JACQUE MARITAIN AND THE INTELLIGIBILITY OF UNIVERSAL HUMAN RIGHTS

Philosophy Interest Group

Jeremy M. Wallace
Oral Roberts University

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Introduction

Perhaps no event in human history has had as great an impact on a global scale as the Great Wars of the twentieth century. In the wake of devastation incurred by the Great Wars, people recast their vision toward the value of human life. Not long after World War II, pains were undertaken by nations to collaborate and explore the feasibility of a unified international body to draft a Declaration of Universal Human Rights (DUHR). What began as an inquiry as to its plausibility became a reality in 1948. Whereas discussion of "rights" is not a new discussion, rooted in centuries of philosophical and legal thought, contemporary American society swims in the sea of "rights talk." Max Hocutt claims America has become an "entitlement culture" and argues that "talk of rights has gotten completely out of hand."[1] This burgeoning "rights consciousness" has, in his view, become unbalanced, for now "rights lists have become wishlists."[2] So, what are the limits of "rights talk"? What role can and should human rights play in society today? How can one make sense of "rights" and what further is needed such that the notion of universal human rights is not only coherent and compelling, but truly intelligible? These questions and more will garner the primary focus of this present essay.

[1] Max Hocutt, "Rights: Rhetoric versus Reality," *The Independent Review* 17, no. 1 (2012), 51.
[2] Ibid., 51.

In search of a coherent explanation and justification of universal human rights, scholars in the fields of jurisprudence and moral philosophy have posited divergent theories. This essay seeks to determine which theory best explains the justification of universal human rights; in other words, which view, if any, can provide a consistent, coherent, and intelligible rationale for how "universal human rights" can justifiably be considered "rights," and how these rights can truly be "universal" in scope? The essay will, therefore, first examine the life, thought, and influence of Jacques Maritain in the realization of the DUHR, followed by analysis of his Natural Law (NL) theory and how NL has historically answered the question of Natural Rights (NR). After alternatives to NL are examined, the author will demonstrate how these alternatives have, to some degree, explanatory power in addressing the functional dimensions of law making, yet fail to provide the sufficient grounds for what is necessary to justify the *universality* of human rights, which alone can be vindicated in Traditional NL (TNL) theory.

The Life and Thought of Jacques Maritain

Jacques Maritain was born in Paris in 1882. He grew up viewing life as basically hopeless. As a young adult he, and his new fiancé Raïssa Oumansav, made a suicide pact together, promising to one another that if they did not find meaning in life within the next year, they would end their lives on the anniversary of their pact. Within that year, however, they both were persuaded by León Bloy that life indeed has meaning, and preeminently in Jesus Christ. Filled with faith that Christianity was true they subsequently were received into the Roman Catholic Church in 1906.[3]

Meritain enjoyed a long, prolific career as a philosopher teaching in numerous Institutes, Colleges and Universities from 1912 till 1960, whereupon Jacques and his wife Raïssa returned to France. Not long after the death of his wife, he joined a religious order in Toulouse, the Little

[3] Jacques Maritain, *Natural Law: Reflections on Theory and Practice* (South Bend, IN: St. Augustine's Press), 1952.

Brothers of Jesus, where he lived and died in 1973[4]. In addition to his prolific teaching career, Maritain composed a voluminous body of published works that notably include *The Degrees of Knowledge* (1932), *True Humanism* (1936), *The Rights of Men and Natural Law* (1942), *The Person and the Common Good* (1947), and *Man and the State* (1951). Focused mostly on social action, he "began to develop the principles of a liberal Christian humanism and defense of natural rights."[5] Just prior to World War II, he and Raïssa fled to North America, where he taught first in Toronto, then Princeton and Columbia. Following WWII, he dedicated much of his attention to assisting in the efforts made by the United Nations to draft a Universal Declaration of Human Rights. Concerning this, William Sweet adds, "in December 1944, Maritain was named French Ambassador to the Vatican (serving until 1948), and was actively involved in a number of diplomatic activities, including discussions that led to the drafting of the United Nations Universal Declaration of Human Rights (1948)."[6] Maritain's legacy is inextricably linked to the role he played both in terms of the content of the UDHR and assistance in its final incarnation. The United Nations Educational, Scientific and Cultural Organization (UNESCO) assembled a committee to examine the feasibility of drafting the UDHR and, as Andrew Woodcock points out, the

