to society already holding inalienable rights. These rights limit the claims that society may make on individuals and control the shape

that a community may assume. Human rights are grasped by a process of reflection that prescind from history and social practice and carries universal force by virtue of its inherent rationality. On this view, then, human rights are abstract, individual, ahistorical, and rationally based.

This contrasting viewpoint, I think, fails to attend sufficiently to the way in which human rights doctrines have actually arisen and gained acceptance in practice. It ignores the historical realities of human rights movements – movements to achieve religious tolerance; abolish slavery; improve conditions in prisons; dismantle colonial empires; broaden the franchise; provide social services; gain full political and social rights for blacks, indigenous peoples, and women; and so on. Our brief discussion of Coles's story suggests how this sort of historical analysis might proceed and the kind of conclusions likely to be drawn.

But the exercise, even if it succeeds in presenting a credible alternative to the rationalist approach, cannot directly counter the latter's appeal, which lies, not in any pretence of historical verity, but in an assertion of inherent rationality – the claim to provide an ahistorical account of the grounds of human rights. So, we need to confront this view more directly.

We will start with the writings of Alan Gewirth, a modern exemplar of the rationalist approach. In a series of carefully argued works, notably *Reason and Morality*,² Gewirth has maintained that human rights have a purely rational foundation which is discoverable simply by reflection and gives them universal force. We will then turn to the contrasting views of Alasdair MacIntyre, who in such works as *After Virtue*³ and *Whose Justice? Which Rationality?*⁴ has claimed that human rights doctrines are bogus. They are the convenient fictions

² (Chicago: University of Chicago Press 1978). See also his collection *Human Rights: Essays on Justification and Applications* (Chicago: University of Chicago Press 1982) (hereafter *Human Rights*).

³ 2d ed. (Notre Dame, Ind.: University of Notre Dame Press 1984).

⁴ (Notre Dame, Ind.: University of Notre Dame Press 1988) (hereafter *Whose Justice?*).

of modern individualistic societies, which assume that the common good is nothing but the sum of our individual preferences, while repudiating history and tradition as grounds for moral reasoning. In reality, maintains MacIntyre, our ideas about justice are necessarily grounded in the standards and practices of particular societies and schools of rational enquiry. There are no neutral standards of rationality available to provide a foundation for universal human rights.

Rights and rationality

What basic obligations do you owe to other people simply by reason of the fact that they are human? Alan Gewirth argues that the answer may be discovered just by reflecting on your own make-up. From some essential features of your own constitution you may deduce what basic obligations you owe to others with the same constitution, and so what basic rights they possess.

At first glance this approach seems to attempt the impossible. How may obligations to others be logically deduced from one's own personal characteristics without covertly introducing premises that bridge the gap between the self and others? The project has the same quirky appeal as an effort to build a perpetual motion machine: we suspect at heart that it can't be done, but we're fascinated by the attempt to do it.

Gewirth's argument, in brief, runs as follows.⁵ As a rational person you are bound to accept the proposition, 'My freedom and well-being are necessary goods,' because these goods are the essential prerequisites of action of any kind. No matter what you want to do, you must have a certain basic level of freedom and well-being in order to be able to do it. Gewirth calls freedom and well-being 'generic goods' because they characterize the entire range of possible actions.

⁵ See especially *Reason and Morality*, supra note 2, chapter 2, and *Human Rights*, supra note 2, essay 1.

If you reflect further on the necessary connection between generic goods and action you will necessarily accept a second proposition: '*All other persons* must at least refrain from removing or interfering with my freedom and well-being.' This proposition follows logically from the first because, from your own perspective, you cannot achieve any of your objectives unless others respect the essential preconditions of action on your part. So you are logically obliged to claim that they respect your generic goods.

This claim in turn requires you to assert a third proposition: 'I have *rights* to freedom and well-being.' This proposition is logically entailed by the second proposition, because to deny it would be to accept that other people may interfere with your freedom and well-being, which you cannot accept because these goods are the fundamental goods of action.

Having come this far, argues Gewirth, you must also accept that *all other beings with the capacity for rational action* have the same rights to freedom and well-being. If your ability to engage in rational action warrants your assertion of rights to generic goods, the same holds true for all others with the same ability. Since the capacity for rational action is common to the whole of humanity, you are logically committed to accepting universal human rights to freedom and well-being.

