PROXIMITY AND THE ONTOLOGY OF HUMAN RIGHTS

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The truth about human rights is plain, says Alisdair MacIntyre, "belief in them is one with belief in witches and unicorns". His rationale for this position is a touchstone for theories of human rights. As MacIntyre says:

The best reason for asserting so bluntly that there are no such rights is indeed of precisely the same type as the best reason which we possess for asserting that there are no witches and the best reason which we possess for asserting that there are no unicorns: every attempt to give good reasons for believing that there are such rights has failed.

This failure to provide convincing evidence for human rights cannot be blamed on a lack of effort by contemporary moral theorists; attempts have been sponsored by intuitionist, institutionalist, intrinsic value, interest-claim, Kantian, and existential theorists. Each of these approaches fails however, because the theories begin too far down the line, before an ontological conception of the idea of "human" or the moral self as it operates within the region of human rights has been worked out. Although the rights part of the equation may be convincingly developed without such a regional ontology, the reason why rights necessarily apply to all humans remains obscure. Only if an essential interpretation of

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1 Alisdair MacIntyre *After Virtue* (Notre Dame: University of Notre Dame Press, 1984), p. 69.
2 Ibid., p. 69.
3 For an analysis of the first four categories of theorists, see Alan Gewirth, "The Basis and Content of Human Rights" in *The Philosophy of Human Rights*, Morton E. Winston (Ed). (Belmont: Wadsworth, 1989), p. 183 ff. Although Gewirth accords Rawls's "veil of ignorance doctrine" its own category, I hold that this is essentially an egalitarian or "intrinsic value" theory.
“human” in human rights theory can be developed, will adequate evidence of the existence of human rights become a possibility.

In this paper, I attempt through a phenomenological analysis to provide a regional ontology that grounds human rights. In order to find what is essential in the humans that have rights, I will begin with a critique of contemporary theories that purport to describe them and define their context. With this critique as a backdrop, I will suggest a general criteria for the kind of human or moral self that must exist if human rights are to exist as a necessity of human experience rather than a mere option. This description, drawn largely from Heidegger's existential analytic of *Dasein*, will provide a starting point for defining the horizon against which humans must be interpreted if they are to have rights. In the final section, I will argue that that horizon is a proximity which is neither temporal or spatial, but rooted in understanding.

II

Despite their far reaching historical and international influence, the notion of any ground is missing from the classic intuitionists' assertions about human rights which form the basis of such great modem documents as the American Bill of Rights, the French Declaration of the Rights of Man, and the UN Universal Declaration of Human rights. Consequently, equally ungrounded are the claims about human rights made by the myriad of organizations from Amnesty International and Americas Watch to the San Francisco Human Rights Commission which draw their authority from these documents. Since theories of natural rights that do not have a metaphysical basis begin with the presumption of self-evident truths that we all allegedly hold, they yield a category of rights that requires no more justification than these self-evident truths. This seventeenth century approach to human rights has become obsolete in our multicultural world for reasons that seem now as self-evident as its adherents' claim to the self-evidence of basic rights: it leaves no room for conflicting intuitions. This has become painfully clear in our nation's attempts to make sense of the seminal American intuition that all men are created equal, for not only have we equivocated historically the notion of "man" to effectively exclude women, African Americans, and Native Americans, Americans have continued the tradition by excluding gays, Asians, illegal aliens, and fetuses from their conception of "man".
Indeed, to avoid thinking of this as a merely historical or evolutionary problem, one needs only consider the current crisis in debates on the rights of fetuses. Although philosophers such as Baruch Brody have made careful and convincing human rights arguments that deny the right of women to abortion, such arguments ultimately rest on an intuitional presumption about the status of fetuses as humans, and others have made equally convincing arguments using contrary intuitions. The intuitional claim that fetuses are humans has no more substantial ground than the contrary claim that they are not, and this issue seems to have been settled not so much philosophically as politically. Borrowing an insight from Maclntyre, such issues of human rights seem consigned to a resolution that draws more on the power of protest than rationality.

According to institutional theorists, such political activity is precisely how human rights are grounded. Joel Feinberg, for example, has argued that a right is by definition a claim validated by a set of governing rules. Rex Martin has extended his position by insisting that such institutional frameworks must include a mechanism for enforcement for, “A human right is defective, not as a claim but as a right, in the absence of appropriate practices of recognition and maintenance”. The first problem with this view is the prima facie incoherence of its contrapositive: without an institutional framework of governing rules (and a mechanism for enforcement) there are no rights. Like any convention-based concept of morality, a view that makes the institution the a priori ground for rights is inconsistent with experience. It cannot, for example, accommodate social reformers like King and Mandela who call for rights that are not yet sanctioned by the society in which they find themselves. Furthermore institutional theories of human rights have no mechanism for acknowledging that institutions can be morally wrong, and they must remain si-

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6 Maclntyre, After Virtue, pp. 71 ff.


lent in the face of such institutional policies as slavery, sexual discrimination, and apartheid.

