

THE HUMAN RIGHTS DELUSION: A DEFENCE OF THE NARRATIVE TRADITION OF THE COMMON LAW

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The notion of rights, which was launched into the world in 1789, has proved unable, because of its intrinsic inadequacy, to fulfil the role assigned to it.

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Abstract

Protecting ‘human rights’ and the promotion of a ‘human rights culture’ have become, by tacit agreement, the only means of debating human dignity and justice in Australia. ‘Rights talk’ has become the *lingua franca* of all those wishing to engage in public debate about justice and public ethics. The near-exclusive focus on rights, however, has brought with it certain presuppositions about the nature of the human subject (that is, the rights-bearer) that are, at once, distorted and illusory. This article explores the source and nature of those distortions and asks whether greater attention to the narrative approach of the common law, and its focus on relationships, will better build a ‘just culture’.

I INTRODUCTION

Modern Australian debate in relation to the protection of human dignity is, for the most part, a debate as to whether fundamental ‘human rights’ are best protected by a constitutional bill of rights, a human rights Act (or some similar legislative measure) or whether the protection of fundamental ‘rights’ is best left to the ‘protection of the common law in association with the

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1 Simone Weil, ‘Human Personality’ in Siân Miles (ed) *Simone Weil, An Anthology* (2005) 69, 71.

doctrine of parliamentary supremacy'.² That debate is therefore, essentially a debate about identifying the best *mechanism* for protecting 'human rights'. It is taken as axiomatic in the debate that all participants wish to see 'human rights' protected and moreover, that the language of 'human rights' is the proper idiom for talking about fundamental issues of human dignity, constitutional limits on State power and public ethics. In that context it is unthinkable that one could question the absolute importance of promoting 'human rights'.

Nowhere is this more evident than in the National Human Rights Consultation Report ('the Report')³ delivered to the Commonwealth Attorney-General by the National Human Rights Consultation Committee ('the Human Rights Committee') on 30 September 2009. The Human Rights Committee, to whom the task entrusted was to determine how Australia could better 'protect and promote human rights', took it as unquestioned that this is the proper, if not the only way, of viewing questions of justice in the Australian legal system. The Report is replete with recommendations for improving and promoting human rights, drawing upon the panoply of international human rights covenants and statements.⁴ Indeed regardless of the particular legislative measures that might be adopted by the Australian community, the overall thrust of the Report points to the imperative of 'creating a human rights culture'.⁵

Rarely do we pause to consider whether this is a good thing. Rarely do we ask the question whether a 'human rights culture' is the same thing as a 'just culture'; or indeed, what, precisely, a 'human rights culture' is. Any reasonable reader of the Report would be left to conclude that there is nothing to be gained by analysing the prior question of whether the translation of all questions of human dignity into the language of 'rights' has set the community on the right path. Practically the only hint of any

2 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 136 (Mason CJ).

3 National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) <<http://www.humanrightsconsultation.gov.au>> at 24 June 2010.

4 Including the following, *International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; Convention on the Rights of the Child; Convention on the Rights of Persons with Disabilities; Declaration on the Rights of Indigenous Peoples* (see National Human Rights Consultation Committee, above n 3, xxxii).

5 National Human Rights Consultation Committee, above n 3, 131.

concern as to the language of rights is the Report's reference to Alasdair MacIntyre's famous dictum that:

[T]here are no such rights, and belief in them is one with belief in witches and in unicorns.⁶

Boldly stated in this way, without any explanation or context, the Report leaves the reader with the view that perspectives such as Professor MacIntyre's are, at best, absurd or incoherent and at worst, malevolent. What remains undisclosed is that there is a large body of historical, philosophical, theological and jurisprudential thought as to the utility of modern rights talk.⁷ This body of thought has been, to a degree, marginalised in the Australian debate about the protection of human rights.

Paradoxically, many,⁸ although not all,⁹ of the critics of modern rights talk fall broadly within the natural law tradition of Aristotle and Thomas Aquinas. I say 'paradoxically' because, superficially at least, one would expect that persons predisposed to a natural law approach to legal

6 Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (1981), 69, quoted in National Human Rights Consultation Committee, above n 3, 52. The Committee then goes on, somewhat blithely, to note that 'there is a long history of philosophical musing about the reality of human rights'. As discussed later in this article, it must be conceded at once that the Report goes to great lengths to emphasise the importance of responsibilities in its advocacy of a Human Rights Act and more broadly, a human rights culture. This introduction of responsibilities, as submitted below, does not however reach the heart of the problems sought to be identified.

7 As the present author is proficient in none of the disciplines referred to, this article is, in the words of Edith Stein, 'written by a beginner for beginners': Edith Stein, *Finite and Eternal Being* (2002) xxvii. For a small sample of those upon whom the author is reliant and grateful, see Mary Ann Glendon, *Rights Talk: the Impoverishment of Political Discourse* (1991); Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (1981); Tracey Rowland, *Culture and the Thomist Tradition - After Vatican II* (2003); and, from an entirely different perspective, Costas Douzinas, *The End of Human Rights - Critical Legal Thought at the Turn of the Century* (2000).

8 Such as Ralph McInerny, 'Natural Law and Human Rights' (1991) 36 *American Journal of Jurisprudence* 1; Bernard Brady, 'An Analysis of the Use of Rights Language and Pre-Modern Catholic Social Thought' (1993) 57 *The Thomist* 97; Heinrich Rommen, 'The Genealogy of Natural Rights' (1954) 29(114) *Thought* 403; Alasdair MacIntyre, 'Community, Law and the Idiom and Rhetoric of Rights' (1991) 26(2) (Spring) *Listening - Journal of Religion and Culture* 96; and Rowland, above n 7.

9 See especially Douzinas, above n 7, 7. It must be noted that Douzinas' critique is directed less towards the rhetoric of human rights than to their having been entrusted to 'triumphalist column writers, bored diplomats and rich international lawyers in New York and Geneva, people whose experience of human rights violations is confined to being served a bad bottle of wine': Douzinas, above n 7, 7.

questions would be likely to embrace the rhetoric of human rights.¹⁰ After all, are not claims of human rights the last remnant of deontological ethics in a sea of utilitarianism and consequentialism?¹¹ Should we not be grateful and embrace the fact that here, at least, the culture endeavours to speak in absolute terms?

Yes. And no.

Yes, because ultimately, people must communicate with one another and, self-evidently, if we do not share a common language we will not understand one another or hope to be able to articulate shared values. And no one can doubt that talking in terms of rights is the *lingua franca* of all those wishing to engage in the public debate about justice and public ethics. Inevitably, if one wishes to engage in debates around issues of justice, one is drawn into speaking about rights.¹² Speaking against the notion of human rights, in favour of some other rhetoric, runs the real risk of misunderstanding and incomprehension.¹³

On the other hand, there remain, in the all-pervasive language of human rights in our national discussion, risks and distortions that have not been sufficiently isolated and identified. These risks relate to what that language says about the subject of those rights, the way in which rights are created and the extent to which other ways of framing the debate may better accord to traditional notions of justice.

The purpose of this article is to identify those risks so that they might contribute to the debate about 'a culture of human rights', and to look beyond merely whether Australia should have a human rights Act (or

10 As the most famous Australian natural lawyer, John Finnis has done: see *Natural Law and Natural Rights* (9th impression, 1997). Indeed, notwithstanding the historical controversy of the assertion, Thomas Aquinas himself is often co-opted as a proponent of 'human rights': see Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights* (2002) 43: 'Later, the tradition of natural law as developed in Europe by St Thomas Aquinas and others had human rights elements, particularly the idea that there was a higher law above that of governmental authority.'