An argument of this kind is open to two sorts of challenges. The first tries to show that the argument fails on its own terms, that its conclusions do not follow inexorably from its premises, or that the premises themselves are open to doubt. A second, related challenge attempts to undermine the universal force claimed for the argument by showing that it is rooted in conceptions particular to modern Euro-American culture. Both sorts of criticisms are advanced by Alasdair MacIntyre in his discussion of Gewirth. Although not of equal strength, the criticisms neatly define the range of issues separating the two camps.

MacIntyre first tackles the argument on its own terms. According to Gewirth, someone who holds that freedom and well-being are

necessary goods is logically committed to claiming a *right* to those goods. But, observes MacIntyre, introducing the concept of a right at this point needs justification. To claim that I have a right to something goes beyond merely asserting that I *need* it, because it entails that others should refrain from interfering with whatever I have a right to. Yet this conclusion does not follow from the simple assertion of a need, no matter how basic or urgent the need may be. So it is wrong to think that the assertion of a right is logically entailed by the assertion of a need.⁶

However, Gewirth is not so easily dispatched; he has a plausible reply at hand. Of course, he says, just because someone *needs* something does not mean they have a *right* to it, since the latter posits duties on others which the first does not. But the situation changes when you move from an external to an internal perspective, from statements about others to statements about yourself. When you assert that you need certain goods as the necessary grounds of action, you are logically committed to asserting that others must respect those goods and (what amounts to the same thing) that you are entitled to them. The logical gap between assertions of needs and assertions of rights vanishes when you are speaking of your own essential requirements. The recognition that you must have certain goods in order to be able to engage in action compels you to claim that others must respect those goods.⁷

How convincing is Gewirth's reply? It seems true that in everyday speech we move readily and without much sense of logical impropriety from the statement that we have a basic *need* for freedom to the assertion that we have a *right* to it. The appeal of Gewirth's argument lies in its evocation of this familiar pattern of thought. The question is whether the inference succeeds only by tacitly relying on additional premises. If so, and if such premises do not command our automatic assent as actors, then Gewirth's argument fails by its own exacting standards of rational necessity.

⁶ *After Virtue*, supra note 3, 66-67.

⁷ *Human Rights*, supra note 2, 48-51.

Of course this does not mean that the argument, suitably altered and fleshed out, might not succeed by some other standards.

Does the argument tacitly appeal to hidden premises? I think it does. Consider the following example. You are hiking through the mountains of a remote area in the dead of winter. As you make your way down a valley, you glance at the masses of snow poised in the peaks above and wonder about the potential for an avalanche. Is that a rumble you hear in the distance? Despite your rising unease and the obvious fact that an avalanche would (as it were) impact adversely on your generic rights, you would presumably not consider claiming that you have a right *as against the snow* not to be buried alive. Your acceptance of the statement 'I must have a measure of freedom and well-being' does not logically require you to claim that the massed snow 'must' respect your generic goods. It only warrants the statement that the snow's remaining in place is an essential precondition for your continuing existence as an agent. The reason seems to be that the snow is not capable of acting in the light of rational considerations.

So before your assertion of a need for generic goods can logically entail a claim of right as against others, it must be supplemented by premises about the character of the other beings in question. At the least, you must posit that they are capable of reasoned action. In itself this point is not damaging to Gewirth's argument, which explicitly limits an agent's claim to other beings of this type.⁸ Nevertheless, it raises the question why it is essential that an entity have the capacity for reasoned action before you can claim a right against it. Otherwise this limitation on your assertion of rights would be irrational, and you would logically be required to advance the same claim against inanimate objects as you do against people. There must be some close link between the concept of a right and the capacity for reasoned action.

⁸ See, e.g., *Reason and Morality*, supra note 2, 72: "He claims as his prudential due certain general goods that *every other prospective agent* can likewise recognize as necessary for his respective agency." (emphasis added)

The link seems to be that *a right only exists when it give others a good reason to respect the claim it embodies*.⁹ Thus, your assertion of a need for generic goods logically requires you to claim a right against others only on the supposition that the character of your needs gives others a good reason to respect them. Now, the fact that freedom and well-being are essential preconditions of your capacity for action clearly gives *you* a good reason to hope or wish that others will respect your generic goods, but it does not warrant the belief that what is a good reason for you is necessarily a good reason for others. Your basic need for freedom and well-being can supply a good reason for others *only on the supposition that they have some concern for your welfare or are otherwise bound to take it into account*. This is as true from the internal perspective of the claimant as it is from an external one. Adopting the internal perspective does not require you to blind yourself to the character of the entities you are making claims against.

