

Theological Studies
70 (2009)

IMAGINATION, VIRTUE, AND HUMAN RIGHTS: LESSONS FROM AUSTRALIAN AND U.S. LAW

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The article attempts to bridge the gap between virtue theory and rights theory by asking what virtues are needed to recognize and protect human rights in concrete circumstances. Drawing on legal cases from Australia and the United States as examples, the author argues that three types of imagination are necessary: ontic, empathetic, and strategic.

THE DISCOURSE OF HUMAN RIGHTS, from a Christian theological stance, might be summarized as the systematic attempt to work out the implications of the Golden Rule in political and social life. “Do unto others as you would have them do unto you,”¹ like the logic of rights talk itself, requires acting agents to refocus their attention. They need to shift their consideration from the implications of their actions for their own lives to the implications of those actions for the lives of others. Both the Golden Rule and the discourse of human rights ask the “doers” to identify with the plight of those who are “done unto” before executing their plans. Yet this shift in perspective rarely happens automatically or easily. In this article, I will argue that identifying with the plight of others requires a certain multifaceted capacity for imagination.

At first glance, the substantive shift in perspective required by the Golden Rule seems to parallel the methodological shift required by a move from an older, virtue-based moral framework to the more contemporary discourse of human rights. Virtue theory, after all, focuses on the character of agents, while rights theory demands that agents consider how their actions affect the just claims of others. Moreover, the shift in perspective required to move from a virtue-oriented approach to a rights-oriented approach can

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¹ The rule, which encapsulates an ethic of reciprocity, finds a place in other religious traditions. For Christians, it is invoked in Matthew 7:12 and Luke 6:30 and stems from Judaism—see Leviticus 19:18 and 19:34.

seem too large for any one conceptual framework to accommodate them both. In fact, an examination of the current literature in both theology and philosophy might suggest to the unwary reader a substantial gulf between virtue theory and rights theory. Many virtue theorists do not talk about rights; many rights theorists ignore or downplay virtue. For example, the distinguished virtue theorist Alasdair MacIntyre once famously dismissed human rights as fictions analogous to witches and unicorns.²

In my view, however, no such gulf ought divide virtue theory from rights talk. Just as, for virtuous Christians, following the Golden Rule is a constitutive part of a life that is modeled on the life of Jesus Christ, so for Christian virtue theorists, respecting the rights of others is a constitutive part of true flourishing, which consists in playing one's part in building up the kingdom of God. In what follows I will outline one possible bridge between virtue theory and rights theory. My approach is interdisciplinary; it also straddles the boundaries of theory and practice. It is rooted, on the one hand, in the thought of Thomas Aquinas and his contemporary interpreters and, on the other hand, in the tradition of Anglo-American case law. The central question I probe is this: what traits of mind and heart—what virtues—are necessary to recognize and to articulate the human rights at stake in concrete cases, as well as to craft an effective means of protecting those rights?

In my first section, I draw upon the work of Aquinas to contend that a properly developed Christian virtue theory must account for human rights. The fulcrum of my argument is the peculiar nature of justice that acts as a bridge between the language of rights and the language of virtue. Following Aristotle, Aquinas recognized that the term “just” is applied in the first instance to a state of affairs in the real world, a state of affairs that gives all persons their due. In today's context, we can understand the function of human rights discourse as specifying precisely what is due to others (and to oneself) in particular situations. For Aquinas, the personal virtue of justice is the settled disposition of character to render other persons their due; in contemporary terms, we can consider it the settled disposition to respect their rights.

To render someone their “due,” we first must recognize exactly what constitutes that “due,” not merely in the abstract but in concrete situations and conflicts. How, concretely, do we recognize what is due to others? What skills are necessary to identify human rights? I contend that the

² “The truth is plain: there are no such rights, and belief in them is one with belief in witches and in unicorns” (Alasdair MacIntyre, *After Virtue*, 3rd ed. [Notre Dame, Ind.: University of Notre Dame, 2007] 69). MacIntyre later qualified his dismissal of human rights, as I indicate below. For an early critique of MacIntyre's dismissal, see Alan Gewirth, “Rights and Virtues,” *Review of Metaphysics* 38 (1985) 739–62.

development of the virtue of justice requires the cultivation of a set of dispositions that enhance our perception of the consequences of our actions (and our failures to act) for the lives and well-being of others. These dispositions are helpfully understood as modes of imagination that prompt us to consider carefully the impact of our actions on other people in ways that support the identification and protection of their rights.

In the subsequent three sections, I identify three different expressions of imagination that facilitate the promotion of human rights. *Ontic imagination* assists us to perceive the fundamental human dignity of others in circumstances where we might be tempted to ignore or overlook it. *Empathetic imagination* allows us to exercise solidarity with others and to recognize how our actions affect their status as members of the same community. Finally, *strategic imagination* allows us to deal appropriately with the fact that advancing the protection of human rights in societies with limited goodwill and limited resources is an incremental project.

These three categories of imagination are my own, developed over years of theologically informed engagement with case reports rooted in the English common law tradition. Judges in this tradition have long played an influential role in the recognition, delineation, and protection of various types of moral and political rights, not merely contributing to the realm of theoretical reflection but also shaping the practice of the communities in which they wield authority. Their decisions implement, sometimes tacitly, sometimes explicitly, a normative vision for communal life, including a vision of the nature of human dignity and its claims upon us.³ Deeply indebted to the work of the great Catholic moralist and jurisprudence scholar John Noonan,⁴ I have asked myself what qualities of character allow one judge to see the *imago Dei* in a vulnerable party, while another judge is blind to it.

I appeal to select case studies to illustrate, not exhaust, the exercise of each of the three modes of imagination in operation. My selection, however, includes a variety of cases with respect to both the time periods and the places represented. The fact that most of my examples come from the law of Australia and the United States allows for an illuminating analysis of similarities and differences in a manner appropriate for an international scholarly forum such as *Theological Studies*. Both countries, for example, have long and difficult histories with aboriginal populations. Former colonies of England, both are committed to representative democracy as a

³ See M. Cathleen Kaveny, "Between Example and Doctrine: Contract Law and Common Morality," *Journal of Religious Ethics* 33 (2005) 669–97, for an examination of the consonance of how the common law of contracts can be considered a well-functioning moral tradition.

⁴ On the implications of Noonan's work for moralists, see Kaveny, "Listening for the Future in the Voices of the Past: John T. Noonan, Jr. on Love and Power in Human History," *Journal of Law and Religion* 11 (1994–1995) 203–28.

form of government, and both are deeply indebted to the English common law tradition, in which judges work out issues of law and morality, including issues pertaining to human rights, in the context of deciding particular cases. Different countries with different cultures, Australia and the United States nonetheless participate in the same moral and legal conversation.⁵

Perhaps the most important variation in the cases selected is the fact that they include moral failures as well as moral successes. I discuss examples of moral reasoning gone deeply awry, as well as examples of clear moral insight. These examples, moreover, are drawn from real life; they are not hypothetical case studies constructed for pedagogical or scholarly purposes. In my view, case law is an underused resource for both religious and secular moralists, in part because it offers an opportunity to examine where and how moral reasoning can deviate from the requirements of justice in concrete situations. It is, of course, easier to perceive these deviations in hindsight; nonetheless, close examination of the moral blindness of the past may help improve our own vision today.

INTEGRATING VIRTUE AND RIGHTS

For centuries, important strands of Western moral philosophy and moral theology have focused on the agent,⁶ and only secondarily on the persons affected by the consequences of the agent's action or failure to act.⁷

⁵ The proximate cause, so to speak, for this comparative exercise is coincidental—or perhaps providential. I was asked to deliver lectures in June 2007 celebrating the launch of Australian Catholic University's new Institute of Legal Studies, a major specialty of which is human rights. This invitation prompted my decision to investigate the legal tradition of Australia, which, like the United States, is a daughter of the English common law tradition.

⁶ Alasdair MacIntyre's publication of *After Virtue* in 1981 ignited new enthusiasm for virtue theory and its attendant concern with issues of character. Important precursors in philosophy were Elizabeth Anscombe's classic 1958 article "Modern Moral Philosophy," which suggests that a law- or rule-based morality is ultimately dependent upon a conception of virtuous living. The article is reprinted in G.E.M. Anscombe, *The Collected Philosophical Papers of G.E.M. Anscombe*, vol. 3, *Ethics, Religion, and Politics* (Oxford: Blackwell, 1981) 26–42. A precursor in Catholic moral theology would be Gérard Gillemann, S.J., *The Primacy of Charity in Moral Theology*, 2nd ed., trans. William F. Ryan, S.J. and André Vachon, S.J. (Westminster, Md.: Newman, 1961). In Protestant circles, an early and important precursor is Stanley Hauerwas, *Character and the Christian Life: A Study in Theological Ethics* (San Antonio, Tex.: Trinity University, 1975).