11 Indeed, it was the father of utilitarianism, Jeremy Bentham, who described natural rights as 'nonsense upon stilts' for the very reason that they must be derived from 'imaginary laws ... "laws of nature":' quoted by William O'Neill, 'Rights as Rhetoric: Nonsense on Stilts' (1991) 26(2) *Listening* 111, 111.

12 As the present author has done in the past: see Peter Quinlan, 'Haggling Over Price: Euthanasia, Reason, and the Purpose of Law' (2009) 36 (10) *Brief* 8.

13 An interesting example of this pragmatic approach to 'rights' talk can be seen within the Catholic Church where the strong critique of 'the rhetoric of rights' by Alasdair MacIntyre and Tracey Rowland (see Rowland, above n 7, and MacIntyre, above n 8), was met by Cardinal George Pell with calls for 'moderation' and the observation that 'abandoning rights is not an option for the 21st century Church': see George Pell, *God and Caesar* (2007) 60.

some similar legislative measure). In that regard, this article is not intended to break new ground, in a field well covered by the efforts of others. Rather, it has the more modest proposal of bringing the fruit of those efforts to a different context and a potentially new audience.

Before doing so, two pre-emptive clarifications and an etymological detour are necessary.

II TWO CLARIFICATIONS

As to the first matter of clarification, it is necessary to note that the scepticism about the language of rights explored in this article is not intended to deny the value and utility of the notions of rights in a properly functioning legal system. When Alasdair MacIntyre observed that belief in rights was 'as one with belief in witches and in unicorns' he was, of course, not referring to the existence of rights as part of the positive system of law in a given community. Those rights are, no doubt, all too real: rights in contract, rights for breach of a duty of care, rights to a minimum wage, rights to a fair trial. These are all matters with which the lawyer and the citizen are properly concerned. To the extent that these positive rights exist, they are the *product* of the positive system of law - 'rights', in that sense, represent the *outcome* of our system of law.

In this respect, this article does not seek to draw a bright line between 'communitarians and their modernist opponents'¹⁴ by denying that individual rights have any role to play in our legal system. Plainly, they do.

On the contrary, what this article is concerned with is the notion of rights as the *starting* point of our system of law; that that system, and the laws it produces, should be judged by reference to the standard of pre-existing rights (which are, themselves, not dependent upon that legal system).¹⁵

14 See Jeremy Waldron, 'When Justice Replaces Affection: The Need for Rights' (1988) 11 *Harvard Journal of Law & Public Policy* 625-647. In this respect, the author denies the premise inherent in Professor Waldron's rhetorical question to communitarians as to how the important function of security 'is to be performed in a community that repudiates rights and legalism, and under the auspices of a theory that gives individual rights no part to play at all.' (at 629). The author gratefully acknowledges the anonymous referee for drawing the reference to Professor Waldron's measured response to communitarians' claims.

15 Louis Henkin, 'The Age of Rights', in Francisco Forrest Martin et al (ed), *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (2006) 941, 941: 'Human rights are universal: they belong to every human being in every human society. They do not differ with geography or history, culture or ideology, political or economic system, or stage of societal development. To call them 'human' implies that all human beings have them, equally and in equal measure, by virtue of their humanity,

Even the most vociferous opponent of rights talk acknowledges the importance of this distinction. In that regard, as the inimitable Simone Weil observed (perhaps a little uncharitably to the role of law schools):

Justice consists in seeing that no harm is done to men. Whenever a man cries inwardly: 'Why am I being hurt?' harm is being done to him. He is often mistaken when he tries to define the harm, and why and by whom it is being inflicted on him. But the cry itself is infallible.

The other cry, which we hear so often: 'Why has somebody else got more than I have?', refers to rights. We must learn to distinguish between the two cries and to do all that is possible, as gently as possible, to hush the second one, with the help of a code of justice, regular tribunals, and the police. Minds capable of solving problems of this kind can be formed in a law school.¹⁶

More succinctly, the issue we are concerned with is: does law/justice come first and rights second, or, rather, do our rights come first and our laws second?¹⁷

The second clarification, at the risk of protesting too much, is one which can often be found in critiques of human rights¹⁸ and it is necessary because of the very risk of misunderstanding and incomprehension referred to above, which arises if one strays from the dominant language of 'human rights'. That is to stress that the criticism of the rhetoric of human rights made here (and elsewhere) is not intended to be a flight from the notions of justice and human dignity that rhetoric seeks to serve, but rather is designed to find a better way of arriving at, and articulating, what is just and what laws will best serve human freedom and dignity.

Indeed, it is the desire to bring the focus back to justice as 'what is right', rather than justice as the province of 'rights' that leads us to the etymological detour.

regardless of sex, race, age; regardless of high or low 'birth', social class, national origin, ethnic or tribal affiliation; regardless of wealth or poverty, occupation, talent, merit, religion, ideology, or other commitment. Implied in one's humanity, human rights are inalienable and imprescriptible: they cannot be transferred, forfeited, or waived; they cannot be lost by having been usurped, or by one's failure to exercise or assert them.'

16 Weil, above n 1, 93. The gender specific pronouns were Ms Weil's, so I render them thus.

17 See Rowland, above n 7, 152: 'As MacIntyre emphasises, on Aquinas's view, law is primary, rights are secondary, whereas for post-Enlightenment modernity, human rights provide a standard prior to all law'.

18 See for example, Charles Blattberg, *Patriotic Elaborations: Essays in Practical Philosophy* (2009) 46: '[M]y complaint about human rights is not at all with the values they represent but with what happens to those values when they are articulated abstractly.' Similar protestation may be found in MacIntyre, above n 8.

III 'RIGHT' VERSUS 'RIGHTS' – A BRIEF ETYMOLOGICAL DETOUR

A useful starting point for leading us into the difficulties created by 'rights talk' is the debate as to the genealogy of rights and the shift, from classical philosophy to the Enlightenment, of the meaning of the Latin *ius*, which we translate as 'right'.¹⁹ That debate concerns the extent to which *ius*, in classical and medieval thought, was confined to an objective state of affairs or whether it incorporated some subjective interest of the individual human subject. Put another way, when Thomas Aquinas asked (and affirmatively answered): 'Whether right is the object of justice?',²⁰ did he mean 'right' as the achievement of an objective outcome; or as the vindication of some 'right of some person or persons'?²¹

While this is not the occasion to rehearse the detail or competing views in that debate, it would seem clear that the general (*albeit* not unanimous) weight of historical opinion comes down on the side of the view that classical and medieval natural lawyers used the expression *ius* only in the strictly objective sense of a fair or just outcome. Beginning in modern times with Michel Villey,²² the French legal historian, this school of thought convincingly argues that, from Aristotle to Aquinas, no general concept of human rights can be discerned. 'Right' (whether the Latin *ius* or the Greek *dikaion*), the object of justice, on this view is certainly *not* a power or property that exists in individual persons. Rather,

jus is the lawful and the just, justice, as a juridical activity, is the art through which the just becomes known and which tends towards establishing a just state of affairs. As the object of justice, *jus* is again a legal quality inherent in an external entity, an objective state of affairs rather than a subjective right, for which Aquinas has no word or concept. The *jus* as just outcome is an arrangement of things amongst people that respects, promotes or establishes the proportion of equality inherent in them, and these proper relations are observable in the external world. *Res justa, id quod justum est*, writes Aquinas and, *ipsam rem justam*, the just thing itself.²³

The 'shift' from *ius* as a thing 'out there' to individual rights 'in here' - at least within natural law thought - is usually traced to the Spanish Neo-

19 Similar semantic issues arise in relation to the Greek *dikaion* (just): see Douzinas, above n 7, 47-56.

20 St Thomas Aquinas, 'Untrum ius sit objectum iustitiae' *Summa Theologica*, II-II, 57, 1.

21 John Finnis, *Aquinas* (2008) 136, cited in Rowland, above n 7, 152.

22 The late Ralph McInerney identified Michel Villey (1914-1988) as the chief proponent of this view in 'Natural Law and Human Rights', above n 8, 1. See also Ernest L. Fortin, 'On the Presumed Medieval Origins of Individual Rights' 26 *Communio* (Spring 1999) 55 at 56-57.