Suppose, for example, that the mountains are inhabited by a reclusive group of people who are hostile to outsiders and do their best to repel them by all means at their disposal, including triggering avalanches. Because of their history of maltreatment at the hands of foreign invaders, these people have no sympathy with outsiders nor concern for their welfare. In what way would your need for generic goods justify you in claiming that they are obliged to respect your freedom and well-being? The inference is only justified, it seems, on the assumption that there is a minimal sympathy, community, or state of reciprocity between you and these people, in the light of which your claim to basic needs gives the latter reason to respect them. It is only because we tacitly assume this holds true of other members of our own society that we feel comfortable in moving from assertions of basic needs to assertions of rights.

So Gewirth's argument requires an additional premise. This holds that all other human beings are in a state of community with us, such that they are obliged to respect the goods necessary for our existence

⁹ Compare Neil MacCormick 'Gewirth's Fallacy' (1983-84) 9 Queen's LJ 345.

as actors.¹⁰ But there is nothing in our understanding of ourselves as potential actors that seems to require or justify this assertion. So Gewirth's argument fails by its own standards. Of course, if we are prepared to accept on other grounds that all human beings form a single community, then the argument may succeed in another form.

But let us now waive this objection and grant Gewirth his proposition that, from within the internal perspective of the claimant, the assertion of a basic need logically entails the assertion of a right as against other people. The question is whether this proposition is sufficient to generate Gewirth's conclusion that we are bound to recognize that other people have rights against us.

Here a new difficulty arises. The move from an assertion of need to one of right is only logical, on Gewirth's own account, from within the claimant's internal perspective. From an external perspective, as noted earlier, there is a logical gap. So, when we universalize the inference from need to right that we draw internally, the most we are committed to holding is that *from within the internal perspective of others* their assertion of basic needs logically requires them to assert rights against us.

But our insight into the internal logic of other people's claims does not give those claims any purchase on us or require us to concede that they actually impose obligations on us. Gewirth has only shown that, by reflecting on the internal logic of our own claims, we may come to understand the internal logic of similar claims made by others. However such claims, as Gewirth concedes, are not logically justified when seen from the external perspective. Yet this is the perspective we are bound to take with others, unless our insight into their minds evokes a pre-existing recognition of community or itself prompts that recognition.

This analysis of Gewirth's argument, then, supports a central conclusion drawn from our discussion of Coles's story. Human rights

¹⁰ Gewirth discusses a similar objection in *Reason and Morality*, supra note 2, 72, 74-75, however his treatment of the subject skirts the main issue.

cannot be derived simply from philosophical reflection on the characteristics of the individual considered apart from society. Human rights are bound up with the recognition that people are in a state of community, which is to say that they are united by a moral bond requiring each to respect the other. For an argument like Gewirth's to succeed, it has to add premises about the existence of human community and show how these premises can be rationally grounded. Such an enterprise must overcome two related obstacles. The first is to establish that a state of community is even *possible*, that people can in certain circumstances be morally bound by mutual duties of respect. The second is to show that this community of mutual respect is both *actual and universal*, that it includes all human beings.

We will return to these questions later. But first it will be useful to examine MacIntyre's second criticism of Gewirth. This queries the degree to which Gewirth's argument can be successfully detached from the unique social and intellectual context of modern Western societies.

Macintyre's argument runs as follows. Claims to rights presuppose the existence of a socially established set of rules. But such sets of rules only come into existence at particular historical periods under particular social circumstances; they are far from being universal. Terms for 'a right' in English and other languages only appeared at a relatively late period in history, near the close of the middle ages. There is no equivalent expression in any ancient or medieval language, be it Hebrew, Greek, Latin, Arabic, English, or Japanese. True, the existence of such expressions is not in itself necessary for rights to exist, so long as the concept of a right is actually embodied in forms of human behaviour. However, as a matter of historical fact, the social institutions or practices necessary to render a claim to a right intelligible have not existed in all human societies. In the absence of such social forms, laying claim to a right would be like presenting a check for payment in a social order that lacked the institution of money. Thus, Gewirth has smuggled into his argument a concept that does not belong to the minimal characterization of a

rational agent, but stems from social forms particular to modern Western societies.¹¹