⁷ Virtue theory was downplayed in both Christian and secular moral thought until at least the mid-20th century. For centuries, the Catholic manualist tradition, which was developed to aid confessors, generally organized its analysis according to the requirements and prohibitions of the Ten Commandments. See John Mahoney, *The Making of Moral Theology: A Study of the Roman Catholic Tradition* (Oxford:

For example, Aristotelian virtue theory⁸ emphasizes the reciprocal relationship between an agent's character and his or her action. It describes the actions, practices, and virtues constitutive of *eudaimonia*—happiness or flourishing within this life.⁹ Thomistic virtue theory maintains this basic structure,¹⁰

Clarendon, 1987). In the secular realm, post-Enlightenment secular thought emphasized a morality of duties (Immanuel Kant) or utility (John Stuart Mill). In the mid-20th century, much Anglo-American philosophical thought focused on rules. See, e.g., the universal prescriptivism of R. M. Hare in his *The Language of Morals* (Oxford: Oxford University, 1952) and *Moral Thinking: Its Levels, Methods, and Point* (Oxford: Oxford University, 1981). This focus found echoes in both Catholic and Protestant moral discussions about whether there could be exceptionless moral rules. For a Protestant view, see Paul Ramsey's engagement with Joseph Fletcher in Ramsey, *Deeds and Rules in Christian Ethics* (New York: Scribner, 1967). In Catholic circles, the focus is seen in the vigorous debate over "proportionalism," which culminated in Pope John Paul II's encyclical *Veritatis splendor* (1993). Representative essays can be found in Charles E. Curran and Richard A. McCormick, eds., *Moral Norms and Catholic Tradition*, Readings in Moral Theology 1 (New York: Paulist, 1979) and *John Paul II and Moral Theology*, Readings in Moral Theology 10 (New York: Paulist, 1998).

⁸ Needless to say, the philosophical literature on virtue is also extensive. Particularly helpful on the relationship of emotions to virtue are Nancy Sherman, *The Fabric of Character: Aristotle's Theory of Virtue* (Oxford: Clarendon, 1989) and *Making a Necessity of Virtue: Aristotle and Kant on Virtue* (New York: Cambridge University, 1997). Important anthologies include Robert B. Kruschwitz and Robert C. Roberts, eds., *The Virtues: Contemporary Essays on Moral Character* (Belmont, Calif.: Wadsworth, 1987); Peter A. French, Theodore E. Uehling, Jr. and Howard K. Wettstein, eds., *Ethical Theory, Character, and Virtue*, Midwest Studies in Philosophy 13 (Notre Dame, Ind.: University of Notre Dame, 1989); Roger Crisp and Michael Slote, eds., *Virtue Ethics* (Oxford: Oxford University, 1997); and Ellen Frankel Paul, Fred D. Miller Jr., and Jeffrey Paul, eds., *Virtue and Vice* (New York: Cambridge University, 1998). Unfortunately, none of these works do more than mention in passing the relationship of virtue and rights.

⁹ Aristotle, *Nicomachean Ethics*, bk. 1. As Alasdair MacIntyre reminds us in *Whose Justice? Which Rationality?* (Notre Dame, Ind.: University of Notre Dame, 1988), virtue theory is not fungible across time, space, and culture. A given catalogue of virtues, including most prominently the virtue of justice, is connected to a given conception of practical rationality, as well as to a broader conception of human flourishing that is instantiated by a particular set of practices and carried through time by a particular set of institutions.

¹⁰ A helpful survey of virtue theory that addresses both theological and philosophical literature is William Spohn, S.J., "Notes On Moral Theology 1991: The Return of Virtue Ethics," *Theological Studies* 53 (1992) 60–75. The degree to which the contemporary resurgence of virtue theory among Christian ethicists is, in fact, an accurate reflection of Aquinas's work is an interesting question. See Thomas F. O'Meara, O.P., "Virtues in the Theology of Thomas Aquinas," *Theological Studies* 58 (1997) 254–85. O'Meara argues that the Dominican school of Thomistic interpretation (e.g., Otto Hermann Pesch and Servais Pinckaers) places important emphasis on grace as the ground of virtue, whereas those influenced by MacIntyre (e.g., Stanley Hauerwas, Daniel Mark Nelson, Paul Waddell, and, to a limited

although it redefines and relocates true *eudaimonia*, identifying it as lasting friendship with God throughout eternity.¹¹

Whether secular or Christian, an action theory rooted in or indebted to a virtue-centered approach to morality analyzes moral actions from the perspective of the acting agent. For example, in Thomistic thought, the fundamental moral description of an action is generally taken from an agent's immediate purpose or "object" in acting.¹² The agent's motives, as well as the circumstances of his or her action, can affect the moral quality of the action, which then affects the agent's character. While the consequences of an agent's action for other persons are not irrelevant, they do not stand at the center of moral analysis of an action. At the center of that analysis stands the immediate and more remote purposes for which the agent understands him- or herself to be acting. Virtue theory highlights the effect that an agent's action has upon the agent him- or herself by describing how actions can contribute to virtuous or vicious habits, thereby either improving or eroding the moral character of the agent.

extent, Jean Porter) place less emphasis on the theological underpinnings of Thomistic virtue.

¹¹ Thomas Aquinas, *Summa theologiae* (hereafter *ST*) 1-2, q. 3, a. 8.

¹² *Ibid.* 1-2, q. 18. It is important for my argument that the object of an act, the *finis operis*, is to be described, not in an externalist manner, but from the internal perspective of the agent. It is only if the agent's immediate purpose in acting is the focus of the *finis operis* that we can appropriately connect acts to character. Literally translated, *finis operis* means "the end of the action (work or deed)," and an action is not merely an event but a purposeful endeavor on the part of a thinking, willing, human being. My theory of an action is indebted to Elizabeth Anscombe's *Intention* (Oxford: Oxford University, 1957); in my judgment, it coheres with Aquinas's action theory. I realize, of course, that not everyone working within the framework of Thomistic action theory would agree.

Moreover, it is obvious that the proper understanding of the "object" of an act is a matter of intense and consequential dispute in Catholic circles. Anthony Fisher notes that *Veritatis splendor* "would seem to allow . . . at least two accounts of the human act: A 'natural meanings' account and an 'intended acts' account. This has been at the heart of debates between orthodox Catholics about matters as diverse as the gravamens of sterilization, abortion and euthanasia, whether and what imperfect legislation one might support, ovulation-suppression after rape, vaccines grown on foetal cell-lines, craniotomy and what to do when someone is trapped in the mouth of a cave obstructing the exit of people suffocating behind him" (Anthony Fisher, O.P., "Cooperation in Evil: Understanding the Issues," in *Cooperation, Complicity, and Conscience: Problems in Healthcare, Science, Law, and Public Policy*, ed. Helen Watt [London: Linacre Centre, 2005] 27-64, at 50). As Fisher notes, I locate myself in the "intended acts" group, not the "natural meaning" group. For a more extensive account of my view of intention, see M. Cathleen Kaveny, "Inferring Intention from Foresight," *Law Quarterly Review* 120 (January 2004) 81-107.

The language of human rights tends to shift the perspective from which we analyze human acts. More specifically, it focuses our attention not on the relationship between the acting person and his or her action, but instead on the relationship between that action and the third parties whose interests it affects. For example, the articulation and defense of a negative right not to be raped likely stresses the physical and psychological harms that an act of sexual violence inflicts upon the victim; it does not devote its primary attention to the consequences of this act against the virtues of justice and charity for the character of the perpetrator. The articulation and defense of a positive right to basic health care likely focuses on the direct benefits of such health care to the persons who receive it, and on the harms they will suffer if they do not receive it. It does not typically emphasize the way a decision against providing basic health care can have a deleterious impact on the moral character of the polity.¹³

As MacIntyre observed in a 1990 speech to the U.S. Catholic bishops, "within recent virtue ethics the concept of a right has received relatively little attention."¹⁴ A review of the salient literature in the field of Christian ethics on virtue suggests he is right.¹⁵ As I noted above, MacIntyre, in *After Virtue*, dismisses human rights. While not similarly dismissive, many virtue theorists indebted to his work do not devote sustained attention to the relationship of virtue to human rights.¹⁶ Among those who do not discuss that relationship are Stanley Hauerwas, Daniel Mark Nelson, Pamela Hall, and Joseph Kotva.¹⁷ In fact, the word "rights" does not

¹³ It is not surprising, therefore, that virtue theorists tend to focus on proximate intention (*finis operis*) and remote intention or motive (*finis operantis*) in analyzing human action; the description under which the acting agent performed the action is crucial to shaping his or her character. In contrast, many rights theorists focus on the foreseen consequences of an action, whether or not they are intended. This different focus makes sense. If an action is wrong because it invades a sphere protected by a right, the invasion would seem to be equally damaging whether it was brought about intentionally or merely foreseen to occur.

¹⁴ Alasdair MacIntyre, "The Return to Virtue Ethics," in *The Twenty-Fifth Anniversary of Vatican II: A Look Back and a Look Ahead*, ed. Russell E. Smith (Braintree, Mass.: Pope John Center, 1990) 239–49, at 247.

¹⁵ See Daniel A. Putman, "Rights and Virtues: Toward an Integrated Theory," *Journal of Value Inquiry* 21 (1987) 87–99. Putman argues, using MacIntyre and Alan Gewirth, that the virtue of "openness to truth" is entailed by rights theory.

¹⁶ According to the index, the most extensive discussion of rights that can be found in Nancey Murphy, Brad J. Kallenberg, and Mark Thiessen Nation, eds., *Virtues & Practices in the Christian Tradition: Christian Ethics after MacIntyre* (Harrisburg, Penn.: Trinity Press International, 1997) is a section entitled "Beyond Rights" (226–28) in Stanley Hauerwas's "Abortion Theologically Understood" 221–38.