23 Douzinas, above n 7, 57.

Scholastics, and in particular Francisco Suarez SJ,²⁴ in the 16th and 17th centuries. By that time, there had been a fundamental shift

from a concept of *ius* as what is just, to a concept of *ius* as a moral power (*facultas*) which every man has, either over his own property or with respect to what is due to him.²⁵

Following this shift, the notion of subjective rights was able to find its full expression in the writings of John Locke,²⁶ in time for the great 'declarations of rights', in the United States of America in 1776 (the Declaration of Independence), and in France in 1789 (the Declaration of the Rights of Man and Citizen).²⁷

'So what?' you may ask. What exactly does this arcane detour have to do with a critique of 'human rights' in modern Australia?

Quite a bit, as it turns out.

IV RADICAL SUBJECTIVITY AND THE ABSENCE OF A STANDARD

The shift in perspective from 'right' (or *ius*) as an objective 'state of affairs'²⁸ to something possessed or 'owned' by the individual, helps to clarify a number of the theoretical and practical problems that exist in the modern human rights debate. Indeed many of those problems derive from the radically subjective nature of human rights, particularly as they are abstracted into the civil and political rights with which we are so often concerned in the West - such as rights to freedom of speech and expression, rights to due process and rights to own property.²⁹

By identifying the standard against which to measure our laws as the 'rights' of the individual, we in fact lose sight of any real objective standard by which to measure our laws. This is because simply declaring that some person has (or all persons have) a 'right' to do something, does not, ultimately, say whether the exercise of that right is a good thing or

24 See Finnis, above n 10, 206-207; Douzinas, above n 7, 61-63; McNerny, above n 8, 1.

25 Rowland, above n 7, 152.

26 See Fortin, above n 22, 57.

27 Hence Simone Weil's dating of the 'launch' of the notion of rights at 1789 contained in the epigraph of this article.

28 See Douzinas, above n 7, 57.

29 The allegedly Western liberal bias in favour of civil and political rights over economic and social rights is, of course, a whole other story: see Charlesworth, above n 10, 46-49.

a bad thing;³⁰ all it identifies is a freedom of action or choice on the part of that person.

The right to free speech, for example, can, of course, be used for great evil; that noble phrase being the basis upon which the United States Supreme Court has struck down legislative bans directed at ‘virtual child pornography’³¹ and ‘crush videos’.³² Indeed, as was observed by McHugh J in *Levy v Victoria*, a decision concerning freedom of political communication:

[T]he constitutional implication does more than protect rational argument and peaceful conduct that conveys political or government messages. It also protects false, unreasoned and emotional communications as well as true, reasoned and detached communications. To many people, appeals to emotions in political and government matters are deplorable or worse. That people should take this view is understandable, for history, ancient and modern, is full of examples of the use of appeals to the emotions to achieve evil ends.³³

The right to freedom of speech is therefore not ordered to (ie, does not have, within itself) any standard of the ‘good’ or the ‘just’. It is entirely focussed on the entitlement of the individual ‘rights-bearer’.

This ‘lone rights-bearer’,³⁴ to use Mary Ann Glendon’s phrase, is a ‘self-determining, unencumbered, individual, a being connected to others

30 I leave aside here those ‘rights’ that are so loaded in their articulation and expression as to be tautological, such as ‘the right not to be subjected to torture’ or the ‘right to freedom from genocide’. In relation to such issues the notion of ‘rights’ seems, in any event, ‘ludicrously inadequate’: Weil, above n 1, 83. See also Raimond Gaita, *Good and Evil: An Absolute Conception* (2nd ed, 2004) 5-6.

31 See *Asbcroft v Free Speech Coalition* 535 US 234 (2002).

32 See *United States v Stevens*, No 08-769, 533F. 3d 218 (2010).

33 *Levy v Victoria* (1997) 189 CLR 579, 623 (McHugh J). It must at once be noted that considerable caution should be taken in considering the freedom of political communication cases decided by the High Court in the context of the debate on human rights. As the decisions recognising that constitutional freedom are at some pains to point out, they are not based on the existence of ‘individual’, ‘natural’ or ‘human’ rights, but upon a necessary implication arising from the structure of the Commonwealth Constitution. Rights and freedoms exist in our system of law ‘not because they are provided for, but in the absence of any curtailment of them’: *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 182 (Dawson J). Further, rights become constitutionally entrenched when, and by reason of the fact that, the legislative ability to curtail them is itself limited. A constitutional right, in the Australian sense, as Brennan J put it in *Australian Capital Television Pty Ltd v The Commonwealth* (at 150), ‘cannot be understood as a personal right the scope of which must be ascertained in order to discover what is left for legislative regulation; rather, it is a freedom of the kind for which s.92 of the Constitution provides: an immunity consequent on a limitation of legislative power.’

34 Mary Ann Glendon, *Rights Talk: the Impoverishment of Political Discourse* (1991), Chapter 3, 47.

only by choice'.³⁵ Whether this person actually exists in the real world remains to be seen. For present purposes, however, it is sufficient to note that the modern language of 'rights' underwrites, and in turn is underwritten by, a particular understanding of the human person: namely a being who, while he or she may be *accidentally* related to others, is not *essentially* so.

Using rights as the starting point for measuring our system of law, I want to suggest, is intimately bound up with the modern tendency to see choice itself (autonomy), and not what we choose, as the ultimate human good. As remarked by David Bentley Hart, the modern ideal in many ways puts personal autonomy and the freedom of the human 'will' above all other values or 'goods':

[W]e live in an age whose chief value has been determined, by overwhelming consensus, to be the inviolable liberty of personal volition, the right to decide for ourselves what we shall believe, want, need, own or serve. The will, we habitually assume, is sovereign to the degree that it is obedient to nothing else and is free to the degree that it is truly spontaneous and constrained by nothing greater than itself. This, for many of us, is the highest good imaginable. And a society guided by such beliefs must, at least implicitly embrace and subtly advocate a very particular 'moral metaphysics': that is, the nonexistence of any transcendent standard of the good that has the power (or the *right*) to order our desires toward a higher end. We are, first and foremost, heroic and insatiable consumers, and we must not allow the spectres of transcendent law or personal guilt to render us indecisive. For us, it is choice itself, and not what we choose, that is the first good, and this applies not only to such matters as what we shall purchase or how shall we live. In even our gravest political and ethical debates – regarding economic policy, abortion, euthanasia, assisted suicide, censorship, genetic engineering, and so on – 'choice' is a principle not only frequently invoked, by one side or by both, but often seeming to exercise an almost mystical supremacy over all other concerns.³⁶

Seen in this way, it might reasonably be concluded that the claim to human rights, insofar as it makes an absolute or objective claim, is not so much a moral claim as an ontological one. That is, the claim that I have 'rights' that are 'inalienable and imprescriptible'³⁷ is not, ultimately, a claim about what I should do (or what should be done to me) so much as a claim as to what I *am*: namely, a being whose sole prerogative it is to determine what I shall 'believe, want, need, own or serve'.

If our 'rights talk' does operate in this way (and it, at the very least, has the tendency to do so), it produces, I would submit, the very opposite of a properly functioning civic culture. It leaves each member of the

35 Ibid 48.

36 David Bentley Hart, *Atheist Delusions – The Christian Revolution and Its Fashionable Enemies* (2009) 21-22. Hart goes on (at 24-25) to contrast this concept of freedom with the 'classical' understanding of freedom.

