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The Perennial and Dynamic Relationship between Human Rights and Natural Law

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1.1 INTRODUCTION

The curious notion of human rights has been remarkably successful. The seventy-five years since the Universal Declaration[1] have witnessed an unsatiated impetus for the cultural, political, and legal respect of *our* human rights. Motivated partly by atrocities and tyrannies; partly by extension of empathy for the human stranger, as injustices elsewhere are brought home by new technologies; partly by avid desires to eradicate the next perceived injustice. From their expression in the Universal Declaration, inspired by constitutional bills of rights in various traditions,[2] human rights have since been legally codified and applied through a range of international and regional treaty regimes,[3] and embedded in constitutional settlements and reforms around the world.[4] Human rights have become the lingua franca to express moral demands in the modern globalised world, especially against state authorities and laws, and across contemporary human cultures and societies.

Despite that practical success, appeals to the human rights concept – that there are moral rights possessed by all human beings simply in virtue of their humanity, and irrespective of whether those rights are enacted in positive law – raise significant justificatory issues that plague their application.[5] From a critical natural law outlook, human rights language is perceived not only as displacing a more fruitful focus on the demands of justice within a community, but also as being founded on an egoistic individualism that enables their unprincipled proliferation to

[1] Universal Declaration of Human Rights (UDHR), 10 December 1948, UNGA Res. 217(III)A.

[2] See Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York, NY: Random House, 2001), ch. 4; Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia, PA: University of Pennsylvania Press, 1999), esp. ch. 1; Paolo Carozza, 'From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights' (2003) 25 *Human Rights Quarterly* 281.

[3] See in particular International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171; International Covenant on Economic, Social, and Cultural Rights (ICESCR), 16 December 1966, 993 UNTS 3; Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221; American Convention on Human Rights, 22 November 1969, 1144 UNTS 123; African Charter on Human and Peoples' Rights, 27 June 1981, 1520 UNTS 217.

[4] See, e.g., Constitution of Bosnia and Herzegovina 2001 (as amended), Arts. II, VI(3)(c); Constitution of South Sudan 2011 (as amended), Part Two. See also the following guidance on a 'human rights approach' to constitutional reform: Office of the United Nations High Commissioner for Human Rights (OHCHR), *Human Rights and Constitution-Making* (New York, NY: United Nations, 2018).

[5] See, e.g,. Jonathan Sumption, *Trials of the State: Law and the Decline of Politics* (London: Profile Books, 2019), ch. III.

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cover any individual interest, need or desire, emotively *felt* to be serious enough.[6] Against this individualistic concept, the sceptic can rightly retort: the fact that some individual has an important interest, need, or desire is not an adequate justification to require other agents, or even national governments, to fulfil or protect that interest, need, or desire. Moreover, if the justification for the range and content of human rights boils down to either consensus or authoritative determination, there is little to recommend their rhetorical moral force in comparison with customary or positive rights, and little to protect against the tyranny of majorities or elites, within human rights practice itself, on the most divisive ethical topics of the day. Despite their success, then, human rights are confronted with a crisis of legitimacy.

The nub of that crisis is expressed in the following question. How can a person, A, have a moral right to demand performance of an action (or non-action), X, by another agent, *B*, if there is no prior moral duty on *B* to perform X based on requirements of just human relations within a community? That question challenges any justification of moral human rights to adequately explain how they are moral *claim rights*; but also points to an avenue of reprieve. Are there moral rules, with grounds independent of positive laws, which articulate general demands of justice between human persons that specify not only the presumed entitlements of a rights-bearer but also the relevant duty-bearer(s) and the form of action (or non-action) required? Is there an order of justice that normatively conditions human will and positive law – a natural law?

In his contribution to the 1948 UNESCO report on theoretical foundations for an international human rights declaration, Jacques Maritain wrote:

> The concept of natural law has been so much abused, so much pulled about, distorted, or hypertrophied that it is hardly surprising if, in our age, many minds declare themselves weary of the whole idea. Yet they must admit that since Hippias and Aloidamas, the history of Human Rights and the history of natural law are one, and that the discredit into which positivism for a period brought the concept of natural law inevitably involved similar discredit for the concept of Human Rights.[7]

Maritain was not naïve regarding the political character of negotiations on the Universal Declaration nor on the diversity of views on philosophical foundations for human rights. On the latter, he underscores the relevance of ongoing debate, especially between the rival worldviews of socialists, liberal individualists, and personalists (identified with natural law theory).[8] Maritain was making a different point: the history of human rights is inextricably linked to natural law in the sense that this *law* continues to be manifested through human conscience *in practice*. The doctrine of the classical natural law tradition – which developed as a synthesis of Aristotelian, Platonic, Stoic, Roman Jurist, and Christian thought[9] – may have fallen into disrepute. Yet the natural law phenomenon continues to manifest itself in practice, and did so strikingly through the political consensus formed in the wake of World War II, around an

[6] See further Pierre Manent, *Natural Law and Human Rights: Toward a Recovery of Practical Reason*, trans. Ralph Hancock (Notre Dame, IN: University of Notre Dame Press, 2020), 5–14; Alasdair MacIntyre, *After Virtue*, 3rd ed. (Notre Dame, IN: University of Notre Dame Press, 2007), 66–71.

[7] Jacques Maritain, 'Philosophical Examination of Human Rights', in UNESCO, *Human Rights: Comments and Interpretations*, UNESCO/PRS/3 (rev.), Paris, 25 July 1948, 61.

[8] Jacques Maritain, *Man and the State* (Washington, DC: Catholic University of America Press, 1998), 106–7; Jacques Maritain, 'Introduction', in UNESCO, *Human Rights: Comments and Interpretations*, VIII.

[9] On continuity/diversity of natural law theory see: Frederick Pollock, 'The History of the Law of Nature: A Preliminary Study' (1900) 2(3) *Journal of the Society of Comparative Legislation* 418; Heinrich Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy*, trans. Thomas Hanley (Indianapolis, IN: Liberty Fund, 1998), pt. I; A. P. Entreves, *Natural Law: An Historical Survey* (New York, NY: Harper & Row, 1965).

enumerated list of human rights for the post-war era – 'a sort of common denominator, a sort of unwritten common law, at the point where in practice the most widely separated theoretical ideologies and moral traditions converge'.[10]

Much the same can be said about the distortion and disrepute of natural law doctrine today, and its unpopularity as an explanation of human rights. A recent edited collection, *The Philosophical Foundations of Human Rights*, provides a convenient litmus test.[11] Despite covering an extensive range of perspectives on foundations of human rights, one key tradition is glaringly under-represented. The role of classical natural law doctrine in the development of the human rights concept is, when mentioned at all, largely relegated by its contributors to a passing stage in a contested intellectual history, while reference to contemporary adherents of that natural law tradition are relegated to footnotes. Impressionable readers could be forgiven for thinking that natural law doctrine is dead, and that human rights foundations need have no recourse at all to the dubious notion of a 'higher' moral law weighing on the discernments of human conscience.

Far from being dead, there is a perennial resurgance in natural law theory. Sustained attention has been given to the relationship between natural law and human rights, most recently in the work of contemporaries such as John Finnis,[12] David Novak,[13] Jean Porter,[14] David Oderberg,[15] Edward Feser,[16] John Witte, Jr,[17] Jonathan Crowe,[18] Nigel Biggar,[19] Pierre Manent,[20] John Milbank,[21] and Alasdair MacIntyre,[22] to name a few. Some develop natural law foundations for human rights by way of rapprochement with a liberal tradition of rights; others stand in a long line of sceptics concerning the consistency between natural law and natural/human rights. This handbook brings together a broad sample of that scholarship to address the significance of natural law for philosophical foundations and contemporary debates in human rights theory. In addition to the diverse selection of contributors, the handbook aims for a broad thematic coverage by focusing on key questions, topics, and perspectives concerning the interconnection between natural law and human rights. This introduction outlines those key

[10] Maritain, 'Introduction', II. See further Chapter 7 by Paul Yowell.