¹⁷ See Hauerwas, *Character and the Christian Life*. He also does not discuss rights in his recent volume written with Charles Pinches, *Christians among the*

appear in the index to any one of the books cited in note 17. Moreover, we do not find an extended treatment of human rights in the work of virtue theorists whose work tends to draw more heavily on other strands of Thomistic thought than that represented by MacIntyre. A discussion of rights does not appear in, for example, Romanus Cessario's *The Moral Virtues and Theological Ethics*.¹⁸ Mary M. Keys in her recent *Aquinas, Aristotle, and the Promise of the Common Good* emphasizes virtue but gives scant consideration to rights.¹⁹ And James Keenan has made creative and important contributions to virtue theory, but he has not discussed human rights in those contributions.²⁰

If virtue theorists pay little attention to human rights discourse, moralists who focus on the latter tend to discount virtue discourse. In the Catholic literature on human rights, there is a parallel lack of attention to the role of virtue. For example, the word "virtue" does not appear in the index of Jack Mahoney's new volume, *The Challenge of Human Rights*,²¹ nor in David Hollenbach's classic work *Claims in Conflict*.²²

Virtues (Notre Dame, Ind.: University of Notre Dame, 1997); Daniel Mark Nelson, *The Priority of Prudence: Virtue and Natural Law in Thomas Aquinas and the Implications for Modern Ethics* (University Park: Pennsylvania State University, 1992); Pamela Hall, *Narrative and the Natural Law: An Interpretation of Thomistic Ethics* (Notre Dame, Ind.: University of Notre Dame, 1994); and Joseph J. Kotva Jr., *The Christian Case for Virtue Ethics* (Washington: Georgetown University, 1996).

¹⁸ Romanus Cessario, O.P., *The Moral Virtues and Theological Ethics* (Notre Dame, Ind.: University of Notre Dame, 1991).

¹⁹ Mary M. Keys, *Aquinas, Aristotle, and the Promise of the Common Good* (New York: Cambridge University, 2006).

²⁰ See James F. Keenan, S.J., "Proposing Cardinal Virtues," *Theological Studies* 56 (1995) 709–29. Here, the point of contact between virtue language and rights would be his discussion of Mrs. Bergmeier, a woman who slept with a Nazi in order to get out of a concentration camp and return home to take care of her struggling family. Did she act with the virtue of justice? Did she act, objectively speaking, justly? Did she violate the rights of her husband? Keenan has also made important contributions to recognition of the right to health care, particularly in his edited collection, *Catholic Ethicists on HIV/AIDS Prevention* (New York: Continuum, 2000). Moreover, he attended to building bridges between virtue theory and New Testament ethics; see Daniel J. Harrington, S.J., and James F. Keenan, S.J., *Jesus and Virtue Ethics: Building Bridges between New Testament Studies and Moral Theology* (Lanham, Md.: Sheed & Ward, 2002).

²¹ Jack Mahoney, *The Challenge of Human Rights: Origin, Development, and Significance* (Malden, Mass.: Blackwell, 2007). Mahoney elegantly integrates the theological, philosophical, and legal perspectives on human rights.

²² David Hollenbach, *Claims in Conflict: Retrieving and Renewing the Catholic Human Rights Tradition* (New York: Paulist, 1979). In his more recent volume, *The Common Good and Christian Ethics* (New York: Cambridge University, 2002), Hollenbach has an illuminating discussion of the specific virtue of solidarity

In *Natural Law and Natural Rights*, John Finnis mentions virtue only in passing.²³ The relationship of virtue and rights is not a focus of any essay in the important anthology *Official Catholic Social Teaching*, which heavily discusses human rights.²⁴

In theological discussions, the important work of Jean Porter offers more possibilities for a connection between virtue and human rights through the medium of the natural law. Nonetheless, the connection remains indirect; Porter's corpus as a whole replicates the divide I describe above. Her first book on virtue does not discuss human rights.²⁵ Her second book, a historical study of natural law, traces the development of rights out of the natural law tradition, in which the language of virtue does not play a large role.²⁶ Her most recent book, *Nature as Reason*,²⁷ helpfully emphasizes the theological presuppositions with which medieval and early modern canonists and moralists would have addressed particular cases, such as the requirements for marriage. Here I simply emphasize that the theologians and church lawyers first articulating distinct rights were doing so as virtuous members of a particular community, with a particular conception of human flourishing. What they saw—and did not see—as worthy of protection depended on their background conception of human flourishing, the virtues believed to instantiate such flourishing, and the degree to which they shaped their own moral vision according to such virtues.²⁸ So the question becomes how better to equip ourselves to see and assess rights claims correctly, as my discussion of actual case studies below means to illustrate.

Despite their difference in focus, virtue theory and rights talk are not inherently incompatible. In fact, I believe that a fully adequate virtue theory must include a significant discussion of what it means for a virtuous

emphasized by Pope John Paul II. Nonetheless, Hollenbach does not systematically consider the relationship of virtue theory and respect for human rights.

²³ John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon, 1980). In his massive study *Aquinas* (Oxford: Oxford University, 1998) Finnis does not stress the Angelic Doctor's affinity for virtue theory.

²⁴ Charles E. Curran and Richard A. McCormick, eds., *Official Catholic Social Teaching, Readings in Moral Theology 5* (New York: Paulist, 1986).

²⁵ Jean Porter, *The Recovery of Virtue: The Relevance of Aquinas for Christian Ethics* (Louisville: Westminster John Knox, 1990).

²⁶ Jean Porter, *Natural and Divine Law: Reclaiming the Tradition for Christian Ethics* (Grand Rapids, Mich.: Eerdmans, 1999).

²⁷ Jean Porter, *Nature as Reason: A Thomistic Theory of the Natural Law* (Grand Rapids, Mich.: Eerdmans, 2005).

²⁸ "To a very considerable extent, the social context of the twelfth and thirteenth centuries was itself shaped by theological beliefs and commitments. The scholastic concept of the natural law, in turn, served as one basis for justifying and guiding these social developments, and was itself transformed in the process into an idea with considerable critical and juridical force" (ibid. 352).

agent to develop the skills of identifying, protecting, and promoting rights. To connect virtue theory and rights in a fully adequate theoretical manner would require a book-length study. Here, I can only sketch key elements. Let me say, as a preliminary matter, that I accept MacIntyre's general description of what the connection would require:

From the standpoint of a virtue ethics, rights would not primarily provide grounds for claims by individuals *against* other individuals or groups. They would instead have to be conceived primarily as enabling provisions, whereby individuals could claim a due place within the life of some particular community, and the question of what rights individuals have or should have would be answerable only in terms of the answers to a prior set of questions about what sort of community this is, directed towards the achievement of what sort of common good, and inculcating what kinds of virtues.²⁹

This claim seems entailed by MacIntyre's extensively argued position that the components of virtue theory are not fungible across time, space, and culture.³⁰ A given catalogue of virtues, including most prominently a thick understanding of the virtue of justice, is connected to a given conception of practical rationality or prudence, in service of a broader conception of human flourishing, which is instantiated by a particular set of practices and carried through time by a particular set of institutions. As Aquinas tells us, human nature gives rise to requirements that need to be accounted for and organized by all stable societies. They do not, however, need to be accounted for and organized in precisely the same way. In fact, different societies will respond to the basic requirements of the natural law, as well as to the basic requirements of justice, in ways appropriate to their context, community, and tradition.³¹

The degree to which the basic requirements of justice can be usefully identified and discussed apart from community and context makes for an interesting theoretical consideration.³² In practice, however, basic requirements of justice and culture-dependent human rights are generally intertwined; judges articulate and protect human rights as the need arises, given the matrix of relationships mediated by the specific communities bound by

²⁹ MacIntyre, "The Return to Virtue Ethics" 247–48. I would emphasize, however, that negative rights—the right not to be killed, raped, maimed—are important, precisely because they protect the basic preconditions of participation in society. Doubtless MacIntyre would agree.

³⁰ See note 9 above.

³¹ "The general principles of the natural law cannot be applied to all men in the same way on account of the great variety of human affairs; and hence arises the diversity of positive laws among various people" (Aquinas, *ST* 1–2, q. 95, a. 2, rep. ob. 3; for English translations of Aquinas's texts, I use throughout the translation by the Fathers of the English Dominican Province [Westminster, Md.: Christian Classics, 1981]).

³² On the tension between the universal and the particular in identifying human rights, see Porter, *Nature as Reason* 358–78.

their ruling. Consequently, the attention I pay to how rights are identified and protected in the case law of particular political communities arises in part out of my theoretical affinity with MacIntyre's approach to moral traditions.

MacIntyre's reflections sketch a general approach for virtue theorists to take toward human rights. They do not, however, give more specific direction regarding how to connect the two forms of moral discourse. One way of proceeding is to focus on the fact that in the political realm human rights do not identify, protect, and promote themselves; they must be identified, protected, and promoted by persons with political authority over a particular community. In the biblical tradition, one prominent icon of the relationship between virtue and justice is the judgment of Solomon (1 Kings 3:16–28); in deciding between two women in a maternity dispute, he finds a creative way to implement the requirements of justice, not in the abstract, but rather as they apply in the particular community for which he is responsible. This icon of the wise, just judge illustrates the nature of justice as both an interior quality of a person and a description of the external relationship among a community's members. It is by focusing on this dual aspect of the virtue of justice that we can, I think, best elaborate virtue theory to accommodate a more capacious discussion of human rights.