> committee was made up of some of the leading scholars and jurists of the day, and it has been suggested that it is largely due to the foundations laid by this group that the declaration ultimately came into existence. . . . [I]f the drafting process had stalled at this point, and it had been established that there could be no agreement between the stakeholders on the question of content, then the process could not have gone on. Jacques Maritain played a significant role at this early stage. He was a key figure in the UNESCO committee, and prepared the introduction to the UNESCO report on the proceedings of the committee. [He] made a significant submission to the committee in his individual capacity . . . [and] the ultimate "tone" of the Declaration *reflects the substantial contribution made by Maritain at this genesis of its creation*.[7]

[4] Ibid., 7.
[5] Ibid., 5.
[6] William Sweet, as cited in Maritain, 6.
[7] Andrew Woodcock, "Jacques Maritain, Natural Law and the Universal Declaration of Human Rights." *Journal of the History of International Law* vol. 8 (2006), 247.

The significant linkage between the content of the UDHR and Maritain's thought can hardly be understated. As Woodcock points out, as "an unashamed Thomist . . . he was a strong exponent of the work of Thomas Aquinas. The dominant theme in his work tends to be on the issue of the rights of man, and the [sic.] human dignity, as it arises from natural law, rather than on the duties of man as a social animal."[8] For Maritain, a reasonable justification for universal human rights is not consistent within legal positivism or alternative natural law theories, but the fruit Thomistic Natural Law. Why does this matter? It is relevant because "the declaration was perhaps the clearest example in the twentieth century of a document which has the appearance of a legislative instrument bearing the hallmarks of a natural law document . . ."[9] On the specifics of NL theory, and Maritain's version of it, this essay turn shall now turn.

Natural Law and Natural Rights

Since discussion of "natural rights" is a legitimate discussion to have, and *universal* rights in particular, one must ask a pertinent question: On *what* is the notion of "natural rights" based? Historically, the response has been that "natural rights" proceed from "natural law." But what is Natural Law? What is its theoretical origination? Which major figures have promoted and advanced NL theory?

Andrew Woodcock argues that "The high watermark of classical natural law theory is to be found in Cicero, the first century lawyer, statesman and philosopher. Cicero approached the identification of true law on the basis of the assumption that the world was the work of a divine entity."[10] Centuries before Cicero, however, philosophers like Plato and Aristotle advanced theories of NL, laying significant groundwork for discussion in the field. The role Cicero played

[8] Ibid., 256.
[9] Ibid., 248.
[10] Ibid., 249.

in the development of NL should not be overlooked. "Borrowing from both Plato and Aristotle, Cicero focused on the essentially social nature of man, to determine the content of law. That is, he considered the social institutions created by Man, and proposed that the content of law must be to promote the interaction of man, and to protect the institutions he has created."[11] The matter of humanity's *preservation* is important to the theory. Woodcock underscores how "the principle of preservation of the order of man is the single most important principle governing the determination of law, which can be identified from the works of all natural lawyers following upon Cicero."[12] Another key figure in the development of NL theory is Thomas Aquinas, the Dominican scholastic of the thirteenth century A.D. In his *Summa Theologiae,* he writes:

> Now among others, the rational creature is subject to Divine Providence in a more excellent way, by being provident both for itself and for others. Therefore, it has a share of the eternal reason, whereby it has a natural inclination to its own proper act and end; and this participation of the eternal law in the creature is called the natural law . . . The light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing other than the participation of the eternal law in the rational creature.[13]

In Aquinas' view, God as creator has ordered the cosmos and everything he has created to function in a rational, particular, ordered way. Thus, everything in creation is ordered to the end (*telos*) to which God has brought it into being. As he states elsewhere, "everything that is contrary to the law of nature is a sin because it is contrary to the law of nature."[14]

Expounding upon NL, Ralph Masiello emphasizes that "The reality of the natural law is manifested in the natural tendency of man to eschew violence and pursue peace. This spontaneous quest for justice, friendship, enlightenment, everything that is necessary for the perfection of the

[11] Ibid., 249.
[12] Ibid., 249.
[13] *Summa Theologiae* I-II, 92, 2, as cited in Ralph J. "Some Brave Ideas on an Old Rule of Law: The Natural Law According to Jacques Maritain - Jacques Maritain on the Natural Law and Human Rights," *Catholic Lawyer* 25, no. 1 (Winter 1979), 4.
[14] Ibid., 6.