[11] Rowan Cruft et al. (eds.), *Philosophical Foundations of Human Rights* (Oxford: Oxford University Press, 2015).

[12] John Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford: Oxford University Press, 2011), esp. ch. VIII; John Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford: Oxford University Press, 1998), esp. ch. V.

[13] David Novak, *Natural Law in Judaism* (Cambridge: Cambridge University Press, 1998), chs. 1, 6–7; David Novak, 'God and Human Rights in a Secular Society: A Biblical-Talmudic Perspective', in Elizabeth Bucar and Barbra Barnett (eds.), *Does Human Rights Need God?* (Grand Rapids, MI: Wm. B. Eerdmans, 2005).

[14] Jean Porter, 'From Natural Law to Human Rights: Or, Why Rights Talk Matters' (1999) 14(1) *Journal of Law and Religion* 77; Jean Porter, *Nature as Reason: A Thomistic Theory of the Natural Law* (Grand Rapids, MI: Wm. B. Eerdmans, 2005), ch. 5.

[15] David Oderberg, 'Natural Law and Rights Theory', in Gerald Gaius and Fred D'Agostino (eds.), *The Routledge Companion to Social and Political Philosophy* (New York, NY: Routledge, 2013); David Oderberg, *Moral Theory: A Non-consequentialist Approach* (Oxford: Blackwell, 2000), 53–85.

[16] Edward Feser, 'The Metaphysical Foundations of Human Rights', in Thomas Cushman (ed.), *Handbook of Human Rights* (London: Routledge, 2011), 23.

[17] John Witte, Jr, *The Blessings of Liberty: Human Rights and Religious Freedom in the Western Religious Tradition* (Cambridge: Cambridge University Press, 2021); *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007).

[18] Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge: Cambridge University Press, 2019), ch. 5.

[19] Nigel Biggar, *What's Wrong with Rights?* (Oxford: Oxford University Press, 2020).

[20] Manent, *Natural Law and Human Rights*.

[21] John Milbank, 'Against Human Rights: Liberty in the Western Tradition' (2012) 1(1) *Oxford Journal of Law and Religion* 203.

[22] MacIntyre, *After Virtue*, 67–71; Alasdair MacIntyre, 'Are There Any Natural Rights?' (1983) Charles F. Adams Lecture, Bowdoin College; Alasdair MacIntyre, 'Community, Law and the Idiom and Rhetoric of Rights' (1991) 26 *Listening: Journal of Religion and Culture* 96.

questions and themes; but, first, we consider what natural law theory can contribute given the malaise to be found in contemporary human rights theory.

1.2 THE MALAISE IN HUMAN RIGHTS THEORY

There is a malaise in human rights theory. A malaise brought about, in our opinion, by a cultural drift away from natural law moorings. Nowadays, this drift is manifested, not through contestation of natural law doctrine, but its consignment to a seeming practical irrelevance. If we can accept philosophical foundations at all, human rights must be grounded on more minimal foundations, with healthier prospects for securing consensus amongst liberal-minded peoples. Effectively, moral truths have become measured by human will, whether expressed through authoritative determinations or consensus. This drift away from nature and traditions, as external measures of human action, has created blind spots in human rights theory, as various standpoints seek to address the overriding moral claims of human rights, without an appeal to the binding character of a natural moral law. The relevance of this handbook is revealed by those blind spots.

Consider the dominant characterisation of rival positions currently shaping the terrain of contemporary Anglophone theory, between 'naturalistic' and 'political' conceptions of human rights. Advocates of 'naturalistic' or 'humanist' conceptions, such as John Tasioulas, James Griffin, and A. John Simmons,[23] maintain that human rights are: moral rights possessed by all human beings simply in virtue of their humanity; identifiable through ordinary moral reasoning; and critical moral standards by which to evaluate political institutions and positive law. According to Tasioulas, this position secures an 'orthodox' consensus on human rights foundations with a long intellectual heritage,[24] encompassing the natural rights tradition, especially thinkers like Thomas Paine, Samuel Pufendorf, John Locke, and Hugo Grotius, and beyond, with roots in scholastic and even ancient philosophical traditions. Within this orthodox consensus, however, there is significant divergence on the specific aspects of our humanity that justify such moral rights, ranging across human needs, well-being, capabilities, personal agency, equal freedom, and the inviolability of human dignity.

In contrast to naturalistic conceptions, 'political' or 'practical' conceptions eschew any necessary connection between emergent human rights practice and specific moral foundations. In particular, John Rawls, Charles Beitz, and Allen Buchanan point to the importance of understanding the role or function of human rights within international political and legal practice.[25] These theorists underpin the continued legitimacy of human rights with an account of the moral/political principles instantiated through the institutional practice of human rights, or by the good of that practice as a whole.

Both positions capture important features of human rights claims, but find it difficult to account for others. On the one hand, human rights give evaluative priority to certain political ends based on an appeal to some *universal* moral importance of human dignity, human agency, and various aspects of human well-being. On the other hand, human rights presuppose an

[23] See, e.g., John Tasioulas, 'On the Foundations of Human Rights', in Cruft et al., *Foundations of Human Rights*, 45; James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008); A. John Simmons, 'Human Rights, Natural Rights, and Human Dignity', in Cruft et al., *Foundations of Human Rights*, 138.

[24] John Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65 *Current Legal Problems* 1; John Tasioulas, 'Are Human Rights Essentially Triggers for International Intervention?' (2009) 4(6) *Philosophical Compass* 938.

[25] John Rawls, *The Laws of Peoples* (Cambridge, MA: Harvard University Press, 1999); Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009); Allen Buchanan, *The Heart of Human Rights* (Oxford: Oxford University Press, 2013).

evaluative social framework that can explain why the prioritised interests, freedoms, capabilities, and the like, are a matter for *common* concern and action, for *these* agents, in *this* society, and why their application is significantly conditioned by socio-political contexts and contingencies. As Raz argues, it is rather odd to think of Stone Age cave dwellers as having a right to education;[26] or, to take another example, a right to 'reasonable limitation of working hours and periodic holidays with pay'.[27] There is a critical tension here between the asserted *universality* of human rights (as inalienable rights *possessed* by *all* human beings, at *all* times) and their determination by reference to concrete relations within particular socio-political contexts.[28] This tension is exacerbated by the dominant expression of human rights from the standpoint of the interests or freedoms to be protected or realised for human beneficiaries (as a 'right to X'); a manifesto form abstracted from the specification of concrete duties and required conduct.[29]

When unduly captivated by this manifesto form, naturalistic conceptions face what Raz calls the 'individualist fallacy'.[30] That fallacy arises where the potential value of the right to the claimant is presumed to ground an adequate reason to impose duties, without due consideration of the constitutive social commitments necessary to make that value a matter for common concern and action. The potential value of the alleged right for the claimant is inflated into a first principle for moral reasoning – some form of *ur-right* – and, as such, the inalienable possession of that right becomes a presumption from which duties can be allocated to others. Broader considerations of justice are thereby displaced from the justificatory grounds for the right, and consigned to a conceptual realm of exceptions and rights conflicts. As Dworkin describes it, there is 'an antagonism between appeals to rights and appeals to the general welfare'[31] – but only because the good of a political community is understood in utilitarian terms. Rights, then, become individuated spheres of presumed entitlement, separated from other claims; and, through that 'individuation', they lose their grounding in a common good that might justify counterpart duties.[32]

The individualist fallacy is rampant in human rights reasoning, and not just in the messiness of human rights advocacy and judicial pronouncements, but within the conceptual clarifications of theorists.[33] That influence continues to motivate a robust tradition of rights

[26] Joseph Raz, 'Human Rights in the Emerging World Order', in Cruft et al., *Foundations of Human Rights*, 217, at 224–6.