First, and most obviously, virtue theorists must recognize that rights talk should be situated in the context of the virtue of justice, which Aquinas defines as "a habit whereby a man renders to each one his due by a constant and perpetual will."³³ The key is to recognize that justice is a particular type of virtue—what Aquinas calls an *external* virtue. More specifically, the virtue of justice focuses not primarily on regulating the internal character of the agent by ordering the passions as do the virtues of temperance and fortitude, which regulate the concupiscible and irascible appetites. Instead, its focus is on the fruits of an agent's actions in the external world, the concrete effect they have upon the lives, property, and interests of other people. Aquinas notes that it is "in respect of external actions and external things by means of which men can communicate with one another that the relation of one man to another is to be considered."³⁴

Aquinas also notes that there are two aspects to the virtue of justice, because agents can relate to others through their external actions in two ways. First, "general justice," sometimes called "legal justice," describes the relationship of our actions toward others with respect to the

³³ Aquinas, *ST* 2–2, q. 58, art 8. Aquinas's account of the virtue of justice is not simple; for a helpful account, see Jean Porter, "The Virtue of Justice (IIa IIae, qq. 58–122)," in *The Ethics of Aquinas*, ed. Stephen J. Pope (Washington: Georgetown University, 2002) 272–86.

³⁴ Aquinas, *ST* 2–2 q. 58, a. 8.

common good. Second, "particular justice" concentrates on the way our external actions affect relationships with other private individuals. The two aspects of justice are enmeshed; because individuals are part of the community, acts that wrongly detract from their well-being affect the well-being of the community as a whole. Moreover, what actually counts as "detracting from the well-being of another" needs to be identified while keeping in mind the fact that the person's identity stems in part from his or her participation in community, including the political community.³⁵

Consequently, the first step toward expanding virtue theory to accommodate a more capacious account of human rights is to recognize the place of such an account within a discussion of the virtue of justice. Precisely because justice is an external virtue, it requires us to take account of the impact that our actions have on the legitimate claims of other persons, both upon their tangible claims to material goods and their intangible claims to a certain dignity and fruitful participation within society.³⁶ These claims can be specified as rights,³⁷ not merely basic human rights in the abstract, but as rights instantiated in a particular society and culture.³⁸

³⁵ "Now it is evident that all who are included in a community stand in relation to that community as parts to a whole; while a part, as such, belongs to a whole, so that whatever is the good of a part can be directed to the good of the whole" (Aquinas, *ST* 2-2, q. 58, a. 5).

³⁶ Aquinas acknowledges, of course, that improperly ordered passions can have a deleterious effect on the just claims of other people. Furthermore, he explicitly notes that one and the same action can be a violation of justice and a violation of another virtue, depending on the perspective from which it is analyzed. "Hence justice hinders theft of another's property, in so far as stealing is contrary to the equality that should be maintained in external things, while liberality hinders it as resulting from an immoderate desire for wealth. Since, however, external operations take their species not from the internal passions but from external things as being their objects, it follows that, external operations are essentially the matter of justice rather than of the other moral virtues" (Aquinas, *ST* 2-2, q. 58, a. 9, rep. ob. 2).

³⁷ I do not mean to say that rights claims exhaust an individual's relationship to external justice; questions of duty, both perfect and imperfect, are obviously also involved.

³⁸ There is some debate about the degree to which Aquinas recognized or thought in terms of rights. Jack Mahoney, for example, is highly skeptical; see *Challenge of Human Rights* 5. I am persuaded by John Finnis's argument that the roots of the concept can be found in Aquinas's use of the Roman law definition of justice in two interchangeable formulations: "the steady willingness to give others *what is theirs*" (*quod suum est*) and to give them "*what is their right*" (*ius suum*). See Finnis, *Aquinas* 133-34. See also John Cooper on Aristotle: "We can claim not only to be entitled, but also justified, in using the language of rights in translating and interpreting Aristotle. It is not merely neo-Aristotelian updates of Aristotle, but even scholars engaged in philosophical reconstruction of his views, who can justifiably speak of 'rights' and 'natural rights' in Aristotle's *Politics*"

Not coincidentally, rights language, too, is largely external in its focus. It centers our attention on the concrete impact that an agent's action has on the legitimate claims of another person, not on the internal state of mind with which the agent performs that action. In fact, one of the purposes of rights language has been precisely to shift the focus away from the interior life of the agent to the objective ramifications of the action for others, no matter what the agent's motive in performing it. The special nature of justice as an external virtue can accommodate this insight. Aquinas explicitly acknowledges that there are two basic ways in which a person can do an objectively unjust thing without being subjectively unjust himself. First, our intention to act justly can misfire in the execution (e.g., a police sharpshooter aims at the terrorist and kills the hostage instead). Second, we can be ignorant of the fact that what we are doing is in fact unjust (e.g., a restaurant patron takes another's coat, mistakenly believing it belongs to her).³⁹ It is not enough that the agents in these two examples are subjectively just. In very different ways, of course, their actions deprived others of what, objectively speaking, was theirs. The fact that we recognize in retrospect that an act was objectively unjust creates demands on all involved in the situations, in some cases for reparations, in many cases for reform. In the first example, the police may respond by training their sharpshooters better. In the second example, the restaurant may respond by installing a placard reminding people to be careful because many coats look alike.

The language of virtue by itself does not lend itself to a detailed focus on the various ways in which our actions can be objectively unjust. In contrast, the language of rights is designed to accomplish precisely that task. The clearest example of the difference, in my view, can be found in Aquinas's treatment of almsgiving in the *Summa theologiae*, and its contemporary commentators. For Aquinas, almsgiving generally falls under the virtue of charity, specifically the virtue of mercy—love toward others. In fact, it is one of the corporal works of mercy. In most cases, he treats almsgiving as a counsel, not a precept. One generally does not have an obligation to give alms if doing so would dip into one's own necessities, defined as including not only what is required to provide for the basic needs of oneself and one's family but also what is necessary to maintain the household in its social situation.⁴⁰ Ordinarily, one need give only out of one's surplus.⁴¹ Furthermore, in most cases no one beggar has a claim on a giver's generosity. In some cases of dire need, however, Aquinas posits a positive duty in

(John M. Cooper, *Reasons and Emotion: Essays on Ancient Moral Psychology and Ethical Theory* [Princeton, N.J.: Princeton University, 1999] 383).

³⁹ See Aquinas, *ST* 2–2, q. 59, a. 2. ⁴⁰ Aquinas, *ST* 2–2, q. 32, a. 6.

⁴¹ *Ibid.*

justice to give alms on pain of mortal sin—and to give them not merely out of one's surplus, but even out of one's nonessential necessities, the resources necessary to maintain one's station.⁴²

Christian ethicists have debated whether Aquinas's framework takes with sufficient seriousness the obligation of Christians toward the poor.⁴³ What strikes me as undebatable, however, is that considering the question of poverty and wealth within the framework of virtue inexorably channels attention toward the character and the material condition of the giver. The description of the condition of the potential recipient is theoretically interesting precisely to the extent that it triggers obligations on the part of the giver. By telling us that giving to those in need is "praiseworthy," and that failing to give to those in dire need may be a "mortal sin," Aquinas directs our attention back to the character of the agent rather than forward to the concrete situation of the recipient. What happens to the beggar tomorrow without a stable claim to food and shelter? How will beggars develop their own virtues if they are always relegated to such marginal status? In contrast to the language of virtue, the language of rights invites us to ponder these questions, thereby broadening the discussion.

How should we specify rights as a general matter? I continue to find Hollenbach's graphic schema in *Claims in Conflict* to be an enormously helpful portrayal of general justice understood from the perspective of rights. His schema portrays how three different types of rights (personal, social, and instrumental) are refracted through eight different realms of human concern (bodily rights, political rights, rights of movement, associational rights, economic rights, sexual and family rights, religious rights, and communication rights). Taken together, these rights constitute a framework supporting human dignity, understood as

⁴² Aquinas, *ST* 2-2, q. 32, a. 5, rep. ob. 3. Aquinas also states in 2-2, q. 66, a. 7 that to take property belonging to another to sustain oneself in case of extreme need is not theft, properly speaking. Reconciling all the relevant texts of Aquinas on almsgiving and the poor is a difficult task. For a painstaking attempt at it, see Finnis, *Aquinas* 188-96.

⁴³ Contrast the position of Daniel Maguire with that of Stephen Pope. Maguire claims: "The principal effect [of approaches indebted to Aquinas's method] was that justice was not seen to have foundational status. It was treated as an imperfect virtue that handled the materialities of relationships. It was indispensable, to be sure, but it lacked the real dignity of love" (Daniel Maguire, "The Primacy of Justice in Moral Theology," *Horizons* 10 [1983] 72-85, at 73). Pope writes: "However, the contempt with which the poor are often treated, both in the Middle Ages and today, finds no support in Thomas's understanding of charity" (Stephen J. Pope, "Aquinas on Almsgiving, Justice and Charity: An Interpretation and Reassessment," *Heythrop Journal* 32 [1991] 167-91, at 169). Hauerwas questions whether practical effectiveness in helping the poor is even part of the gospel vision. See Stanley Hauerwas, "The Politics of Charity," *Interpretation* 31 (1977) 25-62.

dignity-in-community.⁴⁴ The protection of that framework itself is a matter of general or legal justice; it focuses on the common good. Moreover, it is easy to see that, in the course of protecting the framework, judges and legislators may well be involved in specifying the content of particular justice. For example, in Hollenbach's terms, one social right in the economic sphere is a right to a living wage. Protecting that right will require regulating private contracts between employers and employees, which is a matter of particular justice.