Does MacIntyre's argument succeed? I think it fails, and the reasons for its failure tell us much about the deficiencies of MacIntyre's own understanding of human rights doctrines. Let us suppose, for the sake of argument, that MacIntyre is correct in contending that there was no word for 'a right' in many ancient and medieval languages.¹² As he concedes, it does not follow that speakers of these languages lacked the means of conceptualizing or expressing the moral and legal relationships that the modern term 'right' evokes. What MacIntyre does not seem to realize is how ubiquitous such relationships are. Far from being unique to modern Western societies, they lie at the root of societies as such.

The question of what rights a person possesses is at base the question of what is *due* to that person. As Simone Weil has observed: 'The notion of obligations comes before that of rights, which is subordinate and relative to the former.'¹³ Although the concept of a 'right' is a convenient way of expressing what is due to a person from that person's point of view, it is hardly essential to an understanding of the underlying structure of an obligation. What is common to the notions of right and obligation alike is the concept of a *bond* between people by virtue of which one owes something to the other. Binding moral or legal relationships and their concrete embodiments in social life are of course hardly confined to modern societies; they are found in all societies, however small or loosely structured.¹⁴

So, if we are entitled to use the notion of a binding moral relationship, we are entitled to use the notion of a right. The point is

¹¹ *After Virtue*, supra note 3, 67-68, 69.

¹² For helpful discussions, see John Finnis *Natural Law and Natural Rights* (Oxford: Clarendon Press 1980) 198-210; Fred Miller, *Nature, Justice, and Rights in Aristotle's Politics* (Oxford: Clarendon Press, 1995), especially Chapter 4.

¹³ *The Need for Roots: Prelude to a Declaration of Duties Towards Mankind* A.F. Wills (trans.) (London: Routledge and Kegan Paul 1978) 3; first French edition 1949.

¹⁴ Gewirth makes a similar point in *Reason and Morality*, supra note 2, 98-102.

the mirror twin of the one made earlier in discussing Gewirth. There we argued that the existence of rights presupposes the existence of a community; here we argue that the existence of a community presupposes the existence of rights. Of course, to note that the concept of a binding relationship is an essential precondition for the existence of a community is not to show that the concept has a rational foundation, as opposed, for example, to one arising from evolutionary advantage. It is yet another task to establish on purely rational grounds that such relationships unite the whole of humanity, quite apart from existing social practices.

If we doubt, along with MacIntyre, that human rights can ever be rationally established simply by reflection on some features of the human constitution, we are left to wonder if there can be any rational foundation for these rights at all. MacIntyre, characteristically, does not shrink from a flatly negative conclusion. The best reason, he writes, for asserting that there are no such things as human rights is the same as the best reason for saying that there are no witches or unicorns: every attempt to give good reasons for believing in them has failed. Some philosophers, he notes, have asserted that natural rights are self-evident truths; but we know that there are no self-evident truths. Other philosophers have appealed to their own intuitions and the intuitions of others, but the resort to intuition invariably betrays that something has gone seriously wrong with the argument. Natural or human rights, he concludes, are simply fictions.¹⁵

These are sweeping statements, which MacIntyre does not seriously attempt to substantiate. The reader may well think there is more to intuition than MacIntyre is prepared to concede, and that it is at least odd that MacIntyre takes it as self-evident that there are no self-evident truths. The main interest of MacIntyre's broadside, however, lies in the assertion that we should not believe in human rights in the absence of good reasons for believing in them. This raises the question of what kinds of reasons count as 'good reasons,' and

¹⁵ *After Virtue*, supra note 3, 69-70.

whether they are necessarily confined to the sort that philosophers like Gewirth have attempted to supply.

I believe that our acceptance of universal human rights may be justified in another way, one that appeals to the communal practices and traditions within which doctrines of human rights have evolved historically, and to the virtues of tolerance and respect that sustain these practices. It is here that MacIntyre's own work becomes particularly relevant, because it develops the view that traditions have a rationality of their own, and that all rationality is in some sense traditional. This indeed is the major thesis elaborated in *Whose Justice?*¹⁶ That MacIntyre himself has used these ideas to attack what he takes to be the unfounded premises of human rights and liberalism only shows the extent to which MacIntyre (like many others) has misunderstood the historical groundings of those doctrines and their true character. Let us take a closer look at his views.