[27] UDHR, Art 24. See further Joel Feinberg, *Problems at the Roots of Law* (Oxford: Oxford University Press, 2003), 43–4.

[28] Addressing this tension from a natural law outlook, see Chapter 7 by Paul Yowell; Chapter 10 by Christopher Tollefsen; Chapter 22 by Grégoire Webber; Chapter 23 by Stephen Hall; and Chapter 25 by Francisco J. Urbina.

[29] On this manifesto form, see Joel Feinberg, 'The Nature and Value of Rights' (1970) 4 *Journal of Value Enquiry* 243, at 253–7; Finnis, *Natural Law and Natural Rights*, 210–8.

[30] Joseph Raz, 'Rights and Politics' (1995) 71 *Indiana Law Journal* 27; Raz, 'Human Rights in the Emerging World Order', 220–2, 227.

[31] Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978), 367.

[32] On the justificatory role of the common good for human rights, see Chapter 10 by Tollefsen; Chapter 15 by Roland Minnerath; Chapter 19 by John von Heyking; Chapter 20 by Mark D. Retter; Chapter 23 by Stephen Hall; and Chapter 32 by Jonathan Crowe.

[33] See e.g. Philip Alston, 'International Law and the Human Right to Food', in P. Alston and K. Tomasevski (eds.), *The Right to Food* (The Hague: Nijhoff, 1984); James Nickel, 'How Human Rights Generate Duties to Protect and Provide' (1993) 15 *Human Rights Quarterly* 77; Elizabeth Ashford, 'The Duties Imposed by the Human Right to Basic Necessities', in Thomas Pogge (ed.), *Freedom from Poverty as a Human Right* (Oxford: Oxford University Press, 2007), 183; Griffin, *On Human Rights*, ch. 5; Samantha Besson, 'Human Rights: Ethical, Political . . . or Legal? First Steps in a Legal Theory of Human Rights', in Donald Earl Childress, III (ed.), *The Role of Ethics in International Law* (Cambridge: Cambridge University Press, 2011), 211.

scepticism.[34] At the very least, the consequent ubiquity of human rights, developed through emboldened judicial and administrative determinations, undermines their overriding moral force and the legitimacy of institutions making those determinations. And it expands the need to resolve conflicts between rights, and between rights and other interests, through doctrines of proportionality, highly prone to consequentialist balancing with abstracted 'values' language, and result-selective reasoning.[35]

Can naturalistic conceptions overcome the individualist fallacy without resorting to deeper commitments concerning human nature, sociability, and natural justice? Most recently, Tasioulas has been particularly attuned to this problem. He recognizes the distortions that have developed in international human rights law from taking manifesto rights as conclusive considerations to impose duties.[36] But he thinks that, in theory, the problems can be overcome with more moderate foundations; and, in practice, the distortions can be addressed by recovering the 'formative aims' of post-war human rights instruments.

According to Tasioulas, the grounds for human rights need to explain why we can cross the 'threshold' from a 'mere shopping list of valuable "goals"', to claiming fully-fledged *rights* with correlative duties.[37] Part of the problem is the way in which the *universality* of human rights has been conceived. He clarifies and confines the form of universality by reference to the invariance in human interests to be protected, realised, and promoted, and within reasonable temporal limits of human development. The moral grounds for human rights are secured, according to Tasioulas, by considering the basic human interests of sufficient importance for (modern) human beings, simply in virtue of their humanity, which justify the *generation* of duties on others in specific circumstances.[38] What makes these basic interests moral considerations for other agents is the human dignity of the claimant. Given that dignity, these universal interests can be seen, in specific circumstances, as *generating* specific moral duties on others to respect, protect, and promote those interests.

However, despite clarifying the conceptual connection to correlative duties, the use of *generating* easily slips into technocratic language, like *determining* or *allocating*. That language loses a grip on the primary role for moral discernment of the duties in question, even when there may be a contributive role for determination of these duties by customary or positive law (e.g., in defining modalities of property rights, or fair criminal proceedings).[39] The core problem is that Tasioulas does not adequately address the social, political, and legal foundations that explain why a particular individual interest can generate moral obligations on others. True, some notion of 'human dignity' may be a necessary foundation for the equal moral respect due to human beings, as potential subjects of moral rights.[40] In this sense, we might consider human dignity as a necessary 'status concept', expressing that moral concern be afforded any human being by virtue of his or her humanity.[41] However, we still need to understand the normative importance of that

[34] See, e.g., MacIntyre, *After Virtue*, 67–71; Biggar, *What's Wrong with Rights?*; Onora O'Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reason* (Cambridge: Cambridge University Press, 2012), ch. 5. See also Chapter 5 by Tracey Rowland.

[35] See Chapter 25 by Urbina, Chapter 26 by Iain T. Benson, and Chapter 27 by Peter D. Lauwers.

[36] See, e.g., John Tasioulas, 'Saving Human Rights from Human Rights Law' (2019) 52 *Vanderbilt Journal of Transnational Law* 1167.

[37] Tasioulas, 'On the Foundations of Human Rights', 57.

[38] See Tasioulas, 'Towards a Philosophy of Human Rights'; Tasioulas, 'On the Foundations of Human Rights'.

[39] On the role of positive law in specifying human rights, see Chapter 7 by Yowell; Chapter 10 by Tollefsen; Chapter 21 by Julian Rivers; Chapter 22 by Webber; Chapter 23 by Hall; and Chapter 25 by Urbina. See further Maritain, *Man and the State*, 97–100.

[40] See especially Chapter 11 by Josef Seifert and Chapter 18 by Patrick Lee and Robert P. George.

[41] See, e.g., Jeremy Waldron, *Dignity, Rank and Rights* (Oxford: Oxford University Press, 2012).

dignity, and relevant concerns of other human persons, in order to provide sufficient justification for any required conduct to protect, realise, or promote the *aspects of human well-being* expressed through human rights. Equivocating on what is meant by an 'interest' being 'sufficiently important' or 'special' leaves the foundations open to the individualist fallacy, and to the discretionary manipulation of abstract rights for ideological purposes. So, the challenge remains for naturalistic theories: to explain how the 'threshold' is crossed from individual interests, needs, capabilities, and the like, to moral duties on others, and particularly the common action of political institutions.

Difficulties explaining the categorical moral obligations of human rights, while sustaining their conditioning through institutionalised socio-political contexts and traditions, have prompted some theorists to develop political or legal conceptions of human rights, especially in the wake of John Rawls's political constructivism. In this way of thinking, it may make sense to deflate the moral rhetoric surrounding human rights, and to think of correlative obligations as the product of the moral authority of political or legal institutions, perhaps sustained by: broader political commitments to the principle of free and equal peoples;[42] or the value of their general role in protecting sufficiently important individual interests within a domestic setting as objects of international concern;[43] or a plurality of supporting moral and political arguments for an international legal system of human rights.[44] In other words, human rights, on this type of view, are intrinsically connected to a justification for political or legal institutions, and need not have (or can prescind from) any foundations in corresponding moral rights 'outside' that institutional context. At the same time, the generality of the moral principles supporting emergent human rights practice enables a pragmatic flexibility in legal and political determinations. The general justification for human rights institutions becomes a basis for authority to specify and impose duties. This process need not be one of discernment of prior moral rights and principles, and can involve more various normative justifications for the exercise of institutional authority.[45]