The second step follows closely from the first. What does it mean to say that rights language presses us to consider the external impact of our actions on the legitimate claims of other persons? In my view, it means cultivating a disposition to be mindful of the potential effects our actions have upon the lives and well-being of other persons, who are equal to us in dignity. The lives of others might be irremediably affected not only by the intended consequences of an agent's action, but also by the foreseen-but-unintended consequences, as well as consequences that ought to have been foreseen but were not. After all, a victim hit by a car and killed is just as dead whether he or she was run over by a ruthless hit man, crushed by a blindfolded joyrider on a busy pedestrian walkway, or sideswiped by a drunken driver.⁴⁵

To put themselves in the position of those potentially affected by their actions, agents need to exercise their imagination.⁴⁶ The type of imagination required, however, cannot be entirely unguided. Nor can it be morally neutral. It has to allow itself to be shaped by the three fundamental roots nurturing both respect for and proper interpretation of human rights.

⁴⁴ Hollenbach, *Claims in Conflict* 98.

⁴⁵ Interestingly enough, the criminal law is now virtue-oriented to the extent to which the *mens rea*, not merely the *actus reus*, makes a difference to the punishment. The primary distinction between murder and, say, involuntary manslaughter is not in the *actus reus* (the commission of an act that was the legal cause of the death of another) but in the *mens rea* (murder requires intent to kill, manslaughter requires recklessness).

⁴⁶ For a general account of the role of imagination see Philip S. Keane, S.S., *Christian Ethics and the Imagination: A Theological Inquiry* (New York: Paulist, 1984); and William C. Spohn, *Go and Do Likewise: Jesus and Ethics* (New York: Continuum, 1999) chap. 3. For an argument about the irreducibly imaginative nature of moral epistemology see Mark Johnson, *Moral Imagination: Implications of Cognitive Science for Ethics* (Chicago: University of Chicago, 1993). His discussion of empathetic imagination (199–202) has points of consonance with my own, independent use of the category. A book on the topic of the relationship of imagination, virtue, and rights would need to devote a chapter to the question of empathy and virtue. Helpful sources include: Sherman, *Making a Necessity of Virtue*; Martha Nussbaum, *Therapy of Desire: Theory and Practice in Hellenistic Ethics* (Princeton, N.J.: Princeton University, 1994); Roslind Hursthouse, *On Virtue Ethics* (New York: Oxford University, 1999); and Cooper, *Reasons and Emotion*.

The first root is an account of the nature and worth of a human being. For those committed to the Christian gospel, of course, each human being possesses an inalienable dignity, not because of any achievement on his or her part, but simply because, as a human being, he or she is made in the image and likeness of God. The second root is a vision of how human beings ought to relate to one another. In his encyclical *Sollicitudo rei socialis*, Pope John Paul II called for commitment to the virtue of solidarity, which entails recognition of human interdependence. "This then is not a feeling of vague compassion or shallow distress at the misfortunes of so many people, both near and far. On the contrary, it is a firm and persevering determination to commit oneself to the common good; that is to say, to the good of all and of each individual, because we are all really responsible for all."⁴⁷ The third root is some sense of how to deal with contingency and finitude, including the finitude due to human sin. It may not be practically or economically feasible in certain political communities to protect certain human rights at a given point in time. How do we move incrementally toward their protection without undermining our ultimate goal? For Christians, the incremental nature of work for peace and justice is inherent in the time of salvation history that we inhabit: we believe that the kingdom of God is already upon us in a real, if imperfect, way. Our works of peace and justice here and now contribute to the building up of that kingdom.⁴⁸

ONTIC IMAGINATION AND FUNDAMENTAL DIGNITY

The first root of human rights is a commitment to the fundamental dignity of all human beings. In contested concrete circumstances, in contrast to abstract theory, the exercise of this commitment requires imagination. No two human beings, no two cultures, are exactly the same. It is easy to denigrate those who seem unfamiliar to us, either because they are part of a culture different from our own, or because they possess some personal characteristic that sets them apart from us.

An example of how cultural difference can occlude perception of human dignity can be found in the 1550 debate between Juan Ginés de Sepúlveda (1494–1573), a prominent humanist and classics scholar, and Bartolomé de las Casas (1484–1566), a Dominican priest, about the Spanish policies of conquest in the New World. The debate, which took place in Valladolid,

⁴⁷ Pope John Paul II, *Sollicitudo rei socialis* no. 38, http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis_en.html (accessed August 16, 2008). See also Hollenbach, *Common Good and Christian Ethics*, especially chap. 6 where he discusses human rights as institutionalizing solidarity.

⁴⁸ See Romans 8:19–22; and *Gaudium et spes* no. 39 (available at the Vatican Web site [www.vatican.va]).

Spain, was held at the command of the Charles V, the King of Spain, in order to hear arguments about the appropriateness of waging war against the native population to secure their political subjugation as a precondition to instructing them in the Christian faith.⁴⁹

Drawing upon Aristotle's theory of natural slavery, Sepúlveda (who had never been to the New World) argued that native inhabitants were "barbarians" because they were ruled by passion rather than by reason. He writes, "In prudence, talent, virtue, and humanity they are as inferior to the Spaniards as children to adults, women to men, as the wild and cruel to the most meek, as the prodigiously intemperate to the continent and temperate, that I have almost said, as monkeys to men."⁵⁰ Their inferior condition meant that the natives fell into Aristotle's category of "natural slaves." If they did not voluntarily accept rule by their Spanish "superiors," they could be forced into submission, through war, if necessary.

How did las Casas respond? Not with pious generalities about human dignity or vague assertions of equality. Emphasizing his own firsthand knowledge of both the Indians and their Spanish conquerors, he responded as a lawyer in the common law tradition would respond in defense of a client's cause, with systematic application of normative criteria to a richly textured understanding of the facts. More specifically, las Casas broke down Aristotle's category of the "barbaric" (as updated by Sepúlveda to reflect Christian convictions) into four subcategories: (1) those who exhibit savage behavior; (2) those who lack written language; (3) those who "lack reasoning and way of life suited to human beings," such as those exemplified in legally ordered and organized communities; and (4) those who are non-Christian.⁵¹

Las Casas went on to argue that the Native American population qualified as "barbaric" according to none of these criteria. He observed that, if strictly applied, the first category would also condemn the Spaniards, who "have surpassed all other barbarians" in their savage treatment of

⁴⁹ My summary of the debate in the following four paragraphs is taken from Lewis Hanke, *All Mankind Is One: A Study of the Disputation between Bartolomé de Las Casas and Juan Ginés de Sepúlveda in 1550 on the Intellectual and Religious Capacity of the American Indians* (De Kalb, Ill.: Northern Illinois University, 1974) 83–87.

⁵⁰ *Ibid.* 84, citing Juan Ginés de Sepúlveda, *Demócrates segund; o De las justas causas de la guerra contra los indios*, ed. Angel Losada (Madrid: Consejo Superior de Investigaciones Científicas, Instituto Francisco de Vitoria, 1951) 33.

⁵¹ *Ibid.* 83–87. Henke is drawing primarily from Bartolomé de Las Casas, *In Defense of the Indians*, trans. and ed. Stafford Poole, C.M. (De Kalb, Ill.: Northern Illinois University, 1974). According to Henke's description (73–74), Las Casas was a prolific writer and produced two treatises in connection with his debate at Valladolid: the *Defense* (originally composed in Latin) and a treatise in Spanish, which Henke refers to as the *Apología*—its original form is no longer extant.

the Indians.⁵² He highlighted the Indians' highly complex and beautiful languages, citing a fellow Dominican priest's Peruvian grammar to prove their logical structure.⁵³ He argued that the Indians have "kingdoms, royal dignities, jurisdiction, and good laws, and there is among them lawful government."⁵⁴ Fourth and finally, he admitted that the Indians were pagans, but insisted that this did not qualify them as "barbarians" properly speaking.⁵⁵

There were, needless to say, difficulties in Las Casas's argument. Sepúlveda emphasized that the Indians practiced human sacrifice, including the sacrifice of the innocent. While recognizing the problematic nature of this practice, Las Casas was realistic about the prospects of coercing the native population to abandon a longstanding aspect of their ancestral religion. A lengthy process of persuasion would be necessary. Furthermore, human sacrifice exemplified, even if in distorted fashion, a desire to give God one's most precious possession, one's own life. Pointing to God's command to Abraham to sacrifice Isaac, Las Casas argued that human sacrifice could not be altogether "detestable" to God. On this basis, he wrote: "Nor is human sacrifice—even of the innocent, when it is done for the welfare of the entire state—so contrary to natural reason that it must be immediately detested as something contrary to the dictates of nature. For this error can owe its origin to a plausible proof developed by human reasoning."⁵⁶ Consequently, from Las Casas's perspective, even preventing the practice of human sacrifice did not justify the Spanish war against the Indians.

Recognizing the equal human dignity of the native population required Las Casas to demonstrate a type of what I call *ontic imagination*. Shaped by his own experience in Central America, the Caribbean, and Mexico, he was able to look past the cultural differences between the Spanish and the native populations of the New World and discern underlying similarities. It is important to emphasize that these similarities were not random coincidence but principled points of commonality, such as the commitment to law, the evident community order, and the capacity to speak and write. He saw similarity, as well, between the darker practices of the native population and practices of other civilizations throughout history. And it is precisely because Las Casas had the capacity to exercise ontic imagination toward the native population that he was motivated to defend the rights most necessary to them in their concrete circumstances: among them the right not to be plundered and forcibly converted by the Spanish in the name of Jesus Christ.

⁵² Ibid. 83.

⁵⁴ Ibid. 84.

⁵⁶ Hanke, *All Mankind Is One* 94–95.

⁵³ Ibid.

