Beyond the 'Awkward Embrace': Disability Rights, Dialogue and '*Law, Love and Language*' Revisited

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Abstract

Despite the perceived 'human rights revolution' within Church teaching since Vatican II, a measure of dissonance survives between secular rights theory and practice on the one hand and, on the other, ethical thinking informed by the natural law tradition. This article examines some recent developments in that secular theory and practice for signs of possible rapprochement. In particular, it considers the way in which the emergence of 'disability' as a rights issue, for example in the recently ratified United Nations Convention on the Rights of Persons with Disabilities, has contributed to the transformation of equality and human rights law and so has helped shape a broader transformation of rights theory and practice. Central to that transformation has been the ambition of establishing human rights as the basis of a progressive political programme, as witnessed for example by the work of Sandra Fredman and by the Hamlyn Lectures of Conor Gearty, whose Catholic provenance makes his approach especially salient. The article concludes by considering Herbert McCabe's interpretation of Aquinas' ethics, especially in his *Law, Love and Language*, and proposes some potentially fruitful points of contact between McCabe's approach and the identified developments in secular rights theory.

Keywords

Human rights; ethics; disability rights; natural law; McCabe

I

One of the places where fruitful dialogue between secular and Christian ethics breaks down is in discussion of human rights, and this despite the appearance of initial promise. As Charles Taylor has remarked, we are all, believers and non-believers alike, 'partisans of

human rights', to the extent that human rights discourse has triumphed as an essential component of modernity.[1] There has, as a result, been a 'human rights revolution' within the Church, thereby reversing the outright hostility that formed part of the anti-modernist programme. When recent Popes have addressed the United Nations in New York, they have come to support not condemn.[2] Yet there remains something awkward about the Church's embrace of human rights.[3] Part of that awkwardness stems from the apparent mismatch between a view of the world that sees gift and grace, founded on a transcendent teleology, as essential for human flourishing, and a view that instead privileges rights and claims as the chief conditions of justice as fairness. The ability of natural law ethics and rights culture to engage with each other is thereby diminished.[4]

A critical aspect of this dissonance is the apparent tension between natural law theory and human rights. On the one hand, natural law theory reinforces commitment to moral realism, to a teleological system, to an objective and unchanging standard of measurement for human affairs that is frequently seen by its detractors as repressive and incapable of responding imaginatively to the complexity of modern life. On the other hand, rights culture is conceived as a conveyor of subjective rights, singularly lacking in any transcendent grounding or teleological ambition, relativist, permissive and egalitarian in its reach, the culmination of a form of individualism that is ultimately corrosive of enduring value, exclusively concerned with means at the expense of any truly substantive ends.

This sense of dislocation invites an attempt at rapprochement. As Tina Beattie has observed, a 'Thomist' approach to natural law contains within it the prospect of reconciliation.[5] At the same time, however, it should not be overlooked that there are features of evolving secular approaches to human rights that also contain seeds of dialogue and which invite a reassessment of the apparent stand-off between natural law ethics and rights culture. One of the areas in which recent theory and practice offers especially fruitful ground for dialogue is in connection with disability rights.

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[1] Charles Taylor, *A Secular Age* (Cambridge, Mass.: Harvard University Press, 2007), p. 419

[2] Most recently, Pope Benedict XVI's address to the United Nations delivered in New York on 18 April 2008

[3] Roger Ruston, *Human Rights and the Image of God* (London: SCM Press, 2004), Chapter 2

[4] James L. Helft, ed., *A Catholic Modernity? Charles Taylor's Marianist Award Lecture* (Oxford: Oxford University Press, 1999), p. 116–118

[5] Tina Beattie, 'A fulfilment that is recognisable and yet unknown: Christian Teleology and the End of Human Rights', unpublished paper delivered to The Society for the Study of Theology Annual Conference, St John's College, Durham, 31 March-3 April 2008, available at http://tina.beattie.googlepages.com/papers

Disability is an aspect of human experience in respect of which Christian theology is likely to be especially wary of a rights based approach, one of those places where an ethic of gift and grace looks set to be fatally undermined by an alternative that introduces the potential stridency of rights claims. In part, this state of reserve appears to flow naturally from a gospel ethic itself that provides ample material for viewing disability as an occasion of grace, of enlightenment and healing. The idea that disability might become an occasion not of grace but of rights-claims appears to rob the disabled individual of his or her integrity whilst denying everyone else the exercise of Christian charity.[6]