In response, other scholars are quick to point out that this turn to political or legal frameworks and functions undermines the capacity for human rights to be sufficiently evaluative of political and legal institutions. For instance, Onora O'Neill underscores the fact that human rights claims are used as critical standards 'when institutional structures fail to protect or secure those claims', so that, when 'citizens of rogue states are tortured or imprisoned without trials or deprived of their livelihoods, nobody says in justification that those states have not signed up to human rights, or ... that they have signed up but taken no effective steps to secure or implement the standards'.[46] S. Matthew Liao claims that there is a need for more substantive moral resources to account for the content of human rights, as opposed to justifying whatever content is attributed to those rights within political or legal systems.[47] Massimo Renzo doubts the ability of political conceptions to explain adequately why human rights should play a justificatory role in respect of political authority, independent of our institutional membership.[48] David Luban thinks political conceptions lack resources to explain the impassioned motivations of human rights advocacy, especially given the lack of effective institutional capacities for enforcement.[49] Moreover, he

[42] Rawls, *Laws of Peoples*.
[43] Beitz, *Idea of Human Rights*, esp. chs. 5–6.
[44] Buchanan, *Heart of Human Rights*, esp. ch. 4.
[45] Ibid., ch. 5.
[46] Onora O'Neill, 'Response to John Tasioulas', in Cruft et al., *Foundations of Human Rights*, 71, at 71.
[47] S. Matthew Liao, 'Human Rights as Fundamental Conditions for a Good Life', in Cruft et al., *Foundations of Human Rights*, 79, at 98–100.
[48] Massimo Renzo, '*Human Needs, Human Rights*', in Cruft et al., *Foundations of Human Rights*, 570, at 571–2
[49] David Luban, 'Human Rights Pragmatism and Human Dignity', in Cruft et al., *Foundations of Human Rights*, 263, at 266–78.

argues that the central role of human dignity within human rights practice requires at least two foundational commitments: 'first, that every human being should count as an object of concern, and second, that no one should have to beg for their rights'.[50]

But the criticisms are more penetrating when levelled at the role of human rights institutions in expanding state authority and diminishing respect for associational pluralism. Manent argues that the primacy attributed by the human rights concept to the political or legal domains in specifying human rights relinquishes the importance of *nature* as conditioning such rights, in favour of some abstract and reductive notion of equal human individuation – a nature without qualities, or a pure equality, which supports an appeal to universality through its vacuity, while being completely malleable. In consequence, the practical determination of rights becomes a function of the acceptance of some entity's will that specifies this pure equality for given circumstances. And thus the idea of a freedom created under law, which sets moral limits, is entirely undermined; the law itself becomes malleable by the will of state institutions or mass cultural movements.[51] From this perspective, political and legal conceptions of human rights are the end product of an intellectual and cultural retreat from nature and natural law, a retreat traced by many natural law sceptics concerning human rights.[52]

But that historical narrative may seem too stark and not sufficiently immersed in the practical domain of concrete human rights claims. There is room to ponder, with Maritain, whether 'the history of human rights and the history of natural law are one'; whether there remains a core of good moral sense immanent within human rights advocacy. Human rights are not bereft of moral sources, through the discernments of human conscience. Where does that leave us on justificatory foundations? Can an adequate theory sustain human rights as a worthwhile ethical idiom?

Our view is that it can; but theory needs to venture more deeply into an understanding of the good of human persons within interpersonal relations and communities in order to justify corresponding rights and duties by reference to the demands of natural justice. Few contemporary theorists venture this far. Whether from concern for the practical relevance of human rights theory, there is an unhealthy fixation on minimal justificatory foundations, and on securing 'reasonable consensus' within conditions of moral pluralism, which often incorporate communities with starkly variant interpretations of rights and human nature. This significantly underrates the foundations necessary to make human rights claims intelligible. The hope animating this handbook is to rejuvenate reflection on the moral respect to be afforded human beings according to standards of justice, which are constitutive of cooperative relations between human persons in community – the natural law, as opposed to 'pre-social' natural rights. Whether or not the reader is persuaded to join this task of discernment, natural law scholarship has an important contribution to make, clarifying and navigating the malaise in human rights theory and discourse.

1.3 THEMATIC STRUCTURE

1.3.1 *Natural Law and the Development of Human Rights*

Questions about the intellectual origins of natural or human rights, and the relationship to the natural law tradition, are of interest for a number of reasons. First, historical enquiry provides a genealogical account of the use of rights language as instantiated in exemplary sources across

[50] Ibid., 277.
[51] Manent, *Natural Law and Human Rights*.
[52] See Chapter 5 by Rowland.

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time, and a better grasp of what is meant by an appeal to human rights and their legal instruments today. Second, it contributes to explaining the various intellectual, cultural, and material influences on the contemporary practice of claiming human rights. Third, if the enquiry reveals an exceptional character to the development of the natural/human rights concept in human history, it provides insight into the material and cultural preconditions for its intelligible use. Fourth, any positive conclusions on the development of natural rights language out of a natural law tradition may demonstrate the consistency between natural law and appeals to natural/human rights, and offer valuable insight into the grounds for justifying such rights. Fifth, and finally, the development of natural/human rights language may form part of a broader philosophical narrative about the response of human agents, and societies, to the practical phenomenon of natural law, experienced through conscience and practical life in associations. All these points of interest relate to a history of natural law and rights, but they combine historical and philosophical analysis in different ways.

In his concise introduction to natural law, A. P. d'Entrèves identifies two broad approaches to understanding its history, which are relevant to explaining its contribution to the history of human rights.[53] One can think of this history through a procession of thinkers or sources that deploy similar concepts and terms – *lex naturalis*, *ius naturale*, *iura naturalia*.[54] But crucial to any claim of linguistic continuity between thinkers, as part of an intellectual tradition, are judgements about continuity in the meaning of their terms. These judgements raise philosophical questions not just about what specific thinkers meant by using such terms, but also about the realities they were trying to articulate. Engaging meaningfully in this type of intellectual history, then, requires participation in the philosophical enterprise of understanding natural law and its contribution to the genesis of natural/human rights, through these historical thinkers and sources. The alternative approach sees the natural law as a real moral phenomenon articulated, with varying degrees of adequacy, through many different theories and traditions.[55] This presupposes the truth of natural law, not just as a theory, but as a reality that conditions human agency and may have contributed to the expression of natural/human rights. Crucially, when considering natural law, either approach entails aspects of the other. To understand the particular thinker, one needs to enter into their truth claims; and yet, entering into those truth claims is, potentially, to see history in a totally different philosophical light. To understand the phenomenon, one needs to engage with explanations of that phenomenon, which will require engagement with intellectual history. Each chapter in Part I: 'Natural Law and the Origins of Human Rights' strikes a different balance between tracing an intellectual history and philosophically interpreting that history. And they each see the relevance of their enquiry for the philosophy of human rights in different ways.

The first four chapters consider the question of historical continuity between natural law and natural rights within various Western intellectual traditions. In Chapter 2, Cary J. Nederman and Ben Peterson examine 'how the tradition of natural law … came to be associated with universal subjective rights'.[56] Since the earlier Stoic and Roman formulations were entirely focused on objective moral duties, they did not provide conceptual space to infer natural rights in a subjective sense, as a 'set of powers, freedoms, and/or competencies to the extent that they enjoy complete and exclusive dominion over their mental and bodily faculties'.[57] However, Nederman and Peterson seek to demonstrate how this conceptual space was developed through

[53] A. P. d'Entrèves, *Natural Law*, 2nd ed. (London: Hutchinson, 1970).
[54] As an example, d'Entrèves cites: Pollock, 'The History of the Law of Nature'.
[55] See, e.g., Simon, *Tradition of Natural Law*, chs. 1–2.
[56] Chapter 2, Section 2.8.
[57] Ibid., Section 2.1.

the thought of mediaeval canonists and subsequent thinkers in the tradition. As they point out in relation to Thomas Aquinas, whether or not there is conceptual space depends on the understanding of 'natural rights' one seeks to locate or infer. Some Thomistic scholars have derived a different sense of 'subjective natural right' from the natural law ethics of Thomas Aquinas, by understanding subjective rights as the logical corrollary of natural law duties;[58] while other Thomists reject this view, because 'treating rights as merely correlates of duties would imply that discussion of rights adds nothing to discussion of moral or legal duties'.[59] In general, Nederman and Peterson argue that, in answering questions of origins, we should avoid a monolithic concept of 'natural law', and instead pay close attention to the *continuities* and *discontinuities* between various natural law theories, and the 'subjective rights' they support.