37 Henkin, above n 15.

community (for want of another word) as an atomised unit, alone to determine what is 'good', 'fair' or 'just' with no bridge for arriving at shared values or agreed 'forms of life'. As Professor Douzinas said of the 'notion of the human subject as the sovereign agent of choice': 'This atomocentric approach may offer a premium to liberal politics and law but it is cognitively limited and morally impoverished.'³⁸

If this all comes across as too abstract and far-fetched, take the example of the Supreme Court of the United States in *Planned Parenthood v Casey*,³⁹ a decision concerning that most contentious arenas of 'rights talk' in that country: abortion rights. Having exhausted the debate between the 'right to privacy' (protected by the Fourteenth Amendment to the United States *Constitution*) and the 'right to life', the majority of the Court offered its famous 'mystery passage':⁴⁰

[C]hoices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.⁴¹

This passage, while valiantly attempting to do so in the language of constitutional law, ultimately reveals, as underlying the modern concept of 'rights', the very 'moral metaphysics' described by Hart.⁴² In the end, once the debate over 'rights' has been exhausted, one is left only with Hart's 'mystical supremacy' of the autonomous self-defining individual.

The point here is not to enter into (much less to resolve) the rather intractable (and interminable) legal debate between the 'right to privacy' and the 'right to life'. Rather it is to recognise, first, that a legal debate cast in these terms *is* intractable and secondly, that it is intractable for the very reason that taking rights as our starting point does not provide us with any standard with which to identify what is 'just' or what is good.

That such a standard is necessary (unless one is either the crudest majoritarian or a nihilist) should be obvious. Alasdair MacIntyre again:

38 Douzinas, above n 7, 3-4.

39 *Planned Parenthood v Casey* 505 US 833 (1992).

40 See Hadley Arkes, *Natural Rights and the Right to Choose* (2004) 42-43; Janet E Smith, *The Right to Privacy*, (2008) 52.

41 *Planned Parenthood v Casey* 505 US 833, 851 (1992) (O'Connor, Kennedy and Souter JJ).

42 Hart, above n 36.

Rational debate over the application of moral, indeed, more generally, of evaluative concepts, requires that there be some standard, independent of the desires, preferences, and wills of the contending parties, to which appeal can be made in trying to show why the reasons supporting one point of view are superior to those supporting another. In the absence of such a standard, there is nothing to distinguish genuinely rational moral or evaluative disagreements from any other clash of conflicting desires, preferences, and wills.⁴³

This is, however, very often the position in our community, where the desired or desirable outcome of any particular public controversy is expressed in terms of the ‘balancing’ of competing rights. Whether it is a clash between the ‘right to privacy’ and the ‘right to life’, between the ‘right to freedom of religion’ and the ‘right of children to be protected’ or between the ‘right to freedom of expression’ and the ‘right to due process’,⁴⁴ the theory seems to be the same: the disparate rights are simply pushed up against one another until the resulting ‘balance’ miraculously appears.⁴⁵

And yet, the objective standard by which, in that process, one ‘right’ gains preference over another may never reveal itself (if it exists at all). This is because we have failed to begin, from the outset, with some agreed conception of what the common ‘good’ or the ‘just’ outcome might be; rather, we have started with our competing ‘rights’ and declared that, in the particular instance under consideration, one prevails over the other.

And what if, our rights *are* just the expression of our preferences and our desires,⁴⁶ as they must be when we are left alone ‘to define [our] own concept of existence, of meaning, of the universe, and of the mystery of human life’.⁴⁷ Not only will we not have achieved any meaningful common understanding of what is ‘good’, either for the community or the individual, we will have deceived ourselves into thinking that we have done something productive and worthwhile:

[W]e seem to ourselves to be engaging in genuinely rational debate, when we are in fact disguising from ourselves that we are participating in nothing more than a clash of desires, preferences, and wills.⁴⁸

43 MacIntyre, above n 8, 97.

44 I have deliberately used potentially incompatible ‘rights’ that were recommended to be included in a national Human Rights Act by the National Human Rights Consultation Committee in their report - see in particular, Recommendations 24 and 25, xxxv-xxxvi: National Human Rights Consultation Committee, above n 3.

45 Ibid 95.

46 See generally Douzinas, above n 7, Ch 11, especially 312: ‘We have argued that rights legalise desire, that they organise an economy of wants and fears and give public recognition to the subject’s wishes’.

47 *Planned Parenthood v Casey* 505 US 833, 833 (1992).

48 MacIntyre, above n 8, 97.

To make matters worse, the process itself of pitting one ‘right’ against another as the principal mechanism for determining the appropriateness (or indeed validity) of a given law, may very well stifle the culture required to produce a common understanding of what is ‘good’. In this respect, a ‘human rights culture’ might not be the same thing as a ‘just culture’ because a ‘human rights culture’ is not merely *incidentally* adversarial (which our legal system must, at least on occasion, be) but has an adversarial pose at its very centre:

[W]ords like ‘I have the right . . .’ or ‘you have no right to . . .’ evoke a latent war and awaken the spirit of contention. To place the notion of rights at the centre of social conflicts is to inhibit any possible impulse of charity on both sides.

Relying almost exclusively on this notion, it becomes impossible to keep one’s eyes on the real problem.⁴⁹

So much for the weaknesses in the ‘human rights culture’. If such a culture, and all our ‘rights talk’, is not going to lead us to justice, what is?

V ARE RESPONSIBILITIES THE ANSWER?

Human rights proponents are, of course, aware of the dangers of the ‘atomistic’ individualism described above. The solution they generally offer is to stress the existence of ‘responsibilities’ that individuals have alongside their rights. The National Human Rights Consultation Committee, for example, devotes large parts of the Report to the discussion of responsibilities⁵⁰ although it does not, it must be said, advocate the enactment of a ‘Human Responsibilities Act’.

This attempt to highlight responsibilities has its merits, as discussed below, but on the whole, I want to submit, the attempt comes across as clumsy and half-baked. Take this summary of a number of the submissions to the Committee:

Many submissions and community roundtables recognised that each one of us should take responsibility for the rights of others. For example, the Law Institute of Victoria submitted, ‘All persons – whether individuals or public or private entities – have a responsibility to observe human rights’. The Australian Human Rights Commission submitted, ‘It is important to recognise that, just as all people are entitled to enjoy all human rights, all people also have responsibilities to respect the rights of others’. Some submissions also noted that the ability to exercise one’s human rights must be balanced against the ability of others to exercise their rights. In the focus groups conducted by Colmar Brunton Social Research it was generally agreed that human rights need to go hand in hand with associated responsibilities.⁵¹

49 Weil, above n 1, 83.

50 See the National Human Rights Consultation Committee Report, above n 3, 63-68, 93-96.

51 Ibid 93.

This passage, with respect, demonstrates the very risk of circularity and incoherence when we take ‘rights’ as our starting point. No principle is identified for *how* or from *where* our responsibilities arise, or indeed *what* they are, save in the most abstract of terms. The best we seem to be able to muster is to declare that ‘we have a responsibility to observe human rights’ and then imagine that we have actually said something, when all we have done is to restate the problem. Exactly whose ‘rights’ do I have a responsibility to observe? What am I to do if those rights are inconsistent with my rights? Or, as is more often the question in our world: what are *you* to do if those rights are inconsistent with my rights? What standard am I (are we) going to apply?