person, it is rooted in man's will."[15] This "natural tendency" for humanity to "eschew violence" and to "pursue peace" is viewed to be *in itself* a kind of empirical evidence of the "law" which makes these propensities consistent, evident, and consistently evident. This is precisely what Aquinas addresses by his reference to the "natural inclination" of man as predisposed toward his nature. Why? Because "a natural inclination is a tendency of man to function according to the normal capacity of a power."[16] Humans consistently behave *in a certain way*, and as they do, they demonstrate there is distinction evident between the "laws of men" and the "moral laws" which supersede them. It is precisely these "moral laws" which compel many to abide by the "laws of men" and to conform to them. As Woodcock points out, "natural law in its classical formulation is perhaps best stated in the Ciceronian maxim *lex iniustia non est lex* ('an unjust law is not law'). This is perhaps the most simplistic statement of the theory, and it is arguably overly simplistic."[17] This has led some to highlight what is called the "due care standard" with respect to commonly held convictions regarding basic human ethical behavior. In the words of Charles P. Nameth,

> An imprecise doctrine, the due care standard governs human conduct, demanding that every person act reasonably in his journey through the temporal world and entitling him similar treatment in return. It is generally agreed that individuals do not have a duty to anticipate others' negligence, and thus, absent special circumstances, persons may assume, and act accordingly, that other members of society will use ordinary care. The shadow of the natural law may be seen within these lines, for man is thought of as good and is expected to be directed to it.[18]

Nameth's commentary accentuates the basic assumption made by humans to be free to live as "they are entitled" to in their self-determinative pursuits. This "sense of entitlement" directly addresses the notion of "rights," and universal ones at that. This is pointedly significant, because "All legal standards recognize that there is a higher order, a design in which men govern and are

[15] Masiello, 1.
[16] Ibid., 6.
[17] Woodcock 249.
[18] Nemeth, 9.

governed by just measure. This concept is embodied in the natural law. The rights to life, personal freedom and property are not legislative inventions; they are merely reflections on the Supreme rule."[19] As Ralph McKinnon so eloquently puts it, it is "evidenced that laws are made, not discovered except in the natural principles in which they are ultimately grounded."[20]

Not all scholars believe the notion of "human rights" to be all that clear. As Max Hocutt retorted, "the phrase human rights is ambiguous between (1) rights that are presumed to belong to human beings naturally as against rights belonging to them as members of various societies and (2) rights that human beings are presumed to have as against rights supposedly belonging to animals, plants, or inanimate objects.[21] Masiello echoes the challenge of "human rights" rhetoric, particularly their grounding: "The crucial problem relating to human rights today, over and above an overriding sense of uncertainty as to the true foundation of human rights, is the confusion of surrogate rights entrusted to the state with the natural rights, or the relegation of natural rights to acquired rights."[22] Since political legal theory and moral philosophy are replete in virtually every culture, one must consider the alternatives to the TNL view.

Rival Theories to Traditional Natural Law (TNL)

If a person is not inclined to embrace TNL, what alternative theories may be embraced? Some scholars embrace a theory called *legal positivism*, others advocate a form of *new natural law* theory, and yet others contend for a mere "empirical natural law." The author of this essay shall address each of these in turn.

[19] Ibid., 8.
[20] McKinnon in Nemeth 8.
[21] Hocutt, footnote 3, 51.
[22] Masiello, 7.

Logical positivism is "the view that legal standards are merely social conventions and do not reflect a universal moral law."[23] In other words, every culture establishes particular behavioral norms and as such these norms become implicit regulations for how people in these cultures "should" behave. The apparent "moral laws" serve as a functional "law" as they determine the ideal behavioral standard in that particular culture. Not all laws, however, pertain to moral categories. In the words of Leslie Green,

> . . . legal positivism, denies [the claim of natural law that laws are grounded in an essentially moral enterprise] insisting that there is no necessary connection between law and morality, at least none that guarantees that every full-blooded legal system will have some positive moral worth. Law is just an institutionalized mode of rule application, rules being identified by considerations of social fact and without recourse to moral arguments.[24]