Monica García-Salmones moves the narrative forward in Chapter 3 to the development of natural rights in the early modern period, as a precursor to modern human rights. Agreeing with Nederman and Peterson that the notion of 'natural rights' has roots in the scholastic natural law tradition, García-Salmones argues that the concept that crystallises in early modernity was shaped by a new theological and metaphysical outlook, characterised not just by nominalism and voluntarism, but also by philosophical scepticism. In her historical narrative, natural rights became associated with 'a form of public reason that substitutes for individuals' right reason'; this took shape within a refashioned conception of natural law, which considered 'human beings to be endowed by nature with rights, faculties and powers to use the material world in the best possible way'.[60] The connection between natural rights and public reason, in response to philosophical scepticism, becomes an important factor in explaining the character of human rights discourse today, and the crucial role of public authority in their determination.

Kevin Flannery, SJ, takes a closer look at Thomas Aquinas in Chapter 4, as an exemplary thinker in the natural law tradition. A fresh perspective on whether there is a subjective (personalistic) sense of rights in Aquinas's thought is developed in light of the concepts *synderesis* and *conscientia*, as these were inherited from past thinkers. Flannery argues that any notion of natural right in Aquinas is primarily objective, but there is a sense in which it is subjective: 'Although the object of justice is outside of the person, the virtue (or virtues) of which it is the object is within, as is the habit (*synderesis*) that is by nature capable of identifying that object.'[61] Moreover, there is also 'a subjective side of the right *as* objective' – it is 'not incorrect' to say that a person has a 'right to X' if that person is entitled to X by virtue of objective justice. This argument affirms that Thomistic natural law ethics, even though grounded in an objective account of justice, is open to inferring subjective rights from the demands of justice. In arguing this, Flannery recognizes the conceptual space for Finnis's position that 'Aquinas' discussions of wrongs [*iniuriae*] are implicitly discussions of rights',[62] where such rights describe a subject's moral expectation that he or she should be the beneficiary of another person's duty to do X, where X is an action or non-action required in the circumstances by justice.

It is important to distinguish this conception of subjective right – which Finnis identifies with the 'interest theory of rights'[63] – from the contrasting understanding of subjective right as a moral

[58] See, e.g., Finnis, *Aquinas*, ch. 5; Chapter 9 by Edward Feser; Chapter 10 by Tollefsen.
[59] Chapter 2, note 23. See also Porter, 'From Natural Law to Human Rights'; Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), 6.
[60] Chapter 3, Section 3.1.
[61] Chapter 4, Section 4.7.
[62] Finnis, *Aquinas*, 137.
[63] Finnis, *Natural Law and Natural Rights*, 203–5. According to the interest theory, rights describe the interest of or benefit to a beneficiary from the performance of another person's duty.

power, which was the focus of Chapters 2 and 3 – associated in contemporary theory with the 'will theory of rights'.[64] The distinction is crucial to understanding debates between natural law scholars on the compatibility between natural law and natural right. As Tracey Rowland explains in Chapter 5, the critical natural law perspectives on natural/human rights focus their attention on the voluntarist individualism immanent in the idea of 'subjective right' as a moral power, particularly as that concept was developed in the thought of Thomas Hobbes. Rowland vindicates the critical position by arguing that abstract natural rights are difficult to translate into the personalist and communitarian framework of natural law, with its theological commitments; and that there are better alternatives to natural rights embodied within the common law tradition. From this perspective, the debate about the sense of subjective/natural right being used is not simply a matter of analytic definition; these criticisms target an individualistic sense of subjective right that is claimed to be dominant in the natural rights tradition, and persists in human rights culture today.[65]

Implicit in the above chapters is an identification between human and natural rights, and the interrogation of a link between natural rights and natural law. The case for associating human and natural rights is that, as a matter of history, human rights instruments were developed from earlier rights declarations, which gave legal recognition to natural rights; and, as a matter of philosophical understanding, natural and human rights would seem to rest on something like the 'orthodox consensus' mentioned in Section 1.2 above, as rights possessed by all human beings in virtue of their humanity. However, the connection between human and natural rights can be challenged by focusing on more proximate material and political factors surrounding the origins of international human rights instruments. In particular, it is widely accepted that there were various intellectual influences on the agreed text of the UDHR, that the aftermath of the Second World War loomed large in the framing of its provisions, and that the final text was a product of legal drafting expertise and intense diplomatic negotiations. Moreover, it is from this political declaration that international human rights law would take shape, through the crafting of binding treaties, including the two international covenants on human rights. By focusing on these proximate causative influences, and prescinding from 'grand genealogical narratives', one can question the conceptual link between human rights and natural rights, and that between human rights and natural law.[66]

In Chapter 6, James Chappel adopts this stance to argue that the UDHR should not be seen as part of the natural law tradition in any substantive sense. He seeks to show that thinkers and politicians who identified with the natural law tradition did not play a significant role in the drafting of the UDHR. Instead, between the 1890s and the 1950s, the natural law tradition was characterised by general scepticism or antagonism towards human rights. And the 'non-conventional' natural law thinkers who were involved in some capacity, such as Jacques Maritain and Charles Malik, were not as influential on the text as subsequent conservative scholarship might claim.[67] Chappel concludes:

[64] Ibid. According to will theory, rights are not simply correlative to duties; rights entail a power to control another person's duty, which can be enforced or waived by the right-holder.

[65] Cf. Biggar, *What's Wrong with Rights?* ch. 6. Biggar argues that 'there is no such thing as *the* "modern" concept or theory of subjective rights' (at 162). Instead, there are various non-Hobbesian intellectual sources (some committed to a natural law framework); and 'an unstable plurality of vying alternatives' in contemporary discourse (at 164). This pluralism in viewpoints creates 'cultural space' for better justifications.

[66] See e.g., Beitz, *Idea of Human Rights*, 14–27.

[67] See, in particular, Glendon, *A World Made New*.

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> The UDHR was not in any obvious or important way a result of the natural law tradition. It is doubtless the case that some natural lawyers appreciated the text; it might even be true that in the deep history of ideas, all notions of rights-bearing individuals have a root in natural law. And yet as a matter of contingent history, the UDHR was much more a result of power politics on the one hand, and the multi-pronged affinity for rights talk, engulfing many traditions, on the other.[68]

By contrast, in Chapter 7, Paul Yowell clarifies and defends the philosophical claim that the text of the UDHR is best understood in light of natural law principles, while also arguing that the natural law tradition did have a significant, direct influence on its drafting, through adherents like Maritain and Malik. While not denying the role of other traditions, political negotiations, or lawyers, he points to the resonance between natural law ethics and the fundamental philosophical commitments expressed in the UDHR. In particular, with reference to Maritain's thought, he explains how natural law ethics makes sense of the 'common denominator' or 'unwritten common law' to be found 'at the point where in practice the most widely separated theoretical ideologies and moral traditions converge'.[69] And, natural law accounts for the manifesto character of many enumerated rights, through the idea of *jus gentium*, which 'occupies a middle ground, intermediate between the natural law that is applicable in all times and places by virtue of the "simple, intrinsic constitution of human nature" and the positive law created by the specific choices of legislators'.[70]

1.3.2 *Whose Human Rights? Which Natural Law?*

Identifying the core commitments of the natural law tradition, and whether there is conceptual space for natural or human rights, forms part of an ongoing argument over what constitutes that tradition. As Alasdair MacIntyre defines it, a tradition is 'an argument extended through time in which certain fundamental agreements are defined and redefined in terms of two kinds of conflict', those with external critics and those with internal adherents.[71] This does not deny that there is a 'truth of the matter'; but because the human enquirer does not have a definitive grasp of that truth, there is no single conception of *the* natural law foundations of human rights, but a variety of arguments stimulated by reflection on the natural law phenomena and tradition, and their application to human rights claims.