Moreover, applying the salve of responsibilities to the rhetoric of rights is something of an afterthought in the culture of human rights, and is certainly not its main focus. In that regard, ‘responsibilities’ as a counterweight to ‘rights’ may well not be up to the task allotted to them, as was certainly the view of Ralph McInerny:

Rights as the reverse of obligations do not begin to cover the pullulating claims of rights, the lengthening lists of non-negotiable demands, the novel assertions put forward as somehow self-evident.⁵²

Indeed, so much would seem to be accepted by a number of champions of the ‘human rights culture’. Michael Ignatieff, in this regard, confirms the link between our conception of ‘rights’ and their ‘bearer’:

Rights language cannot be parsed or translated into a nonindividualistic, communitarian framework. It presumes moral individualism and is nonsensical outside that assumption.⁵³

So long as the ‘self-determining, unencumbered individual’ remains our ‘rights-bearer’,⁵⁴ talk of responsibilities is unlikely to make much of an inroad into our ‘human rights culture’.

Which brings us back to the question whether this ‘lone rights-bearer’ actually exists in the real world.

VI REDISCOVERING RELATIONALITY

One of the benefits of introducing responsibilities into the human rights discussion is that it begins to refocus our attention on real people in the

52 McInerny, above n 8, 14.

53 Michael Ignatieff, *Human Rights as Politics and Idolatry* (2001) 67.

54 Glendon, above n 34, 48.

real world. The ‘lone rights-bearer’ of our human rights culture, after all, ‘possesses little resemblance to any living man, and even less to most women.’⁵⁵

This is because real people, in the real world, are not merely *accidentally* but *essentially* related to others, in a wide variety and network of relationships, many of which are given, not chosen. The human person, in the real world, is constituted by those relationships and importantly, for present purposes, our rights can only ever arise from (and be derivative of) of those relationships. But it is always, and everywhere, that the relationship comes first. Insofar as it may be true that humans are born with rights, it is only because they are born into relationships.

Costas Douzinas, in his thoroughgoing critique *The End of Human Rights*, which ultimately seeks to rescue and restore human rights to their proper end (*telos*),⁵⁶ does this by drawing upon the priority of ‘the Other’ in the phenomenology of Martin Heidegger and Emmanuel Levinas:

Rights exist only in relation to other rights, right-claims involve the acknowledgement of others and their rights and of trans-social networks of mutual recognition and arrangement. There can be no free-standing, absolute right, because such right would violate the freedom of everyone except its bearer. There can be no positive right, because rights are always relational and involve their subjects in relations of dependence on others and responsibility to the law. Rights are a formal recognition of the fact that before my (legal) subjectivity always and already has come another.⁵⁷

While Professor Douzinas expresses his conclusion in terms such as: ‘the (right of the) other comes first’,⁵⁸ for present purposes (and perhaps of more use to lawyers trained in the common law tradition) a better way of putting it may be: ‘the relationship with the other comes first’ – from which relationship positive rights may then be derived.

For it should now be obvious, if it was not before, that the idea of the ‘lone rights-bearer’ is a literal nonsense and the ‘individual’ human an elaborate, *albeit* powerful, fiction. A person can only ever have rights in relation to (or over against) some other person or persons: ‘In the

55 Ibid.

56 And so seeks to remain, to a degree, within the dominant rights rhetoric.

57 Douzinas, above n 7, 343. Although not referred to by Professor Douzinas, a similar emphasis on ‘relationality’ could, of course, equally be located in, and derived from, Christian phenomenology, such as that found in the work of Edith Stein, *Finite and Eternal Being* (2002), 58; John Paul II (See Rowland, above n 7, 142); and Robert Sokolowski, *Phenomenology of the Human Person* (2008) 58-60.

58 Douzinas, above n 7, 348.

theoretical situation of a person alone in the universe there is no Other, so there are no rights'.⁵⁹

Accordingly, before we can begin to talk about rights (be they 'fundamental' or 'human' rights) we must first identify the relationship within which they are said to arise, understand the contours and texture of that relationship and the ends which that relationship is intended to serve. Then, and only then, can talk of 'rights' make any sense.

In this context, abstract expressions of rights are of little help because whether a 'right' is conducive to the good or the ends of a particular relationship will depend upon what that relationship is, and how that relationship intersects with other relationships. An abstract 'right to freedom of association', for example, may be meaningful in the context of my relationship with my employer; it is, however, preposterous in relation to my relationship with my children. The nature of the relationship will determine the 'demands of justice'.

While Aristotle used the expression 'friendship' (*philia*), rather than 'relationship', he makes precisely this point: namely, that as friendships 'differ in degree'

the claims of justice also differ. The duties of parents to children are not the same as those of brothers to one another, nor are the duties the same for comrades as for fellow-citizens; and similarly in the other kinds of friendship. Hence the wrongs committed against these several types of friends differ too; and are aggravated in proportion to the degree of intimacy. ... It is natural that the claims of justice should increase with the intensity of the friendship, since both involve the same persons and have an equal extension.⁶⁰

In this context the 'demands of justice' are not reducible only to rights; indeed in a particular context there may be no rights at all. In this way, the other claims of justice, such as duty, obligation and responsibility, are not merely the reverse of rights but may be the essential defining characteristic of the particular relationship.

Moreover, if one starts from a common understanding of the good or ends of a particular relationship, it will be apparent that, while the good or ends of the particular relationship may remain the same, the 'rights' or

59 Steven Burns, 'Justice and Impersonality: Simone Weil on Rights and Obligations' *Laval theologique et philosophic* (1999) Volume 49 No 3, 477, 483. Burns goes on to make the further important point that: 'On the other hand, this person would have duties: to try to maintain health, and not to waste her abilities, for example'.

60 Aristotle, Book VIII, Chapter 9 in David Ross and Lesley Brown (eds), Aristotle - *The Nicomachean Ethics* (2009) 142, 145.

‘duties’ necessary to serve those ends may well change over time, to meet changes in economics, technology, science and the environment.

To add one final layer of complexity, each such relationship then must be situated within the broader relationship of the community as a whole,⁶¹ which must itself (if rational debate is to be possible) be based on some agreed conception of the human good to which that community is directed. In this regard:

To spell out what allegiance to some such conception of the ultimate human good involves is to say what it is towards which the life and activities of the community as a whole are directed. Different types of social arrangement and relationship will be evaluated insofar as they do or do not contribute to the achievement of that good. And the different offices within the community and the services to the community conferred by those holding such offices will be evaluated in accordance with the contribution which each makes to the overall good of the community. The virtue which is exemplified in giving due recognition and reward to each office and person according to its or his or her contribution to the overall life of the community is the virtue of justice. Justice thus finds expression in norms governing set forms of human relationship, norms which specify what each person participating in relationship owes to each other person so participating. The word used of such a relationship specifying norm in Roman law was *ius*,⁶² but we can identify the existence and recognition of such norms in many cultures where there is no single word for them.⁶²

Accordingly, before beginning to talk about the ‘demands of justice’ (or rights) it is necessary to immerse ourselves in the complicated network of human relationships that make up the community, arrive at some conception of the good or ends of those relationships (and the community as a whole) and then determine what laws will best suit those ends. And the only way to immerse ourselves in those human relationships, and to identify the ends to which those relationships are directed, is by listening to the stories that those relationships tell.⁶³

This is messy work, of course, and far more difficult than setting down an abstract lists of rights.

VII THICK AND THIN TALK

But this is precisely the point: namely, that abstractions such as lists of human rights, do not refer to actual people; and, in not referring to actual people, relieve us of the need to think about them. In this way ‘human rights’ can subvert the very values they are intended to serve, because

61 Ibid 154: ‘All communities are like parts of the political community’.

62 MacIntyre, above n 8, 99-100.

63 MacIntyre, above n 6, 216: ‘I can only answer the question “What am I to do?” if I can answer the prior question “Of what story or stories do I find myself a part?”’.

they reduce human persons to fictitious ‘rights-bearers’, archetypes and caricatures.