Distinction needs to be made here between the laws a government may pass, and a judge's interpretation of the law in its application, for "to a positivist, a theory of law and a theory of proper adjudication are different enterprises. Law often gives judges the power to decide whether a certain delay is 'unreasonable,' whether a wage rate is 'fair,' whether procedures accord with 'fundamental justice,' and so on."[25] If legal positivism can arrive at a cogent explanation for NL as referring to laws produced by natural, albeit rational animals, the case, it seems, can be made that these local (as opposed to universal) conventional rules are in fact a kind of NL. Such normative behavioral rules are simply naturally produced by natural entities. Still, the question of how one may distinguish between "morals" and "laws" remains. "Certain exponents of positivism have sought a complete separation of law and morals. . . [For instance,] Justice Black believed that the natural law had no place in legal reasoning and felt that the Supreme Court should abandon it

[23] Cowen and Spiegel, 457.
[24] Green, 206.
[25] Green, 208.

as an 'incongruous excrescence on our constitution."[26] Hence, it appears that legal positivism can account for some measure of standardization concerning localized communally compulsory behavioral expectations, yet it cannot, and does not, make a case for universal NL.

What does New Natural Law (NNL) theory bring to the table? The roots of NNL are rooted in TNL theory. As Maritain once claimed (representing the Thomistic tradition), "man's right to existence, to personal freedom, and to the pursuit of the perfection of moral life, belongs, strictly speaking, to natural law."[27] Aquinas maintained that there were two levels involved in the Natural Law: (1) the ontological ground for natural law, and (2) the epistemological (or "gnoseological") dimension related to *knowledge of* the natural law. It is precisely the aim of NNL theorists to contemporize Thomistic Natural Law such that the first level is deemed irrelevant, hence atheists can find common ground with NNL, since human reasoning about normative human behavior is possible.

Shalina Stilley unpacks some NNL distinctives: "New natural law theorists claim that just as principles of speculative reason are not derived from other principles but are *per se nota*, so too is the first principle of practical reason. In addition, they claim that since there are self-evident goods, it is possible to grasp the basic precepts or Oughts of natural law without deducing them from facts about human nature."[28] If indeed certain goods are "self-evident," one is still left to wonder *why* they are self-evident. Nonetheless, NNL advocates contend the starting place must be self-evident goods, from which one deliberates to more complex levels of moral reasoning. On this, George Khushf highlights that, "Generally, new natural law theorists claim that we reason from self-evident basic goods to that sense of the whole meaning of life."[29] This points to what is

[26] Nemeth, 11.
[27] Maritain, 65.
[28] Stilley, 141.
[29] Khushf, 251.

called "practical reasoning." How does this type of reasoning work? "Practical reasoning starts with the self-evident basic goods, specifies these, moves to second-order regulation of their pursuit (and this feeds back on the specification), and then at the tail end of the process comes to a sense of 'integral fulfillment,' which is itself specified and iteratively refined over the whole of life."[30] The process of NL reasoning for NNL is, then, one which builds from *practical reasoning* to *integral fulfillment*. Khushf demonstrates that at least four distinct levels are entailed in NNL:

> If we take for granted what new natural law theorists say about practical reasoning, then: at the first level, practical reasoning orients an agent toward basic goods and regulates how such goods are to be pursued; at the second level, a general theory might be worked out about what is going on at this first level; at the third level, an account might be given of the nature of the accessibility of claims associated with either of these first two levels to an agent or agents who may ask about the grounds for holding any of the claims to be true. Finally, even if we conclude that some set of claims is rationally accessible (whatever we may mean by this), we have a tricky relation between those beliefs about rational accessibility and any belief about what will, in fact, be the case . . .[31]

Khushf does well to highlight the tension NNL faces in the identification of "what is knowable" and what in fact "will be the case" in certain circumstances. When it comes to NNL, therefore, it appears clear that its starting point is the very fact of human acknowledgement of self-evident goods, continuing via practical reasoning to integral fulfillment.[32]

Finally, what can be said about a so-called "empirical natural law" view? Max Hocutt makes the case for an "empirical natural law," one that is evolutionarily tenable to think that moral

[30] Khushf, 251.
[31] Ibid., 246.
[32] Much more could be elaborated here. Note David Elliot in his contention that NNL theorists "insist that prior to any moral consideration whatsoever, practical reason must be aware of the good the pursuit of which will result in moral considerations, but whose sheer awareness itself is distinct from such considerations. This is the level at which practical reason self-evidently knows Aquinas' first principle of practical reason: 'Good is to be done and pursued, and evil avoided.' The idea is that prior to choice human beings find themselves directed towards various goods the realization of which does not merely lead to happiness or flourishing, but constitutes it. These goods are considered to be intrinsic to all human persons, and as such are spoken of by Finnis as 'underived' and 'basic'. They are 'underived' in the sense that the goodness of the goods does not need to be proven by speculative reason because anyone who reflects upon their own practice understands them to be self-evidently good without the need of argument" (Elliot, 36).