At a foundational level, for instance, some natural law theorists emphasise the critical importance of metaphysical commitments concerning the purposive or normative character of human nature, social practice, and cosmos, to ground an account of what human agents should or should not do to achieve their *telos*.[72] In contrast, other natural law theorists seek to secure their account of natural law with first principles within the domain of normativity or practical reason, to avoid the so-called naturalistic fallacy or is-ought problem, whereby conclusions about what human agents ought to do are inferred from mere facts or states of affairs.[73] In consequence, debate about whether the naturalistic fallacy impugns certain variants of natural law theory is a key point of contention, and this debate is intertwined with other issues concerning

[68] Chapter 6, Section 6.3.
[69] Maritain, 'Introduction', II.
[70] Chapter 7, Section 7.3.
[71] Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, IN: University of Notre Dame Press, 1988), 12.
[72] See, e.g., Chapter 8 by Angier, Chapter 9 by Feser, Chapter 15 by Minnerath.
[73] See, e.g., Chapter 10 by Tollefsen, Chapter 11 by Seifert, and Chapter 14 by Novak.

the relationship between theoretical and practical reason in knowing the natural law.[74] Another key point of divergence arises from the two different senses of 'subjective right' that have been identified with human rights: that is, rights as logical corollaries of moral duties, and rights as moral powers. So there are variations between natural law perspectives on human rights, not just in terms of core commitments and focal points to be addressed in developing philosophical foundations, but also in terms of the concept 'human rights' itself. Given this, when thinking of natural law foundations, we can ask: Whose natural law? Which human rights? Part II provides an overview of these natural law perspectives.

As a preliminary issue, the philosophical foundations that should be sought for human rights are put to the question in Chapter 8. Tom Angier takes Maritain's distinction between ontological and epistemological foundations of natural law and human rights as a point of departure to critically reflect on the relationship between speculative and practical reason in the natural law tradition.[75] To what extent, for instance, can we speak intelligibly of a practical consensus between rival traditions on human rights if that consensus is based on incompatible premises? His answer is that we can't, and he argues that '[i]f we want to develop a foundation for human rights in the spirit of the natural law tradition, we will have to engage thoroughly with ontology, and with human nature in particular – even if this comes at the cost of widespread consensus'.[76]

This project is adopted in Chapter 9 by Edward Feser. Feser describes his position as an Aristotelian-Thomistic approach to natural law ethics, which develops justificatory grounds for human rights based on teleological essentialism. On this account, natural law obligations can be inferred from what is characteristically good for human functioning in different contexts. From these natural law duties, the hinge to his argument for human rights is the correlation between rights and duties, following W. N. Hohfeld's analysis of rights language.[77] Applying that thesis to natural law duties entails moral claim rights, which can be described appropriately as *natural* rights. Feser then examines the justification for and limits of free speech to exemplify how the scope of human rights is conditioned within this Aristotelian-Thomistic natural law perspective.

The 'new natural law' (NNL) contribution is elucidated and defended by Christopher Tollefsen in Chapter 10.[78] On this view, there are human or natural rights that follow from the moral respect to be afforded by each person, as a matter of justice, to the flourishing of other human persons, and to certain basic goods that are integral aspects of that flourishing.[79] This approach can be contrasted with the previous two chapters in that the grounds of natural law – those demands of justice – rest on a plurality of basic goods, which are not inferred from human functioning in various contexts (deploying the Aristotelian *ergon* or function argument),[80] but

[74] For various natural law responses to the so-called naturalistic fallacy see: Tom Angier, *Natural Law Theory* (Cambridge: Cambridge University Press, 2021), sec 4.1; Edward Feser, 'Natural Law Ethics and the Revival of Aristotelian Metaphysics', in Tom Angier (ed.), *The Cambridge Companion to Natural Law Ethics* (Cambridge: Cambridge University Press, 2019), 276; MacIntyre, *After Virtue*.

[75] See, e.g., Maritain, *Man and the State*, 84–94.

[76] Chapter 8, Section 8.5.

[77] See Chapter 9, Section 9.3; W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven, CT: Yale University Press, 1946).

[78] NNL theory is a version of natural law developed by John Finnis, Joseph Boyle, and Germain Grisez. Key publications include: John Finnis, *Natural Law and Natural Rights*; Germain Grisez, *The Way of the Lord Jesus* (Quincy, MA: Franciscan Press, 1983); John Finnis et al., *Nuclear Deterrence, Morality and Realism* (Oxford: Oxford University Press, 1987). For a general critique of this position see most notably: Russell Hittinger, *A Critique of the New Natural Law Theory* (Notre Dame, IN: University of Notre Dame Press, 1987).

[79] Chapter 10, Section 10,3.

[80] See Aristotle, *Nicomachean Ethics*, 1097b22–1098a20; e.g., Chapter 9, Section 9.2.

grasped as self-evident and indemonstrable first principles by practical reason.[81] The so-called *is-ought* problem is avoided by grounding ethics on these basic normative first principles, not inferred from facts about the world. There is a correspondence, however, with Feser's use of the Hohfeldian correlativity thesis to infer natural rights – both accounts derive natural human rights from natural law duties. In addition, the NNL position distinguishes between absolute human rights that follow from universal natural law duties (e.g., the prohibition against taking innocent life) and the manifesto human rights enumerated in human rights instruments (e.g., the rights to education and property) that require determination through positive law to specify relevant moral rules and duties. Applying this crucial theme of *determinatio* to manifesto rights enables natural law theory to cater for the institutional flexibility emphasised by political conceptions of human rights, while still framing that flexibility within natural law principles.[82]

Based on his critique of Thomistic natural law, Josef Seifert takes an entirely different approach to human rights foundations in Chapter 11. He identifies two key errors in the 'classical natural law tradition': firstly, that 'the ultimate end of all our actions is happiness instead of asserting that it is doing justice and loving the intrinsically good for its own sake'; secondly, that 'our relationship to the good consists above all in desiring it, instead of giving goods an adequate response of the will and of the heart'.[83] Grounding natural law on natural inclinations, he argues, leads to the naturalistic fallacy, whereby the moral ought is derived from facts about human desires.[84] This is particularly problematic because the objective good is so often not what people actually desire. Instead, drawing on the realist phenomenology and personalism of Dietrich von Hildebrand and Karol Wojtyła,[85] Seifert secures natural law and human rights with an account of intrinsic objective values perceived by human reason. The intrinsic and objective value, or dignity, of the human person grounds a strict ethical obligation (natural law) on others to respect that dignity, and act with an appropriate value response. And the appropriate value response is the object of a person's fundamental human rights. The content, scope, and hierarchy of human rights proceeds from this fundamental ethical obligation to respect human dignity in its *various manifestations*, including ontological dignity, the dignity of conscious and rational persons, acquired dignity, and bestowed dignity.[86]

The explanatory role of moral virtue for practical knowledge of natural law and human rights is central to Chapter 12. Taking MacIntyre's 'virtues of acknowledged dependence' as a point of departure,[87] Mary M. Keys and Melody Grubaugh explore the concept of virtuous humility in Augustine's *City of God*, which rests on acknowledgement of human dependence on God, and of interdependence between human beings and between nations. While pride elevates us above

[81] This view is based on an interpretation and partial critique of what Thomas Aquinas says about the correspondence between natural law and natural inclinations: *Summa theologiae* (ST), I-II, q.94, a.2; Germain Grisez, 'The First Principle of Practical Reason: A Commentary on the *Summa theologiae*, 1-2, Question 94, Article 2' (1965) 107 *Natural Law Forum* 168; Finnis, *Natural Law and Natural Rights*, 33–6, 92–5; Finnis, *Aquinas*, 79–94.