⁵⁵ Ibid. 87.

But cultural difference is not the only alienating factor that can obscure recognition of the basic dignity of other human beings. There is also a vast disparity in the abilities and disabilities that different individuals possess. When faced with those who are more limited than oneself or even than the “ordinary” person, it can be tempting to impugn their basic human dignity. Consider two judicial opinions on sterilization of the mentally handicapped, one by Oliver Wendell Holmes, a U.S. Supreme Court justice in the early 20th century, and the other by Sir Gerard Brennan, an Australian High Court justice at the close of that century.

Oliver Wendell Holmes Jr. (1841–1935) had the most distinguished career in American law imaginable. Before he was appointed to the U.S. Supreme Court, he was a professor at Harvard Law School, and a judge on the highest court of the Commonwealth of Massachusetts. An authority on the English common law tradition,⁵⁷ he was also a leader in the “legal realism” school of jurisprudence, which saw the study of law as the prediction of the use of public force through the instrumentality of judges and legislators. As the eminent American jurist John Noonan has observed, there is more than a little social Darwinism at work in Holmes’s legal theory and opinions: “‘The general principle of our law is that loss from accident must lie where it falls.’ In the contest for survival, the strongest force prevails, and it is not a judge’s business to be tenderhearted to the vanquished or the maimed.”⁵⁸

We see Holmes’s social Darwinism operating very clearly in one of the most infamous cases decided by the U.S. Supreme Court, *Buck v. Bell*,⁵⁹ in which the Court upheld the constitutionality of Virginia’s Eugenical Sterilization Act authorizing the compulsory sterilization of mentally defective persons for eugenic purposes. The plaintiff in the case, Carrie Buck, was described by Holmes as a “feeble minded-white [sic] woman . . . the daughter of a feeble-minded mother . . . and the mother of an illegitimate feeble-minded child.”⁶⁰ After she gave birth, her family had her committed to the State Colony for Epileptics and Feeble Minded, whose superintendent sought to have her sterilized in accordance with the new law.

The Virginia law, sad to say, was not an outlier. Eugenic movements were powerful in the United States and other Western countries in the first

⁵⁷ Oliver Wendell Holmes, *The Common Law*, ed. Mark DeWolfe Howe (Boston: Little, Brown, 1963).

⁵⁸ John T. Noonan Jr., *Persons and Mask of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks*, 2nd ed. (Berkeley: University of California, 2003) 70.

⁵⁹ *Buck v. Bell*, 274 U.S. (1927) 200, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=274&page=200> (accessed August 16, 2008).

⁶⁰ *Buck v. Bell*, 274 U.S. (1927) 205.

half of the 20th century; they lost momentum only with the revelation of Nazi atrocities committed in the pursuit of a "pure" race. But the United States preceded Germany in its adoption of compulsory sterilization laws. The state of Indiana passed the first such law in 1907, authorizing compulsory sterilization of "confirmed criminals, idiots, imbeciles and rapists" who were confined to institutions within the state.⁶¹ The mentally retarded and the mentally ill were the major focus of these programs, but some laws also provided for the compulsory sterilization of the blind, the deaf, the physically disabled, and those suffering from epilepsy. Henry Hamilton Laughlin (1880–1943), a major advocate of compulsory sterilization in the United States, proposed a model Eugenical Sterilization Law that was an inspiration for the Virginia law that authorized Carrie Buck's sterilization. He advocated the sterilization of swaths of people he considered to be potential parents of "socially inadequate offspring."⁶² Native Americans were also sterilized, often without their knowledge, while hospitalized for some other reason. Before enthusiasm for the project waned in mid-century, over 60,000 individuals were involuntarily sterilized in the United States.⁶³ More than 30 states have adopted a statute of compulsory sterilization.⁶⁴

What about the argument that compulsory sterilization violated the rights of those sterilized—in particular their rights under the Fourteenth Amendment to the Constitution to both due process and equal protection of law? It was this argument that the Supreme Court rejected in *Buck v. Bell*. Holmes wrote the majority opinion, justifying compulsory sterilization on the grounds that it is a small sacrifice with great social benefits:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who

⁶¹ 1907 Ind. Acts, chap. 215. The law was declared unconstitutional by the Indiana Supreme Court in *Williams v. Smith* 190 Ind. 526, 131 N.E. 2 (Ind. 1921). After *Buck v. Bell* was decided, the Indiana Legislature passed a second sterilization law, 1927 Ind. Acts, chap. 241. That law and subsequent sterilization laws were not repealed until 1974—by 1974 Ind. Acts, P.L. 60, sec. 1. Further information, including the texts of the relevant legal materials, can be found at a Web site on legal history sponsored by the Indiana Courts, "Three Generations of Imbeciles are Enough: Reflections on 100 Years of Eugenics in Indiana," <http://www.in.gov/judiciary/citc/cle/eugenics/index.html> (accessed October 25, 2008).

⁶² See "Henry Laughlin's Model Eugenical Sterilization Law," <http://www.people.fas.harvard.edu/~wellerst/laughlin/> (accessed August 17, 2008). Laughlin incorporated some concern for due process in his model law, with the aim of enabling it to survive possible constitutional challenges.

⁶³ Philip R. Reilly, *The Surgical Solution: A History of Involuntary Sterilization in the United States* (Baltimore: Johns Hopkins University, 1991) 94.

⁶⁴ "Human Sterilization," Notes and Legislation, *Iowa Law Review* 35 (1950) 251–69, at 253 n. 13.

already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough."⁶⁵

Yet Holmes's approach is not the only possible one. The question of sterilizing mentally handicapped minors came before the highest court of Australia in *Marion's Case*;⁶⁶ the parents of a 14-year-old mentally handicapped girl who resided in the Northern Territory applied to the Family Court for an order authorizing performance of a hysterectomy and an ovariectomy. The Australian High Court ruled that parental authority to consent to medical treatment on behalf of their children did not extend to invasive, irreversible, and major procedures such as deliberate surgical sterilization. Furthermore, the Australian High Court made it clear that courts or tribunals could authorize such sterilizations only if such a procedure was a last resort and in the best interest of the child herself.

Consider the opinion of Justice Brennan in *Marion's Case*. He not only affirms the human dignity of the mentally and physically handicapped; he also argues that respect for their human dignity means prohibiting non-therapeutic sterilizations—no benefit to third parties can justify this fundamental assault on their physical integrity:

To accord in full measure the human dignity that is the due of every intellectually disabled girl, her right to retain her capacity to bear a child cannot be made contingent on her imposing no further burdens, causing no more anxiety or creating no further demands. If the law were to adopt a policy of permitting sterilization in order to avoid the imposition of burdens, the causing of anxiety and the creating of demands, the human rights which foster and protect human dignity in the powerless would lie in the gift of those who are empowered and the law would fail in its function of protecting the weak.⁶⁷

In many respects, Justice Holmes and Justice Brennan are very much alike. They both rose to the summit of their profession, enjoying power and prestige on account of remarkable ability. On nearly every point of comparison, their life situations—their experience of their own minds,

⁶⁵ *Buck v. Bell*, 274 U.S. 207. Subsequent investigation of the facts of the case suggested that neither Carrie Buck nor her child were, in fact, mentally handicapped. Her family had her committed in order to hide the fact that her pregnancy was the result of her rape by the nephew of her adoptive mother. See Paul A. Lombardo, "Three Generations, No Imbeciles: New Light on *Buck v. Bell*," *New York University Law Review* 60 (1985) 50–62.

⁶⁶ *Secretary, Department of Health and Community Services v. JWB and SMB (Marion's Case)*, (1992) 175 *Commonwealth Law Reports* [hereafter CLR] 218.

⁶⁷ *Marion's Case*, 175 CLR 276.

their embodiment, their capacity (as men) to reproduce—could not be more different than those of Carrie Buck and the young girl whose pseudonym was Marion. Yet the divergence in their judicial opinions reveals a great difference in their capacity for ontic imagination. Justice Holmes saw himself and others like him as having nothing in common with Carrie Buck. Her bodily vulnerability and weakness of intellect created a deep and obvious gulf between them, which he found no way to bridge. In contrast, Justice Brennan saw past the differences to affirm a common humanity with Marion. This affirmation was not rooted in either a flight of fancy or a mere projection. It was rooted in a creative perception of a real and enduring truth: his recognition that *all* human beings have a sense of self that is dependent to a significant degree upon their bodily integrity.

EMPATHETIC IMAGINATION AND SOLIDARITY

To defend human rights, it is not enough to respect other human beings as possessing fundamental human dignity. With this respect alone, they could be museum pieces, treasures, precious objects, but not partners or fellow members of a community. The move toward fellowship is a distinct move achieved by the attitude of solidarity. In my view, solidarity is the second root of a commitment to human rights.

What is solidarity? I have found no better definition than that in Pope John Paul II's 1987 encyclical, *Sollicitudo rei socialis*: "Solidarity helps us to see the 'other'—whether a person, people or nation—not just as some kind of instrument, with a work capacity and physical strength to be exploited at low cost and then discarded when no longer useful, but as our 'neighbor,' a 'helper' (cf. Gen 2:18–20), to be made a sharer, on a par with ourselves, in the banquet of life to which all are equally invited by God."⁶⁸

The beginning of solidarity is the effort to see the world from the perspective of other persons, to see them as moral agents with plans and purposes of their own. The alternative is to see them as mere pawns in one's own plans or purposes—or worse, not to see them at all. The legal system, unfortunately, has unique ways of undermining solidarity by rendering human beings invisible. In his classic *Persons and Masks of the Law*, John Noonan describes the process. Recognizing that legal rules are necessary to support a justice that is no invidious "respector of persons," Noonan also alerts us to the danger that legal rules can serve as "masks," as ways of classifying individual human beings that disavow or hide their humanity.⁶⁹

⁶⁸ John Paul II, *Sollicitudo rei socialis* no. 39.