Charles Blattberg, in this context, distinguishes between talk that is ‘thick’ (contextual) and talk that is ‘thin’ (abstract):

Human rights talk ... is thin. It invokes both a biological species as well as a series of universal, independently distinct things (the right to life, the right not to be tortured, etc.) that its members are said to bear. To say that these things are independently distinct is to say that they are separable items capable of being placed on a list, as with those of the various charters, schedules, and declarations. And indeed, this is precisely what abstracting does: it separates things out, isolating them from our concerns as social beings immersed in particular cultural practices.⁶⁴

Professor Blattberg’s solution:

All the human rights talk, however, only gets in the way. What is required instead is the telling of convincing thick stories, both fictional and nonfictional, that can empower the relevant values. Such stories are effective not because they engage sentiment over reason, as Rorty would argue, but because they call upon a practical as distinct from theoretical form of reason.⁶⁵

For a recent Australian example of a thin (abstract) and thick (contextual) approach to fundamental issues of justice, consider the debate concerning the *Northern Territory National Emergency Response Act 2007* (Cth) (‘the *NER Act*’), the so-called Northern Territory Intervention, discussed at some length in the Report. Again, the point here is not to enter into (or resolve) the debate as to the appropriateness of those measures, but to compare two conceptual approaches to the issue, one thin and one thick.

The thin language of ‘human rights’ may be found in the submissions to the Report:

Although aspects of the Intervention appear to have a degree of community support (including among some of the Indigenous people affected by them), concern was raised about the discriminatory impact of the measures and the process by which they have been implemented. The Australian Council of Social Service, for example, submitted that the Intervention has infringed a number of human rights, including the right to self-determination (since the response was developed in the absence of consultation with affected Indigenous communities), the right to social security (under the policy of income management), the right to freedom of movement (since the ‘basics card’ can be reliably used only in designated areas) and Indigenous land rights (as a result of the compulsory acquisition of Indigenous-held land under five-year leases).⁶⁶

Notice how no human being actually appears in this litany of breaches of ‘human’ rights.

64 Blattberg, above n 18, 45.

65 Ibid 49-50.

66 The National Human Rights Consultation Committee, above n 3, 109.

The same abstract (and with respect, self-congratulatory) approach can be found in the judgment of Kirby J in *Wurridjal v The Commonwealth*⁶⁷ ('*Wurridjal*'), the High Court decision on the constitutional challenge to the validity of the *NER Act*. His Honour's judgment is, from start to finish, a *tour de force* of human rights concerns.

His Honour opened with the topic of 'rights':

The claimants in these proceedings are, and represent, Aboriginal Australians. They live substantially according to their ancient traditions. This is not now a reason to diminish their legal rights.⁶⁸

His Honour moved on to stress the importance of the fact that 'rights derived from Aboriginal law and tradition ... recognised by the common law of Australia ... must now be protected and enforced by Australian courts',⁶⁹ notwithstanding the fact that the plaintiffs claimed no such rights.⁷⁰ An impressive array of international law about the protection of 'rights' was cited.⁷¹

Relevant sources of international law recognise the general right to property.⁷² Specifically, there is a growing body of international law that recognises the entitlement of indigenous peoples, living as a minority in hitherto hostile legal environments, to enjoy respect for, and protection of, their particular property rights.⁷³ There is also express recognition of the cultural, religious and linguistic rights of indigenous peoples, including in United Nations treaties of general

67 (2009) 237 CLR 309, 337 [14] (*Wurridjal*). In relation to which, see French CJ's reference to Kirby J's 'gratuitous suggestion' that the outcome of the case was based upon 'an approach less favourable to the plaintiffs because of their Aboriginality' (at 337 [141]).

68 Ibid 391 [204].

69 Ibid 396 [220]: a clear reference to the effect of *Mabo v Queensland [No 2]* (1992) 175 CLR 1 and the *Native Title Act 1993* (Cth).

70 The plaintiffs' interests in their traditional lands being recognised, and regulated, by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), and not the *Native Title Act 1993* (Cth).

71 *Wurridjal* (2009) 237 CLR 309, 411 [269]. Footnotes 72-75 below, reproduce Kirby J's footnotes (399)-(402) as cited in the judgment.

72 *Universal Declaration of Human Rights*, Art 17 (adopted and proclaimed by United Nations General Assembly resolution 217A (III) of 10 December 1948); *American Convention on Human Rights*, 1144 UNTS 123, Art 21 (opened for signature 22 November 1969, entered into force 18 July 1978).

73 *Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries*, Art 14 (adopted by the General Conference of the International Labour Organization on 27 June 1989, entered into force 5 September 1991) ('Convention No 169'); *United Nations Declaration on the Rights of Indigenous Peoples*, Arts 25, 26 (adopted by General Assembly resolution 61/295 of 13 September 2007); *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (unreported, Inter-American Court of Human Rights, Inter-Am Ct HR (Ser C) No 79, 31 August 2001) at 74 [148] ('*Mayagna*').

application to which Australia is a party.⁷⁴ Commonly, such cultural, religious and linguistic rights are directly connected to the land of indigenous peoples, warranting protection of their property rights.⁷⁵

Yet strangely, again, no actual human being appears in this entire narrative. Rather, the plaintiffs, insofar as they are referred to by his Honour, are referred to as an archetype: 'Aboriginal Australians'. Notice how this is made explicit by his Honour's opening words, namely that the claimants 'are, and *represent*, Aboriginal Australians'.⁷⁶ The plaintiffs did not bring the proceedings as representative proceedings in any legal sense. In its context, therefore, this reference should be understood, not in the sense that the plaintiffs brought the proceedings on behalf of certain other Aboriginal persons; rather that they represented 'Aboriginal Australians' in the abstract.

Even more remarkably (his Honour having given so much emphasis to the need for 'vigilance' in the protection of rights in light of the 'background and contextual circumstances'⁷⁷), the fact that communities affected by the *NER Act* were in 'desperate circumstances' was only referred to by Kirby J in order to point out that 'living in such conditions does not affect *in the slightest* the legal question before this Court'.⁷⁸ And because the conditions of those communities did not matter *in the slightest* when it came to human rights, it was not necessary to ask: Who were they? What were their names? How did their families live? How did they spend their days?

Compare this rarefied 'thin' talk to that of Noel Pearson, Director of the Cape York Institute for Policy and Leadership, speaking and writing about

74 *International Covenant on Civil and Political Rights*, [1980] ATS 23, 999 UNTS 171, Art 27 (opened for signature by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force generally 23 March 1976, entered into force for Australia 13 November 1980) (the ICCPR); *Convention on the Rights of the Child*, [1991] ATS 4, 1577 UNTS 3, Art 30 (opened for signature by United Nations General Assembly resolution 44/25 of 20 November 1989, entered into force generally 2 September 1990, entered into force for Australia 16 January 1991).

75 Convention No 169, Art 13; *Mayagna* (unreported, Inter-American Court of Human Rights, Inter-Am Ct HR (Ser C) No 79, 31 August 2001) at 74 [149]; Office of the United Nations High Commissioner for Human Rights, *General Comment No 23: The rights of minorities (Art 27)* (comment on the ICCPR, to which Australia is a party), 8 April 1994, UN Doc CCPR/C/21/Rev.1/Add.5 at [7]; United Nations Economic and Social Council, Final Working Paper of the Special Rapporteur (E A Daes), *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities*, 11 June 2001, UN Doc E/CN.4/Sub.2/2001/21 at 7-9 [12]-[20].

76 *Wurridjal* (2009) 237 CLR 309, 391 [204].