The practice of human rights

MacIntyre is at pains to argue that in modern society there is no rational way to resolve many moral disputes because the opposing sides proceed from premises that are conceptually incommensurable. At one stage, he illustrates his point by supplying three 'incommensurable' arguments addressing the question of abortion.¹⁷ It is worth pausing to consider these arguments here, because they tell us much about MacIntyre's own grasp of human rights. They run as follows:

- (1) Everybody has certain rights over his or her own person, including his or her own body. It follows from the nature of these rights that at the stage when the embryo is essentially part of the mother's body, the mother has a right to make her own uncoerced decision on whether she will have an abortion

¹⁶ *Supra* note 4, especially 326-403.

¹⁷ *After Virtue*, *supra* note 3, 6-7. I have renumbered the arguments for convenience.

or not. Therefore abortion is morally permissible and ought to be allowed by law.

- (2) I cannot will that my mother should have had an abortion when she was pregnant with me, except perhaps if it had been certain that the embryo was dead or gravely damaged. But if I cannot will this in my own case, how can I consistently deny to others the right to life that I claim for myself? I would break the so-called Golden Rule unless I denied that a mother has in general a right to an abortion. I am not of course thereby committed to the view that abortion ought to be legally prohibited.
- (3) Murder is wrong. Murder is the taking of innocent life. An embryo is an identifiable individual, differing from a newborn infant only in being at an earlier stage on the long road to adult capacities and, if any life is innocent, that of an embryo is. If infanticide is murder, as it is, abortion is murder. So abortion is not only morally wrong, but ought to be legally prohibited.

MacIntyre suggests that debate between these viewpoints is interminable in modern society. Although all three arguments follow logically from their premises, the premises themselves employ different normative concepts, and we have no established means of deciding between them. At this level, we are reduced to assertion and counter-assertion. The reason, MacIntyre says, is that we lack a coherent body of theory and practice in terms of which the arguments can be assessed. Instead we have inherited an ill-assorted miscellany of arguments representing fragments of a range of moral traditions, detached from the detailed historical contexts in which they originally made sense. Thus, in the abortion debate 'a concept of rights which has Lockean antecedents is matched against a view of universalizability which is recognizably Kantian and an appeal to the moral law which is Thomist'.¹⁸

MacIntyre is obviously right in observing that the abortion debate is as yet unresolved in contemporary society. But his explanation of

¹⁸ *After Virtue*, supra note 3, 10.

that fact is open to doubt. It is far from clear that the premises in the three arguments are conceptually incommensurable; to the contrary, they can all be translated into a common language of rights and obligations, a fact to which MacIntyre's antipathy to rights seems to blind him.

The first argument is, of course, already framed in terms of rights; it proceeds from the premise that every person, including a pregnant woman, has certain rights over her own body. What is striking about this argument is that it ignores or discounts the possibility that the fetus has rights of its own as against the pregnant woman, in effect denying that there is any significant moral bond between woman and fetus.

Moving down to the third argument, we can see that it takes the converse tack; it assumes that the fetus has the same rights as a newborn infant and concludes that the mother has a duty not to harm or kill it. So doing, it dismisses or overlooks the possibility that, at least at certain stages, a fetus may not have the same moral status and rights as an infant and so may not stand to benefit from the rule against murder.

The second argument asserts that since I must claim that, as a fetus, I possessed certain rights against my mother, I must necessarily grant to human fetuses in general the same rights as against their mothers. Here again, the argument skirts the troubling question of the status of the human fetus and the question whether it can be considered a rights-bearer. All three arguments, then, can be stated adequately in terms of rights and obligations; their essential differences concern the way in which they characterize the moral status and rights of the human fetus.