In secular society, this same intuition has in the past led to public policy initiatives on the part of the western liberal democracies that have seen disability as an object of welfare not rights, a legitimate cause of pity, not indignation. It is only quite recently that 'disability rights' have found expression in law and policy. It was in part the campaigns of returning Vietnam veterans that generated the inclusion of disability rights within a US civil rights agenda that had previously been associated primarily with issues of race and gender discrimination. That civil rights advocacy led in due course to the Americans with Disabilities Act 1990 during the presidency of George Bush, Snr., and in the UK to the Disability Discrimination Act 1995, introduced in the final days of the Major government.[7]

Underpinning the emergence of the positive law initiatives on disability was a newly articulated theory of disability. The so-called 'social model' of disability sought to displace the established 'medical model' by demonstrating that physical and mental impairment do not inevitably and invariably lead to disability; it is instead the failure of the social and physical environment to accommodate the needs of disabled people that turns the contingency of impairment into a form of social exclusion and so of an inability to achieve fulfilment. On this account, disability is not so much a matter of nature as of culture, its remedy not charity but justice.[8]

The emergence of disability as a rights issue has contributed to the transformation of that broader rights discourse itself. In the Anglophone world, law and policy designed to tackle race and gender discrimination have been reconfigured to accommodate the different challenges posed by disability discrimination. That reconfiguration contains within it three features that are in turn especially favourable

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[6] Marilyn E. Bishop, ed., *Religion and Disability: Essays in Scripture, Theology and Ethics* (Kansas City: Sheed and Ward, 1995). See too, Bridget Nuttgens, 'One World: the Disabled in Society', *New Blackfriars* 80 (1999) pp. 291–298

[7] Caroline Gooding, *Disabling Laws, Enabling Acts: Disability Rights in Britain and America* (London: Pluto Press, 1994)

[8] Michael Oliver, *The Politics of Disablement* (London: Macmillan, 1990)

to the possible rapprochement between rights culture and natural law theory: first, the unification of social and civil rights; secondly, the emergence of a substantive, rather than merely formal, notion of equality; and thirdly, the 'positive accent' in which disability rights are enunciated. These features can be illustrated by reference to the new United Nations Convention on the Rights of Persons with Disabilities which opened for signature in March 2007 and which became a legally binding document in May 2008 following the process of due ratification.[9]

It is customary to draw a distinction between negative, justiciable civil rights on the one hand and positive, non-justiciable social rights, on the other. That dichotomy, although absent from the UN Declaration of Human Rights in 1948, is central to the evolution of human rights law in Europe and elsewhere. The European Convention on Human Rights, for example, includes a list of essentially civil-libertarian rights which are enforceable in the European Court of Human Rights in Strasbourg (and since October 2000 in the UK courts also as a result of the Human Rights Act 1998), supplemented by a sequence of social rights contained in the European Social Charter, which are not enforceable in the courts. The Convention on the Rights of Persons with Disabilities is the first UN human rights convention of the 21st century. This new Convention makes quite clear the artificiality of separating civil rights from social rights when addressing the needs of disabled people. The classically civil rights of equality before the law, right to life and liberty, freedom of movement and expression are supplemented by the social rights to live in the community, to education, health and work, to an adequate standard of living, participation in political, public and cultural life.

As the preamble explains, the foundational principles of the Convention include the recognition that disability is 'an evolving concept' and that disability itself results from 'the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'. As a result, the Convention emphasises the importance of 'mainstreaming' considerations of disability into any programme of sustainable development. Whilst recognising the importance of individual autonomy, independence and choice, the Convention expressly acknowledges that discrimination against disabled people is not merely a failure to deliver equality of opportunity or even equal treatment but, more substantively, a 'violation of the inherent dignity and worth of the human person'.[10]

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[9] United Nations, *Convention on the Rights of Persons with Disabilities, and Optional Protocol* (2007). Text and background information available at http://www.un.org/disabilities

[10] Ibid.

Within the terms of the Convention, therefore, there is a deliberate meshing of social and civil rights, which recognises that the negative 'freedoms from' various forms of mistreatment and exclusion are largely devoid of substance unless combined with a range of positive 'freedoms to' enjoy certain benefits and entitlements that make a reality of choice and indeed incline those choices to the various goods of the community as a whole. There is in other words a tendency within the Convention towards a substantive and communitarian view of social goods that recognises not just the human rights values of autonomy and fairness but the reciprocal values of dignity and solidarity.