[82] See further Chapter 7 by Yowell; Chapter 22 by Webber, and Chapter 25 by Urbina.

[83] Chapter 11, Section 11.2.2.

[84] Ibid., Section 11.2.1. This challenge targets the type of natural law ethic developed by Feser in Chapter 8. Feser would object to Seifert's identification of 'natural inclinations' with felt desires, and instead relate them to the purposive *telos* of a nature to its perfection, knowledge of which is developed through experience of human functioning in various contexts. For a survey of views on natural inclinations and natural law in Thomas Aquinas, see: Stephen Brock, *The Light That Binds* (Eugene, OR: Wipf, 2020), esp. ch. 4.

[85] See, e.g., Dietrich von Hildebrand, *Ethics*, 2nd ed. (Chicago, IL: Franciscan Herald, 1978); Dietrich von Hildebrand, *The Nature of Love* (Notre Dame, IN: St Augustine's Press, 2009); Karol Wojtyła, *The Acting Person* (London: D. Reidel, 1979); Karol Wojtyła, *Love and Responsibility* (San Francisco, CA: Ignatius, 1993).

[86] Chapter 11, Section 11.3.2. For rival concerns with the use of 'values language', see Chapter 26 by Benson.

[87] Alasdair MacIntyre, *Dependent Rational Animals* (Chicago, IL: Open Court, 1999).

others and above God, humility disposes us to seek just fellowship according to natural right, based on mutual recognition of an equal moral status with other human beings. Keys and Grubaugh trace the influence of these Augustinian themes on Charles Malik, as an important contributor to the drafting of the UDHR. While the UDHR may be thought to reflect these themes to some extent, Malik's hopeful appraisal is qualified by the need to recognize external standards grounded in the nature of human beings, their relational bonds, and their vocation to divine friendship. Developing Malik's reflections, Keys and Grubaugh argue that human rights interpretation should proceed according to an ethos of humility and natural right, to overcome modern challenges from materialism and self-sufficient humanism.

Jean Porter continues to examine theistic commitments in natural law theory in Chapter 13, by considering the role of divine providence and eternal law in Thomas Aquinas's account of natural justice, and Thomistic notions of natural rights. According to Porter, Aquinas's 'account of the natural law as the rational creature's mode of participation in the eternal law gives salience to rational freedom as the defining characteristic of human nature, and lends credence to the claim that human freedom deserves a measure of respect'.[88] By implication, 'the rational creature's capacities to decide upon and pursue her own fulfilment through her own powers can give rise to normative claims on others, even when she acts badly'. Accordingly, Thomistic natural law is not only relevant for the contemporary theology of human rights, through the providential participation of rational creatures in creation. With its emphasis on the good of human freedom, there is also a 'point of contact' with non-religious defences of natural or human rights.

1.3.3 *Comprehensive Commitments and Religious Traditions*

Metaphysical and theistic commitments in the natural law tradition are often seen as an obstacle to its relevance to contemporary debates on human rights. Attention has focused instead on human rights theories that can make a claim to 'minimalism' in their grounds of justification.[89] In response to this justificatory minimalism, some natural law theorists emphasise the practical basis for knowledge of natural law, prescinding from metaphysical or theistic enquiry.[90] Another approach, however, emphasises the importance of metaphysical commitments to any theory, as well as to human practice. A central claim by MacIntyre, for instance, is that liberalism itself is a tradition with its own comprehensive commitments – it is, therefore, not neutral in justification or non-metaphysical, despite the claims of some proponents.[91]

With acknowledgement of tradition-dependence, respect for pluralism looks different from liberal tolerance. Instead of a reductive view of 'public reason' or 'reasonable consensus' based on non-religious assumptions 'reasonably' acceptable to others, there should be openness to the diversity and fullness of comprehensive traditions and cultures based on the need for common ground and mutual respect due to our human interdependence and shared humanity. Despite intractable disagreements, as MacIntyre argues, there is a natural justice to the practice of shared enquiry, which preconditions good faith in dialogue between comprehensive viewpoints and

[88] Chapter 13, Section 13.4.

[89] See, e.g., Richard Rorty, 'Human Rights, Rationality, and Sentimentality', in Richard Rorty, *Truth and Progress: Philosophical Papers* (Cambridge: Cambridge University Press, 1998), 167; Michael Ignatieff, *Human Rights: As Politics and Idolatry* (Princeton, NJ: Princeton University Press, 2001), 53–8; Joshua Cohen, 'Minimalism about Human Rights: The Most We Can Hope For?' (2004) 12(2) *Journal of Political Philosophy* 190; Beitz, *Idea of Human Rights*, 21, 54.

[90] See e.g. Chapter 10 by Tollefsen, Section 10.7; Chapter 32 by Crowe, Section 32.5. See also, Maritain, 'Introduction'.

[91] MacIntyre, *Whose Justice? Which Rationality?* ch. XVII.

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traditions and requires 'mutual commitment to precepts that forbid us to endanger gratuitously each other's life, liberty, or property'.[92] While some natural law theorists take the conditions of tradition-constituted enquiry as a reason to reject human rights language,[93] there is at least potential for human rights to express ethical requirements for authentic inter-traditional dialogue. With that potential in mind, Part III considers natural justice, law, and rights from the perspective of different religious traditions.

Within the Jewish tradition, natural law has a precarious position due to the influence of what David Novak describes as a 'theological positivism'. Nevertheless, as Novak argues in Chapter 14, natural law has a 'vital role' in how the Jewish tradition should be interpreted by its adherents, and how it should speak on moral questions in dialogue with other traditions.[94] According to Novak, there are two basic approaches to natural law and human rights in the Jewish tradition. The approach of 'natural theology' considers natural law in relation to what is conducive to achieving human goods, grounded in the teleological ordering of human beings and cosmos by a beneficent Creator-God. Human rights are correlates of natural law duties. In contrast, the approach of 'normative theology' understands human nature itself as governed by law, made in the image of a lawgiving Creator-God. Novak argues for this second approach, particularly because it avoids transgressing the is/ought dichotomy. On Novak's view, human rights are justifiable moral claims on another person that engender moral duties. The natural law universalises these claims, expressing the respectful conduct required on behalf of all potential right-bearers. But rights have explanatory priority because the justification of a claim rests on its authorisation. When we ask who is making the claim, what action is required, and why that claim is justified, we question the ultimate source of its authority. To avoid infinite regress, this must rest on the normative authority of a Creator-God and original rights-holder, who is not duty-bound to anyone greater. Human rights are thereby intrinsically connected to moral claims that human persons make on one another, ultimately in virtue of being made in God's image.