Moreover, all three sets of premises, far from being the flotsam and jetsam of differing historical traditions, draw their strength from thriving and reasonably coherent bodies of contemporary moral practice, where the governing principles are in large part settled and undisputed. Thus, the principle 'everybody has certain rights over his or her own person, including his or her own body,' used in the first

argument, lies at the root of substantial portions of the criminal law and the law of torts. Likewise, the 'Golden Rule,' deployed in the second argument, permeates much of our everyday moral reasoning. Even young children understand the force of the question, 'How would you like it if someone did that to you?' Finally, the principle 'murder is wrong; murder is the taking of innocent life' is considered one of our most fundamental rules and not open to question. What is open to question is the extent to which these various principles apply to the matter of terminating a pregnancy (or, on another view, terminating a fetus's life), for this does not clearly fall within one or other of the spheres within which these principles have their accepted and unproblematic operation. The reason is that as a society we have not yet come to any settled view on the status of a fetus or the stages marking its transition to full personhood.

Rather than illustrating the incommensurability of different moral schemes competing for our allegiance, MacIntyre's example shows only that our shared moral practices are complex and somewhat untidy, and resist being displayed as a comprehensive and fully consistent deductive system. In this respect modern societies are not unique, although that fact is sometimes disguised by historians and anthropologists anxious to vest the moral codes of remote societies with a shining rigour and consistency hardly compatible with the ambiguities and complexities of human social life.

The true position seems to be as follows. There are large areas of our lives where the governing moral principles are reasonably well-known and accepted. We could hardly live from day to day were this not the case. These sets of principles are somewhat diverse, and their relations with one another are often unclear. If generalized beyond their established spheres of application, they would sometimes dictate conflicting courses of action. But usually they do not have this effect, because their operation is confined within separate and relatively well-defined areas of practical decision-making. However there are matters that do not fall clearly within one or another sphere, or whose formerly secure position within a certain sphere has become precarious. Consider the case of animals, once classified virtually as 'quasi-things' but now increasingly viewed as entities

meriting regard in their own right. In such contentious cases, debate often centres on the extent to which the matter in question resembles or differs from the subjects of settled spheres of practice – in this instance, how far animals resemble or differ from human beings on the one hand, and mere things on the other. The question is only resolved once it becomes clear what the character of the matter under dispute 'really is,' that is, its relationship to the subjects of existing bodies of practice and the standards that inform them.

So, presumably, the debate over abortion will continue so long as people cannot agree whether human fetuses are closer in nature to infants or to masses of organized tissue appended to a woman's body, or whether they occupy some unique intermediate status. The fact that, in recent times, we have not been able to come to substantial agreement on the issue does not mean that we will not succeed in the future. At any rate, it is sufficient for our purposes to point out that the question, which concerns the possible existence and nature of a moral bond between mother and fetus, can be understood without distortion as raising questions of the scope and application of basic human rights.

On this view, moral reasoning is similar to reasoning carried on in common law systems, where courts make practical decisions within a context formed by sprawling bodies of judicial precedents that are organized roughly in subject areas, with intricate internal links and oppositions. The precedents and the principles and rules they secrete are largely accepted on authority, but they are always open to revision and development, usually in the light of standards already implicit in existing strands of precedents. The rationality of a particular decision, such as it is, flows from the rationality of the system as a whole, which in turn rests on its ability to resolve justly most of the specific questions that are put to it.

The lesson to be drawn from this discussion is that issues of human rights, like other moral issues, arise and find their resolution within the context of a living moral tradition, with its recognized spheres of practice, and the internal goods, virtues, rules, and basic standards that they support. It seems unlikely that the question of what is due

to people as such (and which beings qualify for human status) can be answered on the one hand simply by logical deduction from self-evident first principles, or on the other hand by intuitive processes uninformed by social practice. The question is only capable of being grasped, much less answered, by virtue of the formative influences and resources offered by an ongoing moral tradition. The general point is, of course, one that MacIntyre has elaborated with such insight.¹⁹ It is only his antagonism to the notion of universal human rights that prevents him from seeing how fruitfully it may be applied in this sphere.