This innovative reframing of human rights principles reflects the sort of thinking about substantive equality that accompanies the 'capabilities theory' of social justice associated with Amartya Sen[11] and Martha Nussbaum.[12] Capabilities theory represents a powerful alternative to social contract theories of justice. Nussbaum in particular has argued that the strongest of those social contract accounts of justice, that of John Rawls, fails to accommodate disabled people in general and those with cognitive impairments in particular. On Nussbaum's account, the failure of Rawls to find space behind his 'veil of ignorance' for the hypothesis of future disability undermines the potential of such a theory to give an adequate account of social justice.[13]

Rawls' basic assumption that all parties to the social contract are roughly equal in power and ability, as well as independent, in effect excludes from the contractual equation what is now recognised to be a very significant proportion of the general population and, as changing demographics sustain an older population, a proportion that is likely to increase significantly in the near future. According to Nussbaum, the 'myth of the citizen as a competent independent adult' simply cannot sustain the weight of argument it is required to bear. What is needed by way of remedy is revision of 'the idea of the citizen as independent bargainer' and replacement of it with 'a more complex image of a being both capable and needy, who moves from

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[11] Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999). For consideration of the way in which Sen's work might be of 'particular interest to Catholics' and converge with Catholic social teaching, see Edward Booth OP, 'Amartya Sen: "The Conscience of Economics" A Brief Outline of his Thought', New Blackfriars 83 (2002), pp. 469–471

[12] Martha C. Nussbaum, *Beyond the Social Contract: Toward Global Justice* (The Tanner Lectures on Human Values, 12–13 November 2002 and 5–6 March 2003), published in a revised version as part of Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard: Harvard University Press, 2006)

[13] Nussbaum, *Beyond the Social Contract*, pp. 423–448

helplessness to mutual interdependence, and unfortunately often back to helplessness again'.[14]

That recognition of the 'materiality and need' of the human person as part of 'the specific form of dignity that the human being has' is at root a political conception that identifies the good things available for political distribution not just as 'stuffs and things', as identifiable economic units, but instead as 'an interlocking set of human capabilities'.[15] A critical task of politics then becomes that of 'providing support for human need so that human beings can choose to function'. The aim of politics in turn becomes that of 'providing all citizens with a basic core of capabilities, which can be enumerated as basic entitlements of all citizens', an articulation, in other words, of the distributive task of such a society.[16]

The capabilities approach, in short, 'makes evident the complex forms of interdependence between human beings and their material, social and political environments' and so is well suited 'to provide a core for a society that seeks to acknowledge humanness (including animality, mortality and finitude) rather than to hide from it, calling shame and disgust to its aid'.[17] Just as importantly in this context, it is an approach to social justice that offers a more substantial vision of the state than the neutral and enabling entity envisioned by social contract theory. The sort of state that can deliver the complex of interdependence that will facilitate the flourishing of disabled citizens will as a result be prescriptive of 'the good', not least in requiring of all its members a commitment to the financial and social cost that follows from paying equal respect to the needs of those who do not conform to the social norm and so might not be economically 'productive'.

This account of the human person and of the society that is needed to sustain it encourages the sort of unification of civil and social rights contained in the UN Convention on Persons with Disabilities. The combination of both kinds of rights, alongside positive duties on the state to provide the means by which those rights might be realised in practice, pushes against the traditional reticence of the liberal state to adopt a position of more than strict neutrality when it comes to the assessment of social goals and values. The realistic recognition of the needs of disabled people gives substance to the material, bodily and socially embedded nature of the human person, to the primary human experience of dependence and vulnerability, and to the notion of social solidarity that underpins an essentially

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[14] Martha Nussbaum, Hiding from Humanity: Disgust, Shame and the Law (Princeton: Princeton University Press, 2004), pp. 312–313

[15] Ibid. p. 344

[16] Ibid.

[17] bid. p. 345

communitarian vision of social relationship. This is then an approach to social justice and to rights that aims to get beyond the received view of such rights as essentially individualistic, libertarian and free-floating, devoid of substantive value or any inkling of what the good society might comprise.