David Duquette attempted to resolve this problem by broadening the context of the institutional framework for determining human rights. Arguing that leagues of nations and their agencies rather than individual societies are the proper institutional basis for recognizing human rights, Duquette hoped to overcome these inevitable anomalies that arise from making the "institutions against which human rights claims are made to be the arbiters as to what those rights are, or whether they even exist". Although Duquette certainly solves the problem of inconsistency in the world-wide recognition of human rights, the problem of what rights are to be recognized is left unanswered. By relying, as he does, on a consensus of views about the "great human rights manifestos of the 19th and 20th centuries", Duquette puts the question of rights back into the hands of the intuitionists. But there is no reason that a consensual intuition provides any better ground than an eccentric one.

Such institutional approaches to human rights do not resolve the question, they simply displace it. Institutions still have the responsibility of determining what comprises human rights before any claim can be considered for either validation or enforcement, and there is no mechanism in an institutional view for accomplishing this. As Ronald Dworkin says, there are times when it is not only right but a right to break the law, and there is no reason to believe that such a right is contingent on the size of the institution that has created the injustice.

Dworkin's own view of human rights which leads him to this conclusion is representative of intrinsic value arguments for human rights. According to Dworkin, anyone who professes to take rights seriously:

must accept at the minimum one or both of two important ideas. The first is the vague but powerful idea of human dignity. This idea, associated with Kant, but defended by philosophers of different schools, supposes that there are ways of treating a man that are inconsistent with

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11 Ibid., p. 55.
recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust.

The second is the more familiar idea of political equality. This supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves. 13

Both of these ideas are variations on the theme of equality; according to this view, either one holds absolute some notion of equality among people, or human rights are not possible. Yet this contemporary egalitarian intuition, which has begun to be taken as the most self-evident of presumptions, seems to be among the most facile. 14 Not only is there no empirical reason for presuming equality among people, philosophical strategies for justifying the presumption fail for the same reasons that foundational claims about human rights fail. Whether one approaches the justification of the presumption of equality from Alvin Platinga's "properly basic belief strategy", from Nozick's libertarian perspective, Vlastos's family metaphor description, from pragmatic, utilitarian, or coherentist frameworks, an underlying problem remains: equality among people remains as much a choice as elitism is. Because it is not a necessity of human existence, but merely one of many rationally justifiable possibilities, it cannot be trusted as a principle that will guarantee any level of universal treatment of people.

This is the fundamental problem with any intrinsic value theory of human rights. As Gewirth notes, to claim that we are all "children of God" and therefore deserve respect commensurate with this is tautological; the predication does not go beyond the subject term. 15 In the same sense, natural law arguments like Kohak's claim that human rights derive from nature's righteousness ultimately rest on the observation that we cannot have rights without a morally ordered universe--we cannot live in a world that is both Lockean and Hobbsian. 16 Since the world is ordered, since human existence is value-laden, it must be that we have human rights. Not only does such an argument seem to presume the conclusion,

13 Ibid., p. 108.
there appears to be an inference gap in the equivocation of “rightness” and “right”. That is, even if one assumes the traditional natural law proposition recast by Josef Pieper that all that is, is good,17 how can one get from what is good or even right to “having a right” without some further premise? Or, in other words, how does it follow from this that rights are a necessity and not a mere possibility of an ordered world.

Interest-claim theories, like those of Josef Raz18 and Henry Shue,19 have attempted to resolve this problem by focusing on the unique capacity of humans for interests, claiming that rights are inconceivable without interests. Raz’s argument to this effect is difficult to reject; rights without interests are inconceivable. Similarly, his claim that rights are the grounds of other’s duties seems indisputable. But again, although having rights may require interests, it is difficult to see how having interests ensures having rights. Shue circumvents this problem by simply beginning with the claim that all people have rights to something, and if they have rights to anything, it is incoherent not to assume that they have the basic rights of subsistence and security, without which the other rights would be meaningless. Of course, our world seems not to lack examples of people that violate his first premise, and one is left again with a strong hypothetical argument, with no ground for the hypothetical premise. That is, if people have any rights, it may well be the case that they must have basic rights, but whether they have any rights is still the unanswered question.