⁶⁹ Noonan, *Persons and Masks of the Law*, chap. 1.

One task of human rights activists who are also lawyers is to identify those masks and work toward their removal. The task is difficult, because it requires paying attention to the “negative spaces”—figuring out who is missing from an apparently complete picture. Often in introductory art classes students are shown a black-and-white image that, viewed from one perspective, looks like a vase, but from another perspective appears to be the profiles of two persons facing each other. To see the persons one must shift perspective. The same is true in law.

Masks, as Noonan tells us, obscured the faces of individual people in notorious American cases, such as the legal framework defending the treatment of African-Americans as “property.” But legal masks also operate in more mundane situations, as demonstrated by *Rockingham County v. Luten Bridge Co.*, a case I teach to my first year contracts students.⁷⁰ Rockingham County, North Carolina, entered into a contract for the construction of a bridge with Luten Bridge Company in the late 1920s, on the cusp of the Great Depression. When the membership of the county commission changed, Rockingham County repudiated the contract without any legal justification or excuse. But Luten built the bridge anyway, perhaps hoping that the County would change its mind once more. The end result, as photographs sometimes included in first-year casebooks demonstrate, was a bridge to nowhere.

Once the construction workers finished, the lawyers set to work. The bridge company sued the county for the full price of the bridge on the undisputed ground that the county had breached the contract. The trial court agreed, issuing a directed verdict in its favor. But that verdict was reversed on appeal. The U.S. Court of Appeals for the Fourth Circuit issued an opinion holding that Luten was entitled to monetary damages equal only to its expected profits plus expenses incurred until the time when Rockingham County repudiated the contract. According to the court, the bridge company had a duty to mitigate damages, not to run them up by erecting a “useless” bridge.

But was the erection of the bridge entirely useless? It is true that the company itself would have been made whole by receiving its profits due under the contract, plus expenses accrued by the time of breach. But who is missing from the picture? I ask my first year law students this question, and it usually takes them a while to see the answer. The construction workers are missing. They are out of a job if Luten abandons the project. Because the construction workers were likely “at will” employees, they had no right to a job. Luten could let them go with financial impunity. Consequently, they were irrelevant to the legal analysis of the breached contract to build the bridge. But that contract may not have been

⁷⁰ *Rockingham County v. Luten Bridge Co.*, 35 F.2d 301 (4th Cir. 1929).

irrelevant to them. They may have needed the jobs to support themselves and their families.⁷¹ How the judges should have balanced the interests of the construction workers in working to support themselves and their families against the interests of the County (and the taxpayers) of subsidizing a useless bridge is difficult to say. The first and necessary step, however, is for the judges to see the interests of the workers as a factor that deserves their consideration.

What kind of imagination is necessary to promote solidarity? It is something different from ontic imagination, which emphasizes recognition of our commonality, despite differences in culture or native ability. Instead, solidarity is promoted by what I call *empathetic imagination*, which is the willingness to imagine oneself in the concrete circumstances of another human being, combined with a willingness in principle to allow the effects of the exercise to reshape one's perception of the right course of action, both professionally and personally, in order to maintain a community in which all parties are able to participate in a productive manner. In the legal realm, the beginning of empathetic imagination is the ability to pierce legal constructs that obscure the plight of other human beings, to see through the masks and to reckon with the persons whose faces lie behind them.

In the Australian context, we can see the exercise of empathetic imagination in the High Court's decision in the important and controversial *Mabo* case.⁷² The plaintiffs in *Mabo* were members of the Meriam people, whose ancestors had inhabited the Murray Islands in the Torres Strait for generations before Europeans arrived. The underlying question in the case was the nature, extent, and degree of their property rights in Meriam ancestral lands against the rights of the colony of Queensland, which annexed those lands in 1879. In a decision that had implications for aboriginal land rights throughout the country, the High Court rejected the claim that acquiring sovereignty over the native territory gave the Imperial Crown absolute beneficial ownership over that territory. Instead, it maintained that while the annexation gave the Crown "radical title" to the land as one of the incidents of its sovereignty, it did not by itself extinguish the "native title"⁷³ held by the

⁷¹ A recent article suggests that the case was only incidentally about the duty to mitigate damages, which is the purpose for which it is taught in first year contracts courses. See Barak D. Richman, Jordi Weinstock, and Jason Mehta, "A Bridge, a Tax Revolt, and the Struggle to Industrialize: The Story and Legacy of Rockingham County v. Luten Bridge Co.," *North Carolina Law Review* 84 (2006) 1841-1912.

⁷² *Mabo and Others v. Queensland* (No. 2) (1992) 175 CLR1.

⁷³ Native title is not the same as straightforward ownership of property. The incidents of native title are not to be determined by abstract rules but by a close examination of the traditional laws, customs, and practices of the native people.

Meriam people, who had a longstanding, important, and complex relationship to the land. The High Court acknowledged that the Crown had the power to extinguish native title by granting the land to a third party or by dedicating it to an inconsistent public purpose, but maintained that the intention to do so must be manifested by a clear and plain intention, given the seriousness of the consequences to the native inhabitants of the loss of their land.

The High Court also rejected the contention that before the arrival of the Europeans, the native territory in question was *terra nullius*—literally, land belonging to no one, which under common law could be acquired on behalf of a sovereign by settlement or colonization. In the history of European colonization, that concept had been applied not only to truly unsettled lands (e.g., Antarctica), but also to lands whose inhabitants the colonizers thought to be “primitive” or “barbaric.”⁷⁴ The colonizers discounted the claims of the native inhabitants to the land simply because they did not have the conception of fixed property rights that held sway in Western Europe. Difference meant invisibility. Because the Australian land was not legally controlled in the same way that the colonizers held their land, they considered it *terra nullius*—the land of no one—until the Western Europeans laid claim to it.

But aboriginal peoples of Australia were not “no one.” Their patterns of social organization were neither “primitive” nor “barbaric”—labels that all the justices recognized had been employed too broadly in order to demean and displace native populations with non-European forms of social structure and organization. The two major opinions (one written by Justice Brennan and joined by Chief Justice Mason and Justice McHugh, the other by Justices Deane and Gaudron) offer detailed and sympathetic accounts of the practices and values of the aboriginal peoples, particularly with respect to their claims to the land. In Noonan’s terms, one could say that the justices recognized that the concept of *terra nullius* imposed a mask on aboriginal peoples, rendering their prior claim to the land legally invisible to the European settlers. By engaging in the exercise of empathetic imagination in order to describe to themselves and others what the land meant to the life of the aboriginal population,

Furthermore, the holders of native title cannot alienate the property to a party outside the system; they can only relinquish it to the Crown, whose radical title over the land in question then expands to full, beneficial title.

⁷⁴ The United States justified its treatment of Native American land on similar grounds. In *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823), the U.S. Supreme Court held that Native Americans could not sell their land to private citizens, because they only had a right to occupy the land, not ultimate title to it. The European settlers saw themselves as acquiring ultimate title to the land through “discovery,” and the U.S. government was their successor as sovereign.

the majority in *Mabo* helped to lift that mask. Once the mask was lifted, the court was able to recognize a right that had hitherto been unacknowledged. Justice Brennan writes:

If the international law notion that inhabited land may be classified as *terra nullius* no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be "so low in the scale of social organization" that it is "idle to impute to such people some shadow of the rights known to our law" can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.⁷⁵

STRATEGIC IMAGINATION AND PRACTICABILITY

Ontic imagination and empathetic imagination are not enough to sustain hope for the recognition, promotion, and protection of human rights. *Strategic imagination* is also necessary. A world in which human rights are honored will not magically materialize. It must be built step-by-step. Such a world is not built in the abstract, but in the concrete, in the context of particular communities that instantiate, however imperfectly, the common good for their inhabitants. So the task of promoting human rights requires paying attention to the art of the possible. This is important particularly in the case of positive human rights, which ask the stronger and more fortunate members of the community to contribute something to the less fortunate. Given the resources of a particular community at a particular time, what is the best way to promote human rights in an incremental fashion? Strategic imagination asks and then attempts to answer this question. It is a practical question that anticipates difficulties and accounts for contingencies. The possession of strategic imagination is the mark of a good lawyer, particularly a transactional lawyer, who must negotiate a situation that protects a client's interests over an indefinite period of time and involving substantial uncertainty.

A good example of strategic imagination operative within an American legislative framework designed to promote positive human rights is the Americans with Disabilities Act of 1990 (ADA).⁷⁶ The ultimate goal of

⁷⁵ *Mabo v. Queensland (No. 2)* 175 CLR 40–41 (citations omitted). The lone dissent in this case, written by Justice Dawson, does not endorse the notion of *terra nullius*. The argument that the Crown obtained full, beneficial title to the lands in question upon acquiring sovereignty over those lands, he believes, does not depend for its effectiveness on the concept of *terra nullius*.