This attention to human capability is closely linked to 'the positive accent' within which disability rights are already articulated in the law of the US and UK. The key concept in this context is that of 'reasonable adjustment' (or 'reasonable accommodation', in its US and Canadian version). Whereas the equality laws on race and gender have adopted a principle of equal opportunity, equal treatment or non-discrimination, in the case of equality laws on disability the emphasis has been placed on the duty of those who can to take positive steps to achieve full and equal participation for disabled people, whether in the enjoyment of public goods such as education, transport, health and social care, in the enjoyment of social and cultural life, for example through equal access to leisure and recreational activities, or in the enjoyment of economic life, for example through sustainable employment. On this version of equality as participation, the critical principle is that of different treatment rather than same treatment.[18]

Once again, this 'positive accent' incorporates a more substantive role for the state than the typically negative precepts of conventional civil rights would allow. As with capabilities theory, so this more assertive version of rights discourse discloses a substantive notion of the good society and the good life, challenging the habitual reluctance of the liberal state to prescribe ends rather than means. This positive approach is a variant of the politics of recognition espoused by Charles Taylor and which forms the basis of a contested multiculturalism, an attempt to accommodate cultural difference in the face of uniformity.[19] One of the fears about multiculturalism is that it opens the way to unrestrained relativism, without any control mechanism to limit the range of diverse preferences available. In the case of disability, however, the notion of reasonable adjustment is not put at the service of lifestyle options or arbitrary preference. Instead, the accommodation in question is of the needs of disabled people, those needs whose satisfaction entails fruitful social participation and the possibility of individual human flourishing.

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[18] Sandra Fredman, 'Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?', in Anna Lawson and Caroline Gooding, eds., *Disability Rights in Europe: From Theory to Practice* (Oxford: Hart Publishing, 2005), pp. 199–218

[19] Charles Taylor, 'The Politics of Recognition', in Amy Guttman, ed., *Multiculuralism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994), pp. 25–73

Taylor remarks of the willingness to entertain a measure of cultural difference that it evokes a model of liberalism that is not purely procedural but which requires 'judgments about what makes a good life'.[20] Sen speaks not of preferences but of 'reasoned agency', in the sense of a person's ability to choose not just anything but rather the things he or she 'has reason' to value, thereby introducing a measure of objective boundary to uncontrolled desire.[21] This critical modification of procedural liberalism points implicitly therefore towards the sovereignty of 'the good' over 'the right', substance over process, virtue over law. That evocation is all the more pronounced in the case of accommodating the needs of disabled people where such needs are recognised as basic entitlements and not solely as a matter of personal preference, the material conditions of equal participation rather than life-style options.

II

The emergence of disability rights, and of the refinement of rights discourse that it requires, is just one part of a larger contemporary transformation of secular rights culture. The scale and urgency of that transformation in secular rights thought can be gauged briefly from the recent work of Sandra Fredman.[22] There are three aspects of her approach to human rights in general (and not just to disability rights) that are resonant of the issues raised by a consideration of disability rights: first, her emphasis on the positive freedom and positive duties that lie at the heart of human rights, but which are often in danger of being eclipsed by 'negative liberty' or 'freedom from' state interference; secondly, her engagement with Hegel and Aristotle to find at the heart of human rights a communitarian vision that transcends the sort of individualism frequently assumed to go with rights territory; and thirdly, her sceptical response to liberal claims of state neutrality about the content of the good life.

Fredman finds in the positive notion of freedom, 'freedom to', a vision of human rights that is far more than a celebration of individual liberty with all its overtones of self-indulgence and solipsism. Expressly drawing upon 'capabilities theory' Fredman seeks to withdraw from a purely libertarian human rights vision, instead obliging the state to take 'positive' measures to 'provide the conditions which

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[20] Ibid. p. 61
[21] Sen, *Freedom*, pp. xi-xii
[22] See especially, Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008)

make it possible for individuals to form their choices in genuine freedom as well as act on them'.[23]

Without going so far as to adopt fully Sen's focus on 'the things a person *has reason* to value' (her emphasis), Fredman in effect imposes an alternative but potentially effective control mechanism on unfettered individual preference by suggesting that human rights are at least in part about creating the sort of environment in which balanced choices can be made.[24] In other ways going further than Sen, however, she also argues that the notion of value is not exhausted by concerns with individual 'achievement'. The function of positive human rights duties is not simply to enable individuals to realize their own goals at the expense of other human rights values. Central among these other values is the value of caring, which is not a matter of choice but of responsibility: 'Human rights do not only value choices. They also value relationships for themselves. This gives rise to a duty to ensure dignity and respect, and to promote and facilitate responsibility and caring'.[25]