But this view may seem paradoxical. How can universal human rights, which are said to apply to all persons regardless of their particular features, society, religion, and so on, be rationally grounded in a moral tradition which is local and particular? This question lies at the root of MacIntyre's unease with human rights. Consider the following passage from *Whose Justice?*, which reiterates a theme woven into much of the discussion:²⁰

The conclusion to which the argument so far has led is not only that it is out of the debates, conflict, and enquiry of socially embodied, historically contingent traditions that contentions regarding practical rationality and justice are advanced, modified, abandoned, or replaced, but that there is no other way to engage in the formulation, elaboration, rational justification, and criticism of accounts of practical rationality and justice except from within some one particular tradition in conversation, cooperation, and conflict with those who inhabit the same tradition. *There is no standing ground, no place for enquiry, no way to engage in the practices of advancing, evaluating, accepting, and rejecting reasoned argument apart from that which is provided by some particular tradition or other.*

¹⁹ See especially *After Virtue*, supra note 3, chapters 14, 15 and *Whose Justice?*, supra note 4, chapters 17, 18.

²⁰ *Whose Justice?*, supra note 4, 350, emphasis added.

Does it follow that universal human rights are an impossibility, at least in the absence of a single moral tradition uniting the whole of humanity? The question requires us to distinguish four propositions, which are easily confused:

- (1) moral reasoning, including reasoning about human rights, necessarily *draws upon* a particular moral tradition and body of social practice;
- (2) moral reasoning is necessarily *limited in application* to fellow participants in the tradition or society that nurtures the reasoning;
- (3) moral rights and obligations are necessarily *justified* by reference to socially attributed roles and statuses embodied in the practices of particular communities; they cannot be justified by reference to characteristics ostensibly held by people apart from their membership in any actual community; and
- (4) moral reasoning has *persuasive force* for others only to the extent to which they inhabit the same moral tradition.

The first point concerns the *origins* of moral reasoning, the second its *scope of application*, the third its *mode of justification*, and the fourth its *persuasive force*.

The first proposition, as we have argued above, is clearly right. Moral issues, including those concerning human rights, arise and are resolved within a living moral tradition, with its recognized spheres of practice, and the internal goods, virtues, rules, and principles they harbour. What follows from accepting it? Does it commit us to the other three propositions, which cast doubt on the possibility of universal human rights?

The answer is surely negative. There is no reason in principle why a moral argument may not (1) draw upon traditions and practices particular to a certain society, and at the same time, where appropriate, (2) strive for universality in its scope of application, (3) justify its tenets by reference to grounds or factors that prescind from the features of particular individuals and their roles in actual

communities, and (4) have persuasive force for the inhabitants of other moral traditions.

I cannot deal fully with these points here, and will limit myself to brief comments on each. It is clear, first of all, that when we reason about human rights we are drawing on a long and complex heritage of practice and reasoning, as conducted within a particular moral tradition or set of traditions. Let it be noted that this heritage has been hard won. Rooted in protracted historical struggles, the practice of human rights is not the wan and thin-skinned fruit of intellectual hothouses but the tough and scarred product of soil drenched with blood. In apparent innocence, MacIntyre remarks: 'In the United Nations declaration on human rights of 1949 what has since become the normal UN practice of not giving good reasons for any assertions whatsoever is followed with great rigor'.²¹ Witty but somehow witless, this remark is striking in its disregard of the historical experience from which the UN declaration sprang, as if the experience of Nazism and the Holocaust could not stand as good reason for anything. Here, as elsewhere, MacIntyre's error is one of not learning his own lessons well enough.

To address the second point, the fact that human rights reasoning springs from a particular tradition does not inevitably undermine its claim to universal scope. That Jane Austen spent her life within the confines of a small and relatively secluded sector of English society does not necessarily detract from the universality of her insights into human character. The fact that most modern scientists work within a well-defined tradition of enquiry, which is incompatible with other traditions such as the magical and astrological, is not in itself a sufficient ground for doubting the universal application of their theories. Nevertheless, here as elsewhere, our awareness of the local origins of human rights reasoning should induce a measure of humility and openness in approaching other moral traditions and cultures. Missionaries of human rights can be no less rigid and uncomprehending than their religious predecessors.

²¹ *After Virtue*, supra note 3, 69.

As for the third point, it is true that a large and important part of everyday morality is justified by reference to socially attributed roles. At every turn in daily life, we are guided by complex ranges of responsibilities implicit in our various roles as parents, children, spouses, relatives, neighbours, friends, citizens, teachers, students, employers, employees, and so forth. Reasoning about human rights draws heavily on our reflections on the nature and basis of our actual obligations to others, obligations that have assumed a widely differing character in different societies. But moral reasoning is not limited to the actual practices of our own society; in the end it is concerned with the practices of the *ideal* society. Our knowledge of the ideal is gained through familiarity with the actual, but moves beyond it.