norms are the byproduct of biological programming in human DNA. Every tribal people, according to Hocutt, would have embraced communal duties which, in turn, are passed on not simply in one's oral history, but one that "suggests that an instinct for closely knit tribal communalism is probably built into the human genome and embedded in the human brain; as the saying goes, it's in our DNA."[33] To be certain, this view should be taken seriously. To this he adds, "Furthermore, this hypothesis is confirmed by the fact that human beings everywhere yearned for the security of the tribally based communal existence that their ancestors enjoyed for many millennia. This yearning helps to explain socialist distain of personal Liberty and private property, concepts once pregnant in England and its colonies, if now very much in decline there" (Hocutt 60- 61). His concluding argument is both clear and forceful:

> Rights—moral as well as legal—are constituted by social conventions. Moral rights are constituted by moral conventions, legal rights by legal conventions. Under both kinds of conventions, some people have rights because other people have duties, and others have duties because the members of their society make a practice of enforcing them. Therefore, that a right exists means that it has protection in the form of regular enforcement of the duties associated with it. This explanation holds whether the topic is official rights of law or unofficial rights of morality and etiquette. Legal rights exist under rules of law, so they enjoy the protections of government. Moral rights (and rights of etiquette) exist under informal customs and enjoy the protection of ordinary members of society. Without official protections, no legal rights exist; and without unofficial protections, no moral rights exist. It follows that all rights, legal or moral, are man-made.[34]

John Hasnas, another advocate of empirical natural rights, admits from the outset that morals and rights are products of humanity and need not be grounded in a transcendent source. "The rights I have described . . . are not inherent in human beings and do not spring from human nature or fundamental moral principles." He goes on to explain, "They are certainly not 'natural' in the sense of not having been created by 'human action.' Although not consciously created by

[33] Hocutt, 60.
[34] Ibid., 63.

any human mind, they depend on human interaction for their existence. Thus, although they are 'the result of human action, but not the execution of any human design,' they are indeed the creation of human beings.[35]

If all rights and laws are humanly produced, as Hocutt and Hasnas assert, one is left to ask, "Should this theory be called 'empirical natural laws rather than 'empirical natural *law*'? The use of the singular *law*, although helpful linguistically, may give the strong impression that NL would apply to *all* humans *everywhere*. This, however, does not logically follow from the case made by Hocutt or Hasnas. More on this to come. Attention now will turn to Maritain and his adumbrations of Thomistic NL theory.

Making Sense of "Universal" Human Rights

Thus far, the author of this paper touched on (1) the life and thought of Jacque Maritain, (2) Natural Law and Natural Rights, (3) Alternatives to TNL, and (4) Maritain's application of TNL. Focus will now be given to the shortcomings in alternative theories to TNL in satisfying the preconditions for the intelligibility of UHR. First, NNL will be addressed, then legal positivism, and finally, empirical NL.

Contra NNL. One of the salient questions this essay centers on is this: Which theory can best make the case for the universality of human rights? Deriving from TNL theory, NNL adherents make a strong case for how humans can navigate toward moral and ethical behavior by starting from self-evident goods and extrapolating from these toward a place deemed "integral fulfillment." In strong criticism against NNL, Khushf claims the following:

> On the premises of new natural law theory, the capacity for practical reasoning and the use of that capacity is logically, ontologically, and temporally prior to any awareness of the truth of the theory. Satisfying these conditions for practical reasoning is not sufficient for development of the theory. In fact, many people reason practically yet are not able to explicitly articulate the first principle, let alone

[35] Hasnas, 134.