77 *Wurridjal* (2009) 237 CLR 309, 400 [234]. The preceding paragraphs ([226]-[233]), which variously refer to 'lack of consultation' and 'criticism', were clearly not intended to paint the *NER Act* in a positive, or even neutral, light.

78 *Wurridjal* (2009) 237 CLR 309, 402, [241] (emphasis added).

the same issue.⁷⁹ The deliberation engaged in by Mr Pearson does not begin with abstract rights, but seeks to identify the human goods or ends involved and then determine what measures will best suit those ends (so as to produce and define the ‘rights’):

Child protection is not like poverty or educational underachievement or general socioeconomic disadvantage. Time and deliberation can be taken when considering and devising solutions to these large structural problems.

But what do you do when a child is being subjected to abuse this very day? What do you do when a child is likely to be abused next week? What do you do when abuse is going to happen the week after next? What do we do when there are scores of children involved across the communities, the states and territories? If it were your child at risk of this suffering, would you think this a matter of emergency?⁸⁰

In language no less rational, and no less principled, than that of Kirby J, Mr Pearson’s discussion of the issue brings real people to life by describing the ‘relationships’ involved. In so doing, we begin to *see* the people involved:

The big danger for the Government ... is that they can’t go marching in like cowboys. They’ve got to go marching in with humility, with support, not with arrogance, and they’ve got to enjoin the Aboriginal people of that community. Because you talk to me about one community that does not have within it sober grandmothers, sober mothers, sober men who are concerned about these problems and who would not welcome relief for their children and for their community.

...

[T]he intervention that I want is one where it is only people who are being irresponsible where the intervention takes place. Where parents, and there are many Aboriginal parents who are responsible in relation to their children, and they should be left and encouraged in the continuation of that responsibility. We should only intervene where people are doing the wrong thing so that we send the right message. We send the right message to everybody that if you do the right thing, then you exercise all of the privileges of making your own decision as a parent. But listen, the day has come when there is an end to the day when you as an adult can abuse the money that you get, don’t use it for the benefit of the kids, use it for drinking, use it for gambling, use it for drugs and create living hell for your children. That day has got to come to an end.⁸¹

What is, finally, striking about the ‘practical as distinct from theoretical form of reason’ engaged in by Noel Pearson is that it does not enlist, in

79 See, in various formats, *inter alia*, ABC Online, ‘Noel Pearson Responds to Indigenous Plan’, *PM*, 26 June 2007 <www.abc.net.au/pm/content/2007/s1959560.html>; ‘Politics Aside, An End to Tears in Our Priority’, *The Australian*, (Sydney) 23 June 2007; ABC Online, ‘Noel Pearson Discusses the Issues Faced by Indigenous Communities’, *Lateline*, 26 June 2007, <www.abc.net.au/lateline/content/2007/s1962844.html>; ‘Action Only Way Forward’, *The Australian*, (Sydney) 7 July 2007.

80 Noel Pearson, ‘Politics Aside, An End to Tears is Our Priority’, *The Australian* (Sydney), 23 June 2007 <<http://www.theaustralian.com.au/news/opinion/politics-aside-an-end-to-the-tears-is-our-priority/story-e6frg786-111113806184>> at 26 July 2010.

81 ABC Television, ‘Noel Pearson Discusses the Issues Faced by Indigenous Communities’, *Lateline*, 26 June 2007 <www.abc.net.au/lateline/2007/s1962844.htm>, at 26 July 2010.

any way, the rhetoric of rights.⁸² Rather, it takes, as its starting point, the establishment of 'social and cultural standards'.⁸³

A preference for this form of 'practical reasoning' is not, it must immediately be stressed, a call for policy or law based on emotion or sentiment. Emotivism, the notion that all evaluative judgments are merely expressions of preference or feeling,⁸⁴ is the *opposite* of what we want to achieve. What we want are standards and principles.⁸⁵ It is simply that we have a better chance at finding those standards by focussing our attention on our relationships, rather than on our rights.

If it seems as though I have taken a long time to tell you something you already knew, that is because I probably have. And you probably did.

VIII THE NARRATIVE TRADITION OF THE COMMON LAW

The notion that 'justice' will be better arrived at by starting from relationships, rather than abstract rights, should seem familiar to a lawyer trained in the common law tradition,⁸⁶ because that is what we already do, and that is what we are good at. Common lawyers are natural storytellers⁸⁷ and the way we build an understanding of what best serves the good of the community is our narrative tradition.

As Tracey Rowland has observed:

One of the virtues of the Common Law tradition is that judges were called upon to adjudicate rival claims between litigants from a perspective which placed the parties in the context of a complex ensemble of social and legal relations.⁸⁸

82 Ibid, except where the rhetoric is referred to as part of the problem: 'The wasteland of responsibility in Indigenous Australia is the consequence of government and bureaucracies and welfare organisations, including NGOs, who have intervened in Aboriginal affairs and said: 'Listen, you don't have to take responsibility. You have a whole suite of rights, including the right to welfare, the right to drink, the right to party all night, the right to have the trappings of office without being accountable for any return on your role'.

83 ABC Television, 'Noel Pearson Responds to Indigenous Plan', *Lateline*, 26 June 2007, <www.abc.net.au/pm/content/2007/s1959560.html> at 26 July 2010.

84 MacIntyre, above n 6, 11-12.

85 Nor should such an approach be thought to advocate a 'relativist' view of justice. It is assumed (although beyond the scope of this article) in what has gone before that the proper *ends* of human relationships, and of human life in general, are themselves capable of rational identification.

86 By which I include the doctrines of Equity.

87 The Hon. Justice Peter Heerey, 'Storytelling, Postmodernism and the Law' (2000) 74 *Australian Law Journal* 681.

88 Tracey Rowland 'Natural Rights: A Schallian Guide for the Perplexed' in *Jerusalem, Athens and Rome: Essays in Honour of James V Schall*, South Bend: St Augustine's Press, 2010.

It is from this ‘context of a complex ensemble of social and legal relations’ that our principles and standards are revealed.

More particularly, these principles and standards, in our tradition, are developed by a close analysis of the ends of a particular relationship (be it economic,⁸⁹ nurturing,⁹⁰ healing,⁹¹ conflict resolution⁹² or some other end), the texture of that relationship (be it equality, mutuality, vulnerability, power, control, disadvantage or impartiality) and how that relationship intersects with other relationships.

The obvious example, in the modern era, is Lord Atkin’s famous articulation of the ‘neighbour’ relationship in the tort of negligence in *Donoghue v Stevenson*.⁹³ The centrality of this attention to the nature of ‘relationships’ continues to this day. Consider, for example, the High Court’s decision in *Sullivan v Moody*,⁹⁴ in holding that those charged with the statutory responsibility of investigating and reporting on cases of alleged sexual abuse could have no legal duty to take care to protect those suspected of being the sources of the harm. The Court’s discussion of its methodology reveals both the attention to the network of relationships and a rejection of emotivism:⁹⁵

- [51] In *Dorset Yacht Co Ltd v Home Office*, Lord Diplock said:
 “... [T]he judicial development of the law of negligence rightly proceeds by seeking first to identify the relevant characteristics that are common to the kinds of conduct and relationship between the parties which are involved in the case for decision and the kinds of conduct and relationships which have been held in previous decisions of the courts to give rise to a duty of care.”
- [52] Conversely, conduct and relationships may have been held not to give rise to a duty of care, and the reasons for that holding may provide an important guide to the solution of the problem in a new case.
- [53] Developments in the law of negligence over the last thirty or more years reveal the difficulty of identifying unifying principles that would allow ready solution of novel problems. Nonetheless, that does not mean that novel cases are to be decided by reference only to some intuitive sense of what is “fair” or “unfair”. There are cases, and this is one, where to find a duty of care would so cut across other legal principles as to impair their proper application and thus lead to the conclusion that there is no duty of care of the kind asserted.