Secondly, from Hegel and Aristotle Fredman acquires a view of the human person as essentially social, and of the 'community' as logically prior to the individual. Following the path cleared by communitarian thinkers, Fredman defuses the claims of a purely individualistic liberalism: 'Aristotle argued that a person is by nature a social and political animal, and a fully human life can be achieved only in the context of the polis or the political community...An individual derives her own identity from recognizing others and being recognized by them. Therefore we can only develop and sustain the sense of oneself as free through a process of mutual recognition of other free individuals'.[26]

Finally, Fredman dismisses the liberal ideal of state neutrality as an illusion. Her position starts by recognising the force of Isaiah Berlin's argument that the notion of 'positive freedom' can lead to despotism and the use of coercion to make the individual 'truly free'. The trouble is, she concedes, that 'the illusion of neutrality disguises particular value commitments. Autonomy and individualism are themselves value commitments'.[27]

In apparent contradistinction from pure theories of state neutrality, Fredman notes therefore that 'it is impossible to exercise choice unless adequate options exist, and only the state can provide these. Therefore positive duties cannot simply be rejected on the grounds that they are bound to infringe on individuals' ability to choose the

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[23] Ibid. p. 15
[24] Ibid.
[25] Ibid. p. 16
[26] Ibid. p. 17
[27] Ibid. p. 20

good for themselves. Instead, the central challenge is expressly to recognize and continually engage with the ways in which the state does and should actively infuse a particular kind of public morality into the lives of individuals'.[28] For Fredman, the chief vehicle for meeting that challenge will be to use human rights principles to give 'a voice to those who are necessarily marginalized in the political process, in ensuring that the material and social preconditions exist for full and equal participation, and ultimately in functioning as a catalyst for deliberative democracy'.[29]

Fredman's account of what she describes as 'human rights values'[30] challenges therefore the pure theory of liberal individualism by giving the state a larger role in supporting the range of choices available and in constraining the versions of the good life on offer. By accepting a communitarian account of the self and of meaning, Fredman is committed to an Aristotelian and Hegelian vision that makes room for social solidarity. The very notion of 'positive' human rights duties and responsibilities reinforces this sense of 'the social', making of human rights values much more than cover for unbridled self-interest or the expansion of civil-libertarian ideals. To that extent, Fredman's account offers the foundation of a more rounded, and indeed grounded, political theory, a theory about how humankind can live together in a society bound by more than just tribal values and unreasoned individual preference, or by the sort of 'overlapping consensus' that underpins the hypothesis of social contract.

III

The sort of transformation of human rights that Fredman envisages demonstrates an increasing openness to the perspectives that might draw secular human rights discourse closer to ethical positions informed by the natural law tradition. The 2005 Hamlyn Lectures delivered by Conor Gearty can be seen as representing an overture to such an exercise of rapprochement from the natural law side of the divide.[31] They are, on Gearty's own account, very much a provisional account and therefore an indication of the potential difficulty of realising the sort of rapprochement that Beattie anticipates.[32] Nevertheless, they represent a prestigious intervention from a leading

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[28] Ibid. p. 23

[29] Ibid. p. 5

[30] Ibid. Chapter 1

[31] Conor Gearty, *The Hamlyn Lectures 2005: Can Human Rights Survive?* (Cambridge: Cambridge University Press, 2006)

[32] Kim Economides, William Twining, Gavin Phillipson, Shami Chakrabarti, Conor Gearty, 'Can Human Rights Survive? A Symposium on the 2005 Hamlyn Lectures', *Public Law*, Summer (2007) pp. 209–232, at p. 230

Catholic human rights lawyer in the secular debate about the 'crises of authority, legalism, and security' facing human rights discourse.

Unlike his other human rights scholarship, which is essentially concerned with providing a juridical account of human rights, Gearty's Hamlyn Lectures are, as William Twining has observed, aimed at providing a 'persuasive secular vision and justification for commitment to human rights as moral rights'.[33] In undertaking that task, Gearty has at the heart of his vision the two key concepts of dignity and compassion, the latter drawn from Oliver Davies' account of Aquinas' notion of moral sense or 'synteresis' in his 2005 Aquinas Lecture.[34] His objective is to articulate political goals in human rights terms, his method to transform our basically compassionate human instincts into progressive politics through the achievement of meaningful democratic practice.