> the full theory. Appreciation of this distinction between rational accessibility of the theory and rational accessibility of the principles posited by the theory is important for clarifying the nature of the claim new natural law theorists make about the direct rational accessibility of the principles to all rational agents. They are claiming that *all agents are aware of the principles and they deploy them when they reason practically*. However, at the second-order level, agents may not be aware that they are aware of the principles and how they are deploying them.[36]

An important take-away from Khushf's critique is simply that NNL makes a fatal assumption that agents "are aware of the principles and they deploy then when they reason practically." Khushf astutely points out that *people often fail to do so*. Additionally, NNL, as well as a version of it named NNL Action Theory, fall short of satisfying the "universality factor." In the words of Steven J. Jensen, "One of the great weaknesses of [NNL] action theory is a lack of consistency in applying a universal standard."[37] Elsewhere he writes,

> The fundamental criticism against new natural law action theory questions its account of intention. New natural law excludes from intention (so the criticism goes) that which should be included . . . on the one hand, it might claim that intention includes more than the goal and the means to achieve that goal. On the other hand, it might grant this account of intention but question the new natural law analysis of what counts as a means. I think the merits of the former criticism can often be expressed in terms of the latter.[38]

The failure of NNL to account for why certain goods are self-evident is the Achilles heel of the theory, falling short as a satisfactory model in making the case for UHR. Although it makes a case for a kind of epistemological tenability that explains human behavior—most notably "moral awareness of goods"—it does not make a satisfactory case for both the ontological grounds for why self-evident goods exist, or why such moral duties are compulsory for an individual. It simply falls short of the goal.

[36] Khushf, 253, emphasis added.
[37] Jensen, 525.
[38] Jensen, 529.

Contra Positivism. Legal positivism fares even worse in accounting for UHR. Their own proponents have acknowledged that positivism makes no claim to do so. Positivists argue laws cannot derive their grounding from a supernatural source and "that only its purpose, goal or function makes law what it is; and since it is trivially true that a thing ought to fulfill its proper function, positivists must be wrong to think that there is a difference between law as it is and law as it ought to be."[39] Despite the laws of men taking the form of an "ought," there is no universally binding factor which compels all men everywhere to submit to them. They are merely social conventions and, as such, can be revised and dismissed at the behest of the cultures who produce them.

The rejection of a universal NL leads to a fundamental undermining of UHR. Like NNL, positive law lacks a sufficient ontological ground. "To Maritain, positive law could not exist without the natural law. There is no true 'being' of positive law," says Nemeth.[40] Why is this the case? Because "even the most expert craftsman of legal verbiage must rely on more than mere words. Just as a carpenter needs to have a conceptual picture of a table in order to build one, a legal draftsman needs to have a specific foundation of justice appropriate to his or her legislative proposal."[41] To quote Mortimer J. Adler, "positive law without a foundation in natural law is purely arbitrary. It needs the natural law to make it rational."[42]

Ralph Masiello, professor of philosophy at Niagara University, finds positivism lacking because it reduces to arbitrary subjectivism, lacking universal authority. He warns that "without the natural law as the basis for civil law, a purely pragmatic interpretation of the law could become

[39] Green, 207.
[40] Nemeth, 11.
[41] Ibid., 11.
[42] Adler, *The Doctrine of Natural Law in Philosophy*, in 1 Natural Law Institute Proceedings 83 (A. Scanlin ed. 1949)" (Nemeth 11).

capriciously susceptible to the whims of public opinion, and inalienable rights can become a figment of positive law, undermining the foundations of our democratic freedoms."[43] What becomes apparent is that positive law, a codified instantiation of the general public's opinion, could never be kept in check by a supervening law, hence the public would be left with no other recourse than to attempt to sway public opinion in order to establish a new positive law.

Contra Empirical Natural Law. Max Hocutt, John Hasnas, and others make the case for NL based "solely" on empirical data. Arguing for his version of empirical natural right, Hocutt makes the following case.

> Rights—moral as well as legal—are constituted by social conventions. Moral rights are constituted by moral conventions, legal rights by legal conventions. Under both kinds of conventions, some people have rights because other people have duties, and others have duties because the members of their society make a practice of enforcing them. Therefore, that a right exists means that it has protection in the form of regular enforcement of the duties associated with it. This explanation holds whether the topic is official rights of law or unofficial rights of morality and etiquette. Illegal rights exist under rules of law, so they enjoy the protections of government. Moral rights (and rights of etiquette) exist under informal customs and enjoy the protection of ordinary members of society. Without official protections, no legal rights exist; and without unofficial protections, no moral rights exist. It follows that all rights, legal or moral, are man-made. If calling a right "natural" means only that it was made and is protected by God, no empirical meaning can be assigned to the claim.[44]

Much like legal positivism and NNL, Hocutt's case is persuasive but only to a point. It can answer how local laws arise, their role and complexion in society, and the interrelation between legal laws and moral laws, but it too fails to provide a universally binding dimension to law. Jasnas' theory fares no better, as Hocutt himself even admits: "The main problem with Hasnas' [empirical natural rights] theory is that [his] Lockean conventions appear to be highly provincial, but natural rights are supposed to be universal" (Hocutt 51). Attempts, therefore, to ground all law-making merely

[43] Masiello, 4.
[44] Hocutt, 63.

in the mechanics of human functioning will fall short of demonstrating what these very laws should be and why they should be compulsory.