The Kantian answer to this difficulty is to turn to reason itself as the ground for rights. Although such an approach holds promise because it avoids the presumption or tautological dangers of intuitionists, institutionalist, intrinsic value, and interest-claim theories, Kantian views fail to show that rights exist as a necessary function of human reason. For example, Gewirth claims that freedom is a necessity of rational moral action. All moral agents must claim to have a right to exercise that freedom, and it is inconsistent to claim that I have such a right without universalizing that to all those in similar circumstance, i.e., to all those who are moral agents.20 The problem, as Lee and Macintyre have been quick

to point out, is neither with the claim that freedom is necessary to moral agency, or that if one claims it as a right for oneself that its rational consistency would demand its universalization.\textsuperscript{21} The problem is Gewirth's lack of support for his second premise. How is it that needing freedom in some way implicates a right to it? Again, the problem with human rights, even in Gewirth's careful and well developed Kantian approach, is the difficulty of showing that human rights are any more than a possibility of human existence that may or may not be chosen by those in a position to honor them.

It is precisely this problem that has led Lee to the conclusion that there is no exit from Sartrean existential ethics. As he says:

When I claim to have a right to life, liberty, and the pursuit of property, and I do make such a claim; I recognize that I cannot ultimately ground that claim in knowledge of my natural \textit{telos} or an indubitable rational intuition, or even a linguistic analysis which equates my needs and desires with rights and duties. No, my rights are solely grounded in my free creation of them and my willingness to generalize my choice into a theory of universal human rights I acknowledge, as Gewirth does not, that my choice to believe in the value of my own rights is ultimately an unjustifiable Kirkegaardian "leap of faith" which is grounded solely in my choice.\textsuperscript{22}

A notion of rights such as Lee's which is based on choice is certainly coherent, but ultimately self-defeating, for the precise purpose of a human right is to provide a ground for enforcing claims against someone or some institution that are contrary to their choice. Or, stated differently, the notion of an existential ethics is coherent only as long as it does not have to do service as a ground for how others ought to behave, since any such stipulation must be made at the expense of that which is at the heart of such an ethics: freedom. Yet if we start with a presumption like Raz's that rights are the grounds of duties, then it is clear that human rights have fundamentally to do with others and specifically with the restrictions which we can viably put on their freedom. It is simply contradictory to use freedom as the ground for a freedom-limiting ethics.

Perhaps Lee recognizes this, and his argument is not really that freedom is the ground for human rights, but that there is no ground for hu-


man rights, for it is this lack of ground that ultimately enables Lee to claim that any human rights theory is possible:

On the basis of my approach, in fact, it would be possible for me to choose to adopt any of the theories listed above [e.g., those of the contract theorists, Utilitarians, Rawls’s egalitarianism, Nozick’s libertarianism, etc.] as well as any other so long as I am willing to concede that the ultimate ground of my theory, Hare’s fundamental criteria, are accepted on a faith which is incapable of incontestable demonstration.\(^{23}\)

But how can one distinguish such a view from that of the intuitionists who cannot adjudicate conflicting intuitions? In this case, if Lee accepts that all of the above theories can be equally viable—because there is no moral ground but the leap of faith, the freedom of choice—he must also accept that one can choose to deny altogether that there are human rights. If rights are not a necessity but merely a possibility of human existence, something one is at liberty to choose for oneself but cannot enforce on others, the purpose of calling these virtues or aspirations “rights” becomes suspect, since rights by any definition limit the choice of others, particularly those others who are disinclined to make the choice one desires.

Again, the unifying problem with the approaches to rights that I have examined up to this point is their inability to establish rights as a necessity rather than a mere possibility. When, from an existential perspective, this recognition is itself incorporated into a theory of human rights, then the problem is not resolved but radicalized. Rather than merely being unable to decide which notion of human rights should be accepted, one is unable to decide whether any notion of human rights must be accepted. In order for any human rights theory to have a chance of overcoming the skepticism about the existence of human rights, this last problem must be resolved first; it must be clear that some notion of human rights is a necessity of human existence.

Thus Lee’s conception of existential ethics provides the most important clue for overcoming the problem of necessity in human rights, for by hinging his theory on the radical freedom of the individual to choose, he exposes the underlying presupposition of all theories of human rights that I have considered: the presumption of the self for whom intersubjectivity exists only by choice. That is, the existential ethicist presumes that there is a self that is free to choose human rights, just as an in-

\(^{23}\) Ibid., p. 41.
tuitionist believes that there is a self that intuits, an intuitionist acknowledges that there is an institution (of selves) that can determine, a value theorist posits that there are monadic individuals that “have” value, an interest theorist claims that selves can claim, and a Kantian claims that there is a self that can determine its relation to others.