To achieve that 'political manifesto', as Twining puts it,[35] Gearty, like Fredman, prescribes positive as well as negative rights, and undermines the orthodox classificatory distinction between civil rights and social rights. Critically, to establish the 'bridge that leads to a fuller set of principles', Gearty places at the centre of his account of human rights the concept of 'equality of esteem'. It is by virtue of the fundamental value of equality, and the related notion of human dignity, that the potentially limited and personal quality of compassion as pity or avoidance of cruelty 'grows a thicker human rights content' and so offers a 'wider set of moral engagements with the world around us than the notion of compassion would seem to entail'.[36]

That wider set of engagements in turn opens up a form of progressive politics that is fundamentally democratic, a rekindling of the 'radical and highly effective partnership' of political theory and rights discourse that distinguished the eighteenth century but has since become increasingly obscured.[37] The commitment to democratic politics, to the open-textured quality of political deliberation, offers a balance to the more absolute safety-net offered by the prohibitive aspect of human rights discourse. It is this bipolarity that enables Gearty to conclude by reference to the 'two-dimensional' core of human rights: 'There is the absolute side – the moral wrongness of cruelty and humiliation, and there is also the – perhaps less clear but nevertheless essential – dedication to human flourishing'. From the former, flows prohibition, the demand that 'we do not

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[33] Ibid. pp. 211–212

[34] Gearty, *Hamlyn Lectures*, pp. 43–44, and 48–49, citing Oliver Davies, 'Divine Silence, Human Rights', Aquinas Lecture 2005, 'Rights and Revelation', *New Blackfriars* 89 (2008): 441–467.

[35] Twining, *Public Law*, p. 213

[36] Gearty, *Hamlyn Lectures*, p. 45–46

[37] Ibid. p. 45

degrade our fellow humans by depersonalising them'; from the latter, facilitation, the emphasis on 'growth and personal success', 'radically pluralist in the hospitality towards others –rather than mere tolerance of them – that its underlying ethic demands'. In short, 'viewed as a whole, therefore, human rights is (sic) an idea that both protects us as persons and enables us to grow at the same time'.[38]

Gearty's account of human rights seeks both to strike a blow for truth and universality against post-modern relativism and at the same time to keep its distance from a philosophical account of human rights that overtly owes anything to religious or indeed to any other 'foundationalist ethic'. Crucially, the device for achieving that balance is an appeal instead to evolutionary biology, which Gearty sees as having put paid to the 'humanity is unique school' by reinserting the mind into the body and by establishing language-use as part of that bodily animal make-up, not somehow independent of it.[39] More positively, on Gearty's account, it is evolutionary biology that has identified the distinctive qualities that humankind has as this 'clever animal', over and above the qualities shared with other animals.[40]

He cites three such features: first, self consciousness; secondly, awareness of death; and thirdly, the capacity to keep in tension the two contradictory impulses of compassion on the one hand and of cruelty on the other. It is this third capacity that holds Gearty's attention and enables him to realise his human rights vision. It is human rights language that comes closest to expressing the compassionate side of human nature, 'a language that speaks for people and that manages by forcing people to be visible to everyone, first to make it possible for others to speak on their behalf, and then for them to speak for themselves'.[41] For Gearty a 'core task' for 'human-rights-oriented forms of communication' is to give voice to the victims of cruelty and humiliation, to construct a language of hospitality and kindliness, and above all a language of 'compassion' in the sense (attributed to Davies) of 'a universalistic disposition from which virtue flows'. This language, the language of human rights, is quite simply for Gearty 'the Esperanto of the virtuous'.[42]

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Despite its deliberate distancing from religion and other overtly metaphysical foundations, Gearty's approach does end up, then, endorsing

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[38] Ibid. pp. 140–141
[39] Ibid. p. 32
[40] Ibid. p. 41
[41] Ibid. p. 42
[42] Ibid. pp. 43–44

an approach that moves from certain features of human 'nature' to various ethical conclusions, or at least commitments. It is in biological or species unity that Gearty finds the universal truth on which he can begin to build his political and ethical programme, deriving, in other words, 'an ought' from 'an is'. It is in the end a form of natural law justification for the account of human rights that he wishes to present to his secular audience and that yields the moral theory that underpins it.

In this approach to the biological unity of humankind as the foundation of ethics with 'compassion' at its centre, in his concern for human rights talk as a medium in which linguistic diversity can nevertheless yield a coherent ethics that deepens sensitivity to the plight of the dispossessed and marginalised, and in his ambition for an ethics that is also capable of founding a progressive political programme based upon equality and democratic participation, Gearty offers an account of human rights that is intriguingly resonant of the interpretation of Aquinas' ethics offered by Herbert McCabe, especially in his 1968 book-length treatment *Law, Love and Language*.[43] By way of conclusion, it is salutary to reflect upon that resonance and upon the extent to which the kind of exposition of Aquinas put forward by McCabe, albeit with little or no explicit mention of human rights, might in fact offer a way forward for the rapprochement between secular human rights discourse and natural law theory.