Maritain's Application of Traditional Natural Law

Maritain stayed well within the bounds of TNL but helped to flesh out much of Aquinas' thought so as to be understood and applied within a twentieth-century post-WWII context. To understand a Maritainian NL theory, one must appreciate his emphasis on the nature of "true humanity." This view emphasizes a human as both an "individual" as well as a "person." Andrew Woodcock provides a useful summary:

> In order to understand [Maritain's] formulation of natural law, it is essential to appreciate Maritain's distinction between personality and individuality. The concept of individuality is derived primarily from the work of Aquinas, and is based upon the proposition that all things of matter have a purpose. The consequence of this is that everything of matter has a function, and must fit in as a portion of the total physical whole. Therefore, individuality tends to describe the position of man as a fraction of the totality of mankind. Conversely, the concept of 'personhood' is much more complex, and represents a whole in itself. The idea of personhood is something separate from the material; 'it refers to the highest and deepest dimensions of being.' The person is the vehicle for the exposition of human intelligence, which is the high point of human development, and which makes humanity separate and superior to the rest of creation. The person is therefore a whole in itself. As a whole, it is able to communicate with others, and this, then is the basis for community.[45]

Here, Woodcock explains how Maritain's starting point centers on the *nature of man*, that is, humanity's *ontology*. He adds, with "respect to the ontological element, the first assumption which may be made is twofold; firstly, man has certain ends, or a role in the world, and secondly, that as a creature with the gift of intelligence, man is capable of ascertaining those ends."[46] The relevance of this cannot be stressed enough, for everything humanity does comes out of its nature. Further, the whole notion of NL, according to Meritain, rests on the premise of man's nature. In his own

[45] Woodcock, 257.
[46] Ibid., 257.

words he states, "the natural law of all beings existing in nature is the proper way in which, by reason of their specific nature and specific ends, they achieve fullness of being in their behavior."[47]

A significant function of human nature revolves around a human's capacity to cogitate, both in what Maritain calls "inclination" (by way of Aquinas) and "conceptual reasoning." In *Natural Law*, Maritain indicates that "the formal medium by which we advance in our knowledge of the regulations of Natural Law is not the conceptual work of reason, but rather those inclinations to which the practical intellect conforms in judging what is good and what is bad . . . The notion of natural knowledge through inclination is basic to the understanding of Natural Law, for it brushes aside any intervention of human reason as a creative factor in natural law."[48] By "inclination" Maritain means something along the lines of a "predisposition," a "moral propensity," or a "practical intuition." This, he claims, is part of man's nature as according with Eternal Law, rooted in Divine Reason. He explains how morality and human reason presuppose God as their foundation:

> . . . uncreated Reason, the reason of the Principle of Nature, is the only reason at play not only in *establishing* Natural Law (by the very fact that it creates human nature), but in *making Natural Law known*, through the inclinations of this very nature to which human reason listens when it knows natural law. And it is precisely because Natural Law depends *only* on Divine Reason that it is possessed of a character naturally sacred, and binds man in conscience, and is the prime foundation of human law, which is a free and contingent determination of what Natural Law leaves undetermined, and which obliges by virtue of Natural Law.[49]

In recapitulation, therefore, Maritain's NL holds that mankind has a nature which simultaneously contains a predisposition toward moral inclinations (by virtue of his nature) as well as the ability to reason about those very inclinations *cum eo* (after the fact). The moral inclinations constitute a kind of "practical reason," such that a person has immediate access to knowledge of what is good.

[47] Maritain, 29.
[48] Ibid., 43.
[49] Ibid., 22.