...

89 Such as employer/employee or contractual parties.

90 Such as parent/child.

91 Such as doctor/patient; hospital/patient.

92 Such as court/litigant.

93 [1932] AC 562.

94 (2001) 207 CLR 562.

95 *Sullivan v Moody* (2001) 207 CLR 562, 580-581 [51]-[56] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ) (footnotes omitted).

- [55] More fundamentally, however, these cases present a question about coherence of the law. Considering whether the persons who reported their suspicions about each appellant owed that appellant a duty of care must begin from the recognition that those who made the report had other responsibilities. A duty of the kind alleged should not be found if that duty would not be compatible with other duties which the respondents owed.
- [56] How may a duty of the kind for which the appellants contend rationally be related to the functions, powers and responsibilities of the various persons and authorities who are alleged to owe that duty?

The Court went on to consider the complex network of powers, interests and relationships involved in order to arrive at a principled conclusion.⁹⁶ This is a far better approach, it is submitted, than simply pitting the ‘right of children to be protected’ against the ‘right to reputation’.

Or take, as another example, *Magill v Magill*,⁹⁷ which concluded that ‘private matters of adult sexual conduct and a false representation of paternity during a marriage’ are not actionable in the tort of deceit. The Court was clearly concerned, in reaching that conclusion, to analyse the ‘ends’ of the marriage relationship,⁹⁸ its differences with other relationships⁹⁹ and what rights would best serve those ends.¹⁰⁰

Nor of course, is the approach confined to the law of torts. Equity, in particular, derives many of its doctrines from a close analysis of the ends and features of the relationships existing between parties. From fiduciary relationships, in which the categories are never closed,¹⁰¹ to the doctrine of unconscionability,¹⁰² equity takes as its starting point the relationship between the parties, and the stories they tell.

96 *Sullivan v Moody* (2001) 207 CLR 562, 582-83 [60]-[63].

97 (2006) 226 CLR 551.

98 *Magill v Magill* (2006) 226 CLR 551, 564 [24] (Gleeson CJ): ‘The structure of marriage and the family is intended to sustain responsibility and obligation. In times of easy and frequent dissolution of marriage, the emphasis that is placed on the welfare of the children reflects the same purpose.’

99 *Magill v Magill* (2006) 226 CLR 551, 580 [88] (Gummow, Kirby and Crennan JJ): ‘[C]onduct which constitutes a breach of promise of sexual fidelity and any consequential false representation about paternity, occurring within a continuing sexual relationship, which is personal, private and intimate, cannot be justly or appropriately assessed by reference to bargaining transactions, with which the tort of deceit is typically associated.’

100 *Magill v Magill* (2006) 226 CLR 551, 593-594 [133]-[134], especially the discussion of the numerous considerations relevant to what is described as a ‘voluntary complex and private relationship of trust and confidence’ (Gummow, Kirby and Crennan JJ).

101 See Meagher, Gummow & Lehane, *Equity Doctrines and Remedies*, (4th ed, 2002) [5-005]-[5-025]; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

102 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, [16-005]-[16-035].

To use Professor Blattberg's terminology,¹⁰³ the common law is 'thick'.

That is why we remember, for example, that May Donoghue's drink on 26 August 1928 was bought for her by a friend.¹⁰⁴ That Giovanni and Cesira Amadio were in their kitchen when they executed a guarantee in favour of their son in 1977.¹⁰⁵ That Maree Whitaker was apprehensive about her upcoming surgery in July 1984 and asked questions 'incessantly'.¹⁰⁶ That John and Brenda Miller didn't care much for cricket.¹⁰⁷ And, even, that Frances and Leo Baumgartner named their only child 'Dallas'.¹⁰⁸

Moreover, all of these facts were important for understanding what the 'demands of justice' were in each case.¹⁰⁹

To add to the genius of the common law tradition, moreover, not only do we (the participants in the process) tell the story, with its 'complex ensemble of social and legal relations' in the particular case before us, we also retell the stories that have come before. We do this to determine how the complex of factors in the present case compares to the complex of factors in the cases which gave us the principle or the standard to begin with. Comparing the two enables us to best determine how to apply that standard in the present case.

In this way, the past informs the future. Adam MacLeod puts it this way:

After preserving a sample of cultural fabric, the legal narrative directs the future evolution of that fabric by teaching which choices are just and which ones are not. For better or worse, the common law tradition always looks backward before looking forward. Lawmakers and interpreters of the law begin their deliberations by reading the law's narrative about the past. Informed by this narrative, they proceed to pass new judgments on choices currently at issue.¹¹⁰

We should, however, recognise one further virtue of the common law's narrative tradition. That is that, being a tradition, it is not static. A tradition, if it is healthy, carries within it the mechanisms for its own correction. The conversation between the new story and the old stories does not, for example, simply inform the judgment to be made in the case at hand (the new story). It may also reveal something hitherto unnoticed in the old story, something latent within that story which clarifies the

103 Blattberg, above n 18, 45.

104 *Donoghue v Stevenson* [1932] AC 562, 566.

105 *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 453.

106 *Rogers v Whitaker* (1992) 175 CLR 479, 491.

107 *Miller v Jackson* [1977] 1 QB 966, 976.

108 *Baumgartner v Baumgartner* (1987) 164 CLR 137, 139.

109 Well, perhaps not the last one. But we remember it anyway.

110 Adam MacLeod, 'The Law as Bard: Extolling a Culture's Virtues, Exposing Its Vices and Telling Its Story' (2008) *J. Juris* 11, 12-13.

standard or principle in question. Indeed, it may be that, in light of the most recent case, something is revealed which suggests that the tradition has gone off course in the past – and that one of the old stories might have turned out differently if we could have seen then what we can see now. In that way the tradition helps to maintain ‘its own best being’.¹¹¹

Given where we started, with the Report’s reference to him, it is only fair that the final word, in this regard, should go to Alasdair MacIntyre:

A living tradition then is a historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition. Within a tradition the pursuit of goods extends through generations, sometimes through many generations. Hence the individual’s search for his or her own good is generally and characteristically conducted within a context defined by those traditions of which the individual’s life is a part, and this is true both of those goods which are internal to practices and of the goods of a single life. Once again the narrative phenomenon of embedding is crucial: the history of a practice in our time is generally and characteristically embedded in and made intelligible in terms of the larger and longer history of the tradition through which the practice in its present form was conveyed to us; the history of each of our lives is generally and characteristically embedded in and made intelligible in terms of the larger and longer histories of a number of traditions.¹¹²

This is how, I submit, the common law works at its best and this is the best way, ultimately, to build a ‘just culture’.

IX CONCLUSION

None of the above is put forward, or intended to argue, on this occasion, for a particular outcome or outcomes. That would miss the point of the entire exercise. It has not been the purpose of this article to propose a legislative or constitutional ‘model’ for the fundamental protection of human dignity, although it should be obvious that such protection is not a task that can simply be left to ‘experts’ in ‘human rights’.

Rather, it is a question of *method*, and the best mechanism by which to build a just culture. As I have sought to show, that mechanism is not our fictional ‘lone rights-bearer’ plaintively holding up his or her list of ‘human rights’, but, rather, the long and arduous work of recalling, retelling and building our narrative tradition.

As stated earlier, this is messy work. But someone’s got to do it. And that ‘someone’ is all of us.

111 Gerard Manley Hopkins, ‘The Leaden Echo and the Golden Echo’, *Selected Poetry* (1998), 139.

112 MacIntyre, above n 6, 222.