But, beginning with the most explicit expression of this presumption, is it true that the self is free, as Lee argues, to choose human rights? if so, then there are no human rights; the humans that have, acknowledge, repudiate, intuit, value or claim human rights cannot be free to choose for there to be human rights. Their freedom must be limited to deliberating on such questions as “how” or “what” and must be barred from the domain of “whether”. For human rights must reign over all selves, even those who would choose otherwise if one is to assert that they do exist rather than that they may exist, and for this reason humans cannot be fundamentally constituted by freedom if they are to have inalienable rights. But if not freedom, then what is essential to the moral self for which human rights necessarily exist?

III

John Caputo has suggested that no ethics is possible without obligation, and I would argue that as a branch of ethics, this holds for human rights as well: there can be no human rights without obligation. By “obligation”, I mean a relationship that is binding, an inseverable relationship towards others. Furthermore, unlike interests, in which one can claim that their existence is necessary for rights but does not necessitate them, obligation is a two way street. if one has an obligation, is obligated, bound towards another, then there is no way of rationally denying the other’s ethical claim against one, for once obligation becomes a choice, it ceases to be an obligation. It is not only necessary for human rights, but necessitates them. It is no more possible to imagine human rights without obligation than to imagine obligation towards humans without rights for those to whom one is obligated. But the observation that rights cannot exist without obligation does nothing to prove that humans are constituted by obligation, or that obligation is any more a necessity of human existence than are rights.

Obligation is a necessity of human existence only if human beings cannot be imagined without it. That is, is it possible to imagine human beings without binding relationships? It depends, I believe, on what one means by human being, or, more specifically, what the ‘being’ of humans means. Heidegger has argued that it is “Care”, not ontologically in the sense of solicitude, I hasten to acknowledge, but more in the sense of the “natural light”.

The essence of being human is, in shorthand, its capacity for disclosing the truth of Being or, in less mystifying terms, its inescapable relationship to meaning. I want to stress that this is a fundamental ontological relationship of humans to truth rather than one of many attributes. As Heidegger says, “Dasein, as constituted by disclosedness, is essentially in the truth. Disclosedness is a kind of Being which is essential to Dasein. ‘There is’ truth only in so far as Dasein is and so long as Dasein is. Entities are uncovered only when Dasein is; and only as long as Dasein is, are they disclosed.”

Although Heidegger may point here in the direction of the ontological character of the self in human rights, one must keep in mind that he cannot by any stretch of insight be interpreted as laying a groundwork for ethics. I am therefore reluctant to use his analysis as a categorical authority for any claim about human rights. But one need not merely take his word that care or the fundamental relation to truth is essential to being human. If it is not, however, then one must be able to imagine oneself as a human being without a relation to meaning. Obviously, such Cartesian imagining itself is proof of the contrary.

But if this relationship to meaning is necessary, the question then becomes whether it is possible to have a relationship to meaning that does not implicate others, does not demand an inseverable relationship with others as the condition of the possibility of its being meaningful. But it is as impossible to imagine a human being without meaning as it is to imagine human meaning without a world of others. That is, one cannot imagine a self constituted without others; one cannot imagine how a self could be if others were not. Not only would a self that was self-constituted not have parents, family, world, and so on, it would not have the language that would make meaning and thus being human possible. This was precisely Heidegger’s point when he recognized that being

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26 Ibid., p. 269.
human was being in the world, not as a possibility, but as an ontological necessity of existentiality. Since one cannot imagine any self without others, one can say that one is necessarily bound to others as a condition of one's existence, that obligation necessarily exists. But in what way does this form of bondage result in human rights? Is it not an equivocation of "obligation" to say that because others are a condition of one's being, that one "owes" others rights?

The answer to this depends on the essence of the obligation that constitutes the necessary relationships between humans, and in particular on the relationship between "owing" and "obligation". To be obligated ontologically is to be bound at the level of being. Since the essence of being human is the existential relation to meaning, to be ontologically bound to the other means that there would be no possible relation to meaning without the other. One "owes" for what one has and the other "owns". One has meaning and it is owned by the other in the sense that without them it would not be. One "owes" the other only for the meaning they have that would not be without the other. This owing determines the nature of ontological responsibility, for one owes the other a willing of their being to the degree that one wills the meaning to be for which they are responsible. This is not a sudden importation of a morality, a sudden statement of "ought", but still a reflection of what is not possible to imagine as otherwise. It is not possible to imagine how one could will the condition of the possibility of meaning not to be as long as one willed the meaning. As long as the meaning is meaningful, one necessarily wills the "fullness" of its meaning, and therefore wills the other that owns that fullness.