There are three aspects of McCabe's approach that deserve particular attention in this context: his account of the point and purpose of ethics; his understanding of equality as a necessary condition of love; and his insertion of ethics in the greater sacramental scheme of things.

For McCabe, there are three possible starting-points for considering the point and purpose of ethics: ethics as love, ethics as law and ethics as language. The problem for ethics as love, 'love is all you need', is that (as Gearty finds with pure 'compassion') it lacks substance and reduces to an impracticable form of 'situation ethics', relativism and a preoccupation with the personal at the expense of the public. To remedy that deficiency (and to make the sort of bridge between compassion and politics that Gearty finds in 'equality') the notion of law, natural law, offers the prospect of defining the ultimate 'situation' against which human conduct must be measured, namely, the shared situation of humankind as a biological, species-whole: 'the

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[43] Herbert McCabe OP, *Law, Love and Language* (London: Sheed and Ward, 1968; republished London: Continuum, 2003). See also Stanley Hauerwas, 'An Unpublished Foreword', *New Blackfriars* 86 (2005), pp. 291–295; and James Smith, *Terry Eagleton: A Critical Introduction* (Cambridge: Polity Press, 2008), esp. pp. 13–15

first demands made upon us are the demands made by the community of the human race'.[44]

Those demands in turn reflect the fundamental principle of human equality and dignity. A distinctive characteristic of 'love', for McCabe, is its revolutionary capacity to outgrow itself, to take on deeper meanings, in a way that words like 'jam-jar' and 'perhaps' do not. One of the crucial ways in which 'love' outgrows itself and so can be substantiated is by the realisation that true love is only possible between equals, that 'caritas' or 'agape' are more than the English word 'charity' precisely because they entail a radical sense of equality between lover and beloved.[45] The society built on love and refined by natural law, the just society in other words, is marked by the signs of equality: mutual participation, reciprocity and self-expression.

The trouble with this introduction of (natural) law as a means of adding substance to the otherwise empty promise of 'love' is that membership of the human race is not just biological but linguistic, cultural and historical as well as 'natural'; and in this linguistic or cultural sense, the unity of humankind is still work in progress: there is no ultimate community, and instead 'mankind is in a sense a theoretical construction'.[46]

The best we can hope for, it seems, in the world is that people belong to each other in the least trivial ways possible, that we establish ways of being together that enable self-expression and not self-assertion, structures of genuine communication rather than of domination, the sort of society that Gearty envisages as flowing from truly democratic practice. For McCabe, 'ethics is…the study of human behaviour as communication' and it 'does for the whole of life what literary criticism does for a small part'.[47] The purpose of ethics, then, is 'to enable us to enjoy life more by responding to it more sensitively, by entering into the significance of human action'.[48] To live the life of virtue is to have cultivated the settled dispositions to make that form of human flourishing possible; the shared political practice of that virtuous disposition is for Gearty the practice of democratic politics, informed by human rights principles. Where Gearty finds fundamental rights as the boundaries within which democratic practice must operate and submit to constraint, so McCabe's celebration of ethics as language, informed by law, discounts any possible drift towards relativism. True, the notion of ethics as a sort of literary criticism writ large leaves scope for a measure of pluralism when

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[44] Ibid. p. 34
[45] Herbert McCabe OP, *God Still Matters* (London: Continuum, 2002), pp. 4–6
[46] McCabe, *Law, Love and Language*, p. 98
[47] Ibid. p. 94
[48] Ibid. p. 95

it comes to the practice of delving ever deeper into the meaning of human character and behaviour. Yet, there are limits: there comes a point where, like the footballer who picks up the ball and so finds himself playing rugby instead, the human agent so steps outside the boundaries of his or her proper function that nice questions of ethical judgement become irrelevant. Not just anything can count as love, or indeed as compassion, and as McCabe puts it, 'Learning how to play well is analogous to acquiring a virtue; cheating is not playing the game badly: it is not playing the game at all, it is attempting to be adjudged a winner by an action which is not part of the game at all but pretends to be, and is analogous to sin'.[49]

It is at this point that McCabe, inevitably given Gearty's self-imposed constraints, goes beyond his secular account. For McCabe, the perfect image of the good society is the Trinity as a community of love, and the Incarnation is the means by which that community is made present in the world. As McCabe puts it, 'The word of God is the way in which the Father sees himself, his realisation of himself; the incarnation means that this divine self-realisation is shared with us. We are able to enter into the language, and hence the life, of the Father. This self-giving is the meaning of human history because what man is meant for, what he is summoned to, is to share the life of the Father'.[50] For McCabe, the unity of humankind is in the end realised neither in biology nor human language but in the dramatic unity offered by the Incarnation as the Word of God.