Maritain states, "my contention is that the judgments in which Natural Law is made manifest to practical Reason do not proceed from any conceptual, discursive, rational exercise of reason; they proceed from that *connaturality* or *congeniality* through which what is consonant with the essential inclinations of human nature is grasped by the intellect as good; what is dissonant, as bad."[50]

Reason itself, says Maritain, is grounded in Divine Reason, and *ordered* reason, at that. This very "ordered-ness" of Eternal Law makes Natural Law intelligible, for law *as such* presupposes order. Order is discernable in all law. "That which defines law is reason, intelligence, because there is an order. It is reason that can make order, and which is itself order. Law presupposes an ordination of reason for the common good. The community, then, is the subject of the law, while the good of this community is the end or purpose of the law."[51]

How exactly do NL and NR relate one to one another? Somewhat surprisingly, Maritain seldom defined what he meant by "rights" within his writing. In an unpublished paper entitled "The Philosophical Foundations of Natural Law," he defined what he meant by a human "right" in stating the following:

> A right is a requirement that emanates from a self with regard to something which is understood as *his* due, and of which the other moral agents are obliged in conscience not to deprive him. The normality of functioning of the creature endowed with intellect and free will implies the fact that this creature has duties and obligations; it also implies the fact that this creature possesses rights, by virtue of his very nature—because he is a self with whom the other selves are confronted, and whom they are not free to deprive of what is due him. And the normality of functioning of the rational creature is an expression of the order of divine wisdom.[52]

Elsewhere Maritain connects NL with rights. "How could we understand human rights if we had not a sufficiently adequate notion of natural law?", Maritain inquires. "The same Natural Law which lays down our most fundamental duties, and by virtue of which every law is binding, is the

[50] Ibid., 20.
[51] Maritain, 44.
[52] Maritain, footnote 27, 60.

very law which assigns to us our fundamental rights."[53] On this view, rights as "universal human rights" are not only warranted, but *to be expected*. The Eternal Law which grounds NL also grounds universal human rights (UHR). For rights to be universal, they must find their source in a Grand Orderer of the nature of humankind.

> In other words, there is no right unless a certain order—which can be violated in fact—is inviolably required by what things are in their intelligible type or their essence, or by what the nature of man is, and is cut out for: in order by virtue of which certain things like life, freedom, work are due to the human person, an existent who is endowed with a spiritual soul and free will. Such an order, which is not a factual datum in things, but demands to be realized by them, and which imposes itself upon our minds to the point of binding us in conscience, existing things in a certain way, I mean as a requirement of their essence.[54]

In sum, Maritain employed Thomistic NL theory consistently in his own thinking about NL and NR. His insistence that the grounds for NL, as well as "conceptual reasoning" about it, are equally important to the whole endeavor of making the case for UHR. In the final section of this essay, the failures of NL's rival theories in providing sufficient grounds for UHR will be articulated.

Conclusion

The question of UHR is one of profound relevance today. The establishment of the DUHR in 1948 marked a strident move forward in the recognition for the need to substantiate UHR, and the role that Jacques Maritain played in bringing the DUHR into being was both crucial and laudable. The key theory in helping to bring about this Declaration was founded primarily on the principles grounded in TNL, rooted in the likes of Aristotle, Cicero and Aquinas. Maritain's thought helped to elucidate that "the law in effect is essentially an ordinance of reason (*ordinatio rationis*), so that without an ordering reason there is no law. The notion of law is essentially bound

[53] Maritain, 58.
[54] Maritain, 61.

up with that of an ordering reason. Indeed, in the case of natural law, human reason has no share in the initiative and authority establishing the law, either in making it exist or in making it known" (Maritain 43). He made the compelling case that "in reality, if God does not exist, the natural law lacks obligatory power. If the natural law does not involve the divine reason, it is not a law, and if it is not a law, it does not oblige."[55] The contention is strong—UHR requires a NL. In the words of Roscoe Pound, "Natural law has proved itself in the history of civilization . . . It gives us the distinction between law and laws."[56]

Alternative theories to TNL fail to meet the preconditions (both ontological and epistemological) necessary for a thoroughgoing justification for (1) how UHR are intelligible, and (2) how in fact UHR can meet the "universality factor." Apart from a transcendent, rational, ordered NL, the legal pronouncements of men would be reducible to fruitless legal pronouncements and in-fighting, one nation claiming their man-made laws to be superior to another nation's man-made laws. It would "appear that any state action that abridges human rights automatically violates the natural law."[57] If no NL exists to serve as a "check" for the laws of all humanity, what will compel nations to change their laws? How could any nation be guilty of violating a person's "universal human right?" Without an ontologically grounded Natural Law, none could rightly do so.

[55] Ibid., 47.
[56] Roscoe Pound, "The Revival of Natural Law," *Notre Dame Law* 17 (1942) 287, 328, cited in Nemeth 12.
[57] Nemeth, 11.

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