But just because we will others or even owe others in a general sense, it is not yet clear how we move to the particular rights of particular individuals. That is, although I am ontologically bound to "the" other, it does not follow that I am ontologically bound to any particular other, to "an" other, and without this relationship there is no ontical obligation, no practical human rights. In order to understand how we are bound to an other and not merely the other, we must consider more carefully what it means to owe others for meaning ontologically. To say that we will others because they are the condition of the possibility of our being, means that we will their being present. Their presence is the fundamental obligation. Yet we are bound to will this presence only to the degree and so long as they contribute to that meaning of which they are the fullness of, so that our obligation is necessarily proximate. It is proximity
alone that allows for the movement in obligation from the general to the particular other. Proximity alone determines obligation.

But how, then, is proximity determined? Empirically, it would seem initially to be determined spatially or temporally, since we are all aware of our own general tendency to accord rights to others according to their distance from our moment and place on the planet; the responsibility to spend a few cents to keep a Rwandan child from dying is less pressing than the responsibility to spend a few dollars on the neighbor girl's girl scout cookies to support summer camp for suburban children. The atrocities against our Native Americans a hundred years ago seem more deserving of reflection than the atrocities of the Anglo-Saxons against the Celts, or the Normans against the Anglo-Saxons.

Yet the exceptions suggest a deeper determinate of proximity. For not all those who suffer near to us seem deserving of attention. One need only think of the last homeless person one passed or stepped over while on the way to an important lunch. And recent suffering is not always privileged suffering; consider, for example, the perennial affect of Anne Frank's diary, or the still raw injustice of the Salem trials. But if the proximity of obligation is neither spatial or temporal, what remains? Is this conclusion itself not proof that it cannot exist? It is precisely this presumption of the physicality of human rights that has led MacIntyre to deny their possible existence on the same basis that one denies the existence of witches and unicorns. But obligation and its subsequent rights and responsibilities cannot be held to the same standards of evidence as witches and unicorns, for the proximity that is at the essence of such notions is not physical but metaphysical. By metaphysical, I mean first that it exists only if and to the degree that it is thought. That is, thinking itself is the determiner of proximity; thinking alone brings others close in a way that is neither spatial nor temporal.

Since thinking metaphysically is thinking what is beyond but not without the physical, thinking which brings near and into view the essence of what becomes physical, only a particular kind of thinking is appropriate to metaphysics: the thought of being. To think of human rights metaphysically is to think how rights are with being, to think the emergence of the being through rights, and being emerges through human rights by way of the proximity that comes through thinking of others.

It is not that human rights are owed to whomever we think we owe them to. Rather, human rights are owed to whomever we think of. Thus the existence of human rights cannot be questioned, for the questioning
itself implicates the anonymous intentionality of others. Yet thinking of others is not merely having others in mind. To think of another such that they are brought into proximity means to understand. The more one understands another, the more one becomes obligated to them, the more rights one owes them.

I mean understanding in the hermeneutic sense, as the process of disclosing possibilities to oneself through the encounter of other horizons of meaning. The nature of the rights are, therefore, determined by the nature of the understanding, by the kinds of possibilities that are opened to us. The victims of the holocaust, for example, have the right not to be forgotten, for it is by remembering that we preserve the possibility of not going down that road again through racism, nationalism, and the objectification of other humans. We owe the victims this right not to be forgotten because it is by the granting of such a right that we preserve our own humanity, and we violate this right at great peril to our own being.

Similarly, as a father, I owe my children at least a right to protection from me, for only through their preservation is my identity as a father maintained. Furthermore, the more I understand my children, the more possibilities are opened to me as a father and the broader is their spectrum of rights. We are suspended, thus, in a network of rights stemming from the identity we draw through our relations to others as fathers, spouses, children, teachers, citizens, and so on. It is a network whose lines are drawn by the proximity to others that comes from our understanding of them.

Therefore, the more one understands, the more meaning there is in one's life, the more rights one accords others, the more there is the "being" of being a human being. Conversely, the fewer rights one accords, the less connection to others there is, the less meaning can be in one's own life, the less one "is" a human being. Or, even more simply, human rights allow human being.

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