MacIntyre aptly describes this process in his discussion of Aristotle:²²

The justice of which Aristotle offers an account ... exhibits justice-as-it-ought-to-be-understood as implicit in the practice of justice-as-it-is. The justice of actual *poleis* is held to be in varying ways defective, but it is in studying the principles implicit in those varying forms that we discern how those defects are all departures from or failures to achieve a form of justice which would be the best justice of the best kind of *polis*.

Reasoning about human rights is directed at determining what is due to people living in the ideally just community, given the potential implicit in human nature. It does not seek to supplant the moral knowledge derived from the practices of our own community, but to supplement and transform it. The ideal community envisaged by human rights doctrines is ultimately a universal one, encompassing the whole of humanity, although not one that ousts local forms of community. Experience with the *polis* has shown its inadequacy as the sole matrix for moral endeavour and development. If this was not obvious to Aristotle, it should now be obvious to us.

²² *Whose Justice*, supra note 4, 90-91.

As for the final point, the persuasive force of moral principles and practices is not always limited by their local origins, as the course of human history reminds us. Prophets live in particular times and places, yet they may speak to distant ears. In various ways, the examples set by Gandhi, Norman Bethune, and Julius Nyerere have reached far beyond their home provinces. Whatever the local roots of the doctrines and practices of human rights, it is clear that they have slowly been transforming not only the societies of Western Europe and the Americas but also, at varying paces and in different ways, those of Eastern Europe, Asia, Africa, and the Middle East. There is reason to think that the process is accelerating and deepening rather than slackening off.

Epilogue

Practice and tradition help explain the process by which reasoning about human rights is carried on. However, they do not go far to show the underlying dynamic. Human rights represent, I think, the gradual unfolding of the meaning and requirements of commitments to certain basic values or goods that are experienced as lying beyond the practices where they are first encountered. There are, of course, many such goods, but one in particular seems worthy of emphasis: the value of *friendship* and the role that it plays in bringing home to us the intrinsic worth of others. Through our concern for the welfare of our friends, coupled with the practice of simple forms of courtesy and respect, we come to realize the importance of a basic level of concern for people in general.

The point may be illustrated, once again, by a story related by Robert Coles. The story concerns a nine-year-old boy from the slums of Rio de Janeiro, the '*favelas*.' Like many other children, this boy went every day to the oceanside boulevard of Copacabana to hustle for the privilege of washing the cars of the rich. Here are the boy's reflections on his experiences:

I do not hold it against them; I know they did not arrange Rio to be the way it is before they were born here! I know I didn't arrange things either! It's the luck of the draw! My luck is

bad; theirs is good – the kids I see coming out of the big hotels and apartment houses in Copacabana and Ipanema. I talked with one boy last week – he stared at me, and I stared back. He had a suit on: poor kid. It was a summer suit, but he looked hot. I guess he was upset that the air conditioning stopped when he left the lobby of the building. Even the rich have to sweat sometimes! He was very nice to me: he asked me how I was doing. He had been watching me from the window of his apartment before he came down, to wait for the driver to take him to his father's office. He said he thought I was very strong, the way I worked so fast on the cars. He said he'd tell his father to pay me to do their cars. I asked how many they have. He said three.

"Then one of them came, a Mercedes: rich! The doorman tells me in our country a Mercedes costs four times what it costs in other countries, because of taxes. But he said "these people, they can afford anything, and it doesn't bother them to pay lots of money." He said, "if they buy something cheap, they don't believe it's any good!" I'd love to be in their shoes, but it's not my luck. They sure don't want to be in my shoes! But that kid, I think he was curious, and I was very glad to speak with him. I thanked him for the job suggestion, and he was very polite; he thanked me for offering to do the job! Thank you, thank you, we were saying to each other, over and over – just two kids, not "us" up here in the favela and "them" over there in Copacabana!"²³

A small story about a trivial incident. But how incomparably richer and more suggestive it is than our best attempts at theorizing. Bringing philosophy to bear on human experience is like fishing with a large-meshed net. Only the big and clumsy are snagged; the small and quick escape. And the ocean itself drains unnoticed through the strands.

²³ *The Moral Life of Children*, supra note 1, 13-15 (note omitted).