The chief way in which that Trinitarian love is repeatedly made present in the world is through the sacramental life, and especially the Eucharist. For McCabe, the sacraments are 'an articulation of the deep meaning of human living'.[51] If the ethical life is an ever-deepening awareness of human possibility, then the sacramental life is the means of dramatic immersion in that possibility, the way in which the signs that constitute the sacramental form are made real. Of the Eucharist, McCabe remarks, 'The eucharist, the centre of the sacramental language, displays the revolutionary character of social life...the significance of all eating and drinking together, all sharing of life, all community...The sacrament we call the eucharist is a creative interpretation of all man's attempts to form a community of love symbolised in the common table'.[52] Yet crucially, 'the eucharist proclaims that all such attempts point towards a true society which is only achieved through the sacrificial love of Christ'. In other words, the medium

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[49] Herbert McCabe, *The Good Life* (London: Continuum, 2005), p. 87

[50] McCabe, *Law, Love and Language*, pp. 126–127

[51] Ibid. p. 146. For fuller treatment of the sacramental life, see Herbert McCabe, *The New Creation: Studies on Living in the Church* (London: Sheed and Ward, 1964).

[52] Ibid. pp. 148–149

of human communication that natural law theory espouses is, ultimately, beyond humanity and is what we call divinity: God is love.

<center>V</center>

McCabe's emphasis upon ethics as language, equality as a condition of love, and the sacramental life as the dramatic realisation of genuine community frame a political programme that, very much of its time, affords a measure of complicity between socialist revolution and Christian eschatology.[53] For McCabe, social revolution is simply not revolutionary enough when it comes to the matter of establishing new media of communication: for that it is necessary to aver to the doctrine of the Resurrection.[54]

William Twining, on the other hand, has spoken of Gearty's moral theory of human rights as a form of 'liberation theology for secular society'[55] and so points to the role that human rights discourse has come to play in secular moral and progressive political thought. McCabe's reconfiguration of Aquinas' ethics serves to create a bridge between natural law theory and the post-war secular idiom shaped by Marx and Wittgenstein. By establishing the potentially radical and emancipatory credentials of Aquinas' ethical thought, McCabe provides encouragement for the belief that a similar measure of rapprochement might be achieved between natural law theories and the sort of progressive politics that human rights discourse increasingly harbours.

As Gearty proposes, human rights language should stand as the vocabulary of choice for the dispossessed and the marginalized, and as the 'Esperanto of the virtuous'. As human language it attempts to do the job that McCabe asks of ethics, that it should help bring about less and less trivial ways of being together, get us closer to the ultimate 'situation' against which our actions should be measured, the situation of 'humankind as natural and cultural unity' that is in fact still work in progress. But as an approximation of the divine language of love, of human dramatic unity, it remains just that – an approximation. And to that extent McCabe's approach points also to the inevitably conditional status of human rights discourse, to the realization that can save it from idolatry, and in other words to the

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[53] Aidan Nichols OP, 'The English Dominican Social Tradition', in Francesco Compagnoni OP and Helen Alford OP, eds*., Preaching Justice: Dominican Contributors to Social Ethics in the Twentieth Century* (Dublin: Dominican Publications, 2007), pp. 429–432

[54] McCabe, *Law, Love and Language*, pp. 166–173

[55] Twining, *Public Law*, p. 217

source of the tension in Gearty's attempt to ground the rich texture, the 'thick content' of human rights discourse, in a version of natural law ethics that is set loose from its overtly theological moorings. As McCabe puts it in a rare explicit allusion to human rights: 'Of course a Christian sees such human rights as not simply based on the comprehensive authority of the Creator but on the authority of Christ and foreshadowing in a non-sacramental way the coming of the Kingdom, as the Church does in a sacramental way'.[56]

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[56] Herbert McCabe, *On Aquinas* (London: Burns and Oates, 2008), p. 156