⁷⁶ Americans with Disabilities Act (ADA) Pub.L.No. 101–336, 104 Stat. 328 (1990) (as amended in scattered sections of 42, 47, and 29 U.S.C. [United States Code dealing with public health and social welfare]). Several Supreme Court decisions have narrowed the protections offered by the ADA.

the ADA is to enable the 43 million Americans with one or more disabilities to move from social exclusion to actively contributing to society. But this good cannot be achieved all at once; it must be achieved stepwise, with each step carefully preparing the way for the next. For example, Title I of the ADA requires businesses to provide "reasonable accommodation" to protect the rights of individuals with disabilities in all aspects of employment. It does not require a business to provide every possible or helpful accommodation, no matter how expensive or impractical; doing so might bankrupt the business. In that case, everyone involved, including persons with disabilities, would be worse off. Critics of the ADA point to its deficiencies: it does not help all persons with disabilities, and it chiefly helps those with mild disabilities, who presumably need the least help. But it is a start. Over time, with advancing technology and new businesses coming into existence—businesses that design their workforce from the ground up—the bar for what counts as "reasonable accommodation" ought to rise to include more persons within the Act's effective sphere of protection.

Legislatures, however, are not the only branches of government that exercise strategic imagination. Turning to the Australian context, the *Mabo* case again provides an instructive source for reflection. The six justices who held that native title survived the acquisition of sovereignty by the Crown were not in agreement about the broader ramifications of that holding. All six agreed that the Crown had the power to extinguish native title by an inconsistent grant of the land in question to a third party or dedication to an inconsistent public use. But then the agreement broke down. On the one hand, three justices (William Deane, John Toohey, and Mary Gaudron) believed that the extinguishment of native title by an inconsistent grant was wrongful, at least in the absence of a clear statutory provision to the contrary. In such circumstances, those wrongly deprived of native title would have a claim to monetary damages from the government. On the other hand, three justices (Gerard Brennan, Anthony Mason, and Michael McHugh) did not recognize a claim to monetary damages. While admitting that native title survived the acquisition of sovereignty by the Crown, they did not endorse the further step that its extinguishment, even without explicit statutory authority, would generate a claim to wrongful deprivation of native title. On this question, the views of the seventh and dissenting justice (Daryl Dawson) broke the tie. Since he did not recognize any right to native title whatsoever, *a fortiori* he did not recognize any right to compensation for its wrongful deprivation.

If one acknowledges, as Justice Brennan, Chief Justice Mason, and Justice McHugh do, that the legitimate and enduring connection of the aboriginal peoples to their land was repeatedly ignored by the

English settlers,⁷⁷ why not allow them to bring a claim for monetary damages against the Crown? In my view, the answer to this question lies in the general framework for the development of the common law that Justice Brennan articulated in his opinion: "In discharging its duty to declare the common law of Australia, this court is not free to adopt rules that would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. . . . The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed."⁷⁸

Arguably, a skeletal principle of common law is the principle that sovereignty carries with it the power to create and to extinguish private rights and interests in land within the Sovereign's territory. Justice Brennan wrote that "the sovereign power may or may not be exercised with solicitude for the welfare of indigenous inhabitants but, in the case of common law countries, the courts cannot review the merits, as distinct from the legality, of the exercise of sovereign power."⁷⁹ In short, the High Court is not in a position to call into question past land grants made by the sovereign merely on the grounds that they are unjust. To a certain degree, what happened in the past must remain in the past, because innocent third parties have built their lives on the stability of the system of property put in place long ago. Thoroughly eradicating the fruits of past injustices would not be possible without inflicting new injuries.

But what about the objection that Justices Deane, Toohey, and Gaudron were not calling into question the validity of the grants, but were merely authorizing a claim for damages in cases without explicit authorization for the grants? A possible response would be that authorizing such causes of action afflicts the property system with significant uncertainty that must be settled by lengthy and expensive litigation. Statutes of limitations do not necessarily add the requisite stability, since there is always the possibility of litigating about their applicability. Furthermore, damage claims would likely not be paid by those who benefitted from the land—the heirs of the individuals to whom the land was conveyed by grant or sale—but by the government, with revenues drawn from the people as a whole. It might be

⁷⁷ "The facts as we know them today do not fit the 'absence of law' or 'barbarian' theory underpinning the colonial reception of the common law of England. That being so, there is no warrant for applying in these times rules of the English common law which were the product of that theory. It would be a curious doctrine to propound today that, when the benefit of the common law was first extended to Her Majesty's indigenous subjects in the Antipodes, its first fruits were to strip them of their right to occupy their ancestral lands" (*Mabo v. Queensland [No. 2]* 175 CLR. 39).

⁷⁸ *Ibid.* 29–30.

⁷⁹ *Ibid.* 63.

a better and more effective strategy for the government to dedicate those funds to improving the well-being of aboriginal citizens today, rather than framing their efforts as an attempt to remedy injustices long past.⁸⁰

The practical effects of the decision in *Mabo* were two. First, the Australian High Court publicly repudiated the claim that the Australian lands before European settlement were *terra nullius*; it also publicly recognized that the racist assumptions frequently backing that claim had no place in contemporary Australian common law. In so doing, the High Court set the common law on a firmer moral footing than it had previously enjoyed. Second, while the decision did not undo morally questionable appropriations and grants of native property in the past, it provided a firm foundation for the continued protection of lands that remain under native title.⁸¹ This decision exemplifies the balance of moral idealism and moral realism that is the mark of strategic imagination.

CONCLUSION

By identifying certain habits of mind that facilitate the identification, promotion, and protection of human rights, this article has aimed to provide a helpful link between virtue theory and rights theory. Ultimately, however, this link must be made in practice as well as in theory. Both virtue theory and rights theory point beyond themselves to real life. Rights theory promotes an actual state of affairs that gives each and every person his or her due in justice—as Aquinas said, justice is a virtue focused on external operations, pointing to the actual impact that our actions have on others.⁸² But the virtue of justice is also the disposition to act in ways that promote a just state of affairs. One task of virtue theory is to elaborate on the habits of mind, heart, and spirit that allow agents to appropriately deliberate upon and choose rightly in the crux of actual decision-making,

⁸⁰ This argument also applies to reparations claims made by the descendants of American slaves.

⁸¹ “Until recent times, the political power to dispose of land in disregard of native title was exercised so as to expand the radical title of the Crown to absolute ownership, but where that has not occurred, there is no reason to deny the law’s protection to the descendants of indigenous citizens who can establish their entitlement to rights and interest which survived the Crown’s acquisition of sovereignty. Those are rights and interests which now may claim the protection of s. 10(1) of the Racial Discrimination Act of 1975 which ‘clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community.’” *Mabo v. Queensland (No. 2)*, 175 CLR 53, citations omitted.

⁸² Aquinas, *ST* 2–2, q. 58, a. 9.

so that they will help produce an actual state of affairs that stands in harmony with the human rights of all those affected by the action.

By situating my analysis in the context of actual cases and controversies from Australia and the United States, I hope to have honored the necessary connection between theory and practice in the discussion of both rights and virtue. The concrete questions at stake in the cases and controversies enabled me to show how imagination, channeled along three paths that reflect the normative roots of a commitment to human rights, can support the recognition of human rights in various forms of governmental decision-making. Ontic imagination enables decision-makers to see those who are very different from them as equal in fundamental human dignity. Empathetic imagination allows decision-makers to envision living in community with those whose needs, and even existence, they might otherwise ignore. Strategic imagination permits decision-makers to implement concrete programs for protecting human rights in the deeply flawed and limited world in which we live.

In other words, I have argued that the exercise of these three forms of imagination comprises the habits that support the recognition and protection of human rights in concrete situations. Precisely what kind of virtues are they? In my view, a crucial next step of this project will be to interpret the relationship between human rights and imagination in terms of the relationship between justice and prudence. In Thomistic terms, the three forms of imagination might be categorized as virtues ancillary to the virtue of prudence, which itself straddles the intellectual and moral realms. One might argue, for example, that an agent who employs ontic imagination in an effort to appreciate the true dignity of an alien and unfamiliar people is in fact exercising the habit of understanding. A quasi-integral part of the virtue of prudence, the habit of understanding, shapes the correct grasp of a universal principle in a particular instance.⁸³ Empathetic imagination might be considered an instantiation of the habit of circumspection, another quasi-integral part of prudence that allows us properly to perceive the morally relevant circumstances of our action.⁸⁴ Finally, we might think about strategic imagination as an aspect of shrewdness, the quasi-integral part of prudence that allows us to grasp the broader contours of a particular situation rapidly and reliably, so that we can promote human rights as best we can in less-than-ideal situations.⁸⁵

Those committed to human rights face some dark times at the present in both the practical and theoretical arenas: egregious abuses of human rights are all too common throughout the globe, and the very idea of human

⁸³ *Ibid.*, q. 49, a. 2

⁸⁴ *Ibid.* a. 7.

⁸⁵ *Ibid.* a. 4.

rights is under serious attack from a wide range of theoretical perspectives.⁸⁶ I hope this article has contributed in some small way to the defense of human rights by highlighting the character traits that enable their recognition and protection in concrete cases.

⁸⁶ Communitarians worry that the proliferation of human rights leads to individualism, selfishness, and social divisiveness. Cultural relativists object that human rights are a form of cultural imperialism imposed by the West on other cultures and value systems that have equal claim to moral legitimacy. And postmodern deconstructionists charge that the idea of human rights as articulated in the Universal Declaration wrongly presupposes a static and clearly identifiable "human nature" which can be distinguished from cultural conditioning; they contend that human nature is essentially malleable, due to choice and, more importantly, due to cultural influences. Jack Mahoney discusses these and other objections to human rights in *Challenge of Human Rights* chap. 3.