Comparisons can be made between this Jewish perspective and Catholic social doctrine. According to that doctrine, the teleological perspective of 'natural theology' and lawgiving perspective of 'normative theology' are synthesised in God's creative act. This doctrinal position is articulated in Chapter 15 by Archbishop Roland Minnerath. After presenting the classical Thomistic view on God's creative eternal law and natural law and right, Minnerath develops an intellectual genealogy explaining how this position was displaced by a new vision of the cosmos, which disrupted the interdependence between ethical claims and a created natural order, and ultimately grounded ethics on human will. Against this backdrop, Minnerath explains that the Catholic Church was a 'relative latecomer to the culture of modern human rights' because of the association of subjective rights with this new cosmology.[95] 'First steps' to recognize subjective moral rights were taken in Pope Leo XIII's encyclicals, and subsequent social teaching on human rights up to the Second Vatican Council developed through the subject-centred focus of personalist philosophy. This emphasis on the subject entailed a synthesis with the external and objective standpoint of classical natural law doctrine, rather than its rejection. According to that synthesis, the source of human rights is the measure inscribed in the created order by God's eternal law. So natural rights are determined by what constitutes a just relationship between

[92] Alasdair MacIntyre, 'Intractable Moral Disagreements', in Lawrence Cunningham (ed.), *Intractable Disputes about the Natural Law* (Notre Dame, IN: University of Notre Dame Press, 2009), 1, at 23. On the importance of implicit metaphysical claims, see Chapter 26 by Benson.

[93] See Chapter 5 by Rowland.

[94] Chapter 14, Section 14.1.

[95] Chapter 15, Section 15.4.

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persons in accordance with natural law. Despite the challenges confronting this position within contemporary culture, Minnerath identifies recent social doctrine on 'integral ecology' as a focal point to express contemporary environmental concerns, and renew awareness of the natural law and created order.[96]

The classical natural law tradition is typically associated with the Roman Catholic position just outlined. Indeed, many Evangelical Protestants today would follow Karl Barth in rejecting natural theology and appeals to natural law or rights, seeing these as grossly overestimating the power of human reason and wholly underestimating the roles of divine revelation and grace.[97] There is also an influential historical narrative that claims that the cultural demise of classical natural law, and cultivation of rights language, was assisted by the Protestant reformers in the sixteenth century, especially by their scepticism concerning natural reason and their voluntarist commitments.[98] These positions are put into question by John Witte in Chapter 16. Examining some early Lutheran and Calvinist teachings, he demonstrates continuing engagement between early Protestant thinkers and classical natural law doctrine. The reformers would, however, ground 'teachings in distinct accounts of the created order, human nature, the Ten Commandments, law and Gospel, divine sovereignty and natural order in the two kingdoms, which gave their views a unique accent'.[99] With that 'unique accent', they became a driving force behind 'political platforms, constitutional reforms, and revolutionary manifestoes that helped catalyse the early modern democratic revolutions in France, the Netherlands, Scotland, England, and America'.[100] In particular, the way these reformers combined natural law and natural rights shaped the development of early bills of rights and subsequent rights movements.

The focus to this point has been on 'Abrahamic' religious traditions. A central claim of natural law theory, however, is that the natural law is embodied in human practice, and precedes theoretical articulation. If true, one would expect to see ethical views in diverse traditions that resonate with natural law teaching, although expressed using different concepts.[101] And, if something like 'natural law' is evident in other traditions, questions can be asked about whether such views are open to subjective moral rights.

In Chapter 17, Shashi Motilal and Jeremiah Dumai consider these questions from the perspective of Hindu teachings on *Dharma*. They explain that *Dharma* has multiple meanings. It expresses a principle of natural ordering, which incorporates a regulative moral principle for human agency by which 'personal perfection and social order, peace and harmony go hand in hand'.[102] As a practical moral principle, *dharma* enjoins both universal and role-based obligations, conditioned by the hierarchical caste system (based on Hindu belief in karma and reincarnation). While there may be unjust elements built into the concept, Motilal and Dumai argue that it incorporates a notion of human moral obligations analogous to

[96] Ibid., Sections 15.5–6.

[97] Emil Brunner and Karl Barth, *Natural Theology: Comprising 'Nature and Grace' by Emil Brunner and the Reply 'No' by Karl Barth*, trans. Peter Fränkel (Eugene, OR: Wipf and Stock, 2002).

[98] See, e.g., Milbank, 'Against Human Rights'; Brad Gregory, *The Unintended Reformation: How a Religious Revolution Secularized Society* (Cambridge, MA: Belknap Press, 2015), particularly ch. 4. See also Chapter 5 in this volume.

[99] Chapter 16, Section 16.4.

[100] Ibid., Section 16.1.

[101] See C. S. Lewis, *The Abolition of Man* (New York, NY: HarperCollins, 2001). Lewis discusses the common ethical and moral laws across a wide array of religious and ethical codes under the term 'Tao'. The Appendix gives 'illustrations of the natural law'. Christopher Dawson also discusses similarities between major world religious traditions in relation to *telos* and nature: 'Christianity and the New Age', in Christopher Dawson and J. F. Burns (eds.), *Essays in Order* (New York, NY: Macmillan, 1931), 155, especially Section II.

[102] Chapter 17, Section 17.2.

Thomistic natural law, with its emphasis on right natural, social, and ethical order discerned through human reason. If 'egalitarian resources' can be developed through the concept of human moral obligations, and respect for equal human dignity, there is a common basis with the Western tradition to recognize human rights as correlative to such moral duties. However, that communitarian and duty-based understanding would stand in conflict with the individualism of the 'modern liberal conception of human rights in the Lockean tradition'.[103]

This Hindu perspective resonates with other comprehensive religious traditions and cultures: the individualistic ontology of the Western liberal tradition presents an obstacle to inter-traditional dialogue on human rights. As Charles Taylor and Nigel Biggar suggest, if there is to be a human rights ethos that can speak across cultures and traditions, the individualist ontology should be jettisoned in favour of duty-based and communitarian foundations, evident in more traditional moral outlooks.[104] In this light, the cultural critique of the 'Western' concept of human rights does not lead to cultural relativism. Instead, the challenge to human rights from rival cultures is best understood, and vindicated, as an attack on the 'individualist fallacy' (defined above in Section 1.2), and an appeal to dialogue based on a richer conception of pluralism that respects genuine diversity and associational difference, and rests on alternative ethical sources that dovetail with the natural law tradition.[105]

1.3.4 *Human Persons, Political Community, and the Rule of Law*

How can the natural law tradition sustain support for the equal dignity of human persons, and universal human rights, along with a commitment to the paramount importance of the political common good? How does the natural law provide ethical framing conditions for a political community, and what is the relevance of this framework for human rights institutions and law? What is the relationship between moral human rights and positive human rights law? Part IV takes a closer look at these questions.

In Chapter 18, Patrick Lee and Robert P. George defend the view that the gound for human dignity, and possession of fundamental rights, is 'being a person, that is, an individual substance of a rational nature'.[106] From a NNL perspective, they argue that all human persons are bearers of this fundamental dignity. This worthiness of moral respect is apprehended through the first principles of practical reason – those basic goods (also described in Chapter 10), which are apprehended as 'objects or activities [that] are worth pursuing for their own sake and not merely as means towards other conditions'.[107] According to Lee and George, the human agent's responsibility to respect these basic goods in their own life intelligibly extends to a duty to promote and respect them in the lives of other human persons, which grounds certain basic rights. This extension to universal respect for the basic goods of other persons, and their basic rights, follows from direct apprehension that, as agents with the same practical standpoint toward these basic goods, they are relevantly similar in terms of dignity. So, there is an intimate connection between human dignity and human rights. While not excluding other supporting

[103] Ibid., Section 17.4.
[104] Charles Taylor, 'Conditions of an Unforced Consensus on Human Rights', in Joanne Bauer and Daniel Bell (eds.), *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999), 124; Biggar, *What's Wrong with Rights?* ch. 8.
[105] See, e.g., Fred Dallmayr, *Integral Pluralism* (Lexington: University of Kentucky Press, 2010).
[106] Chapter 18, Section 18.4.
[107] Ibid., Section 18.3.

arguments based on human interdependence, political coordination, and civic friendship,[108] this dignity-based argument for the moral respect entailed by basic rights proceeds non-inferentially, through the direct apprehension of the normative importance of the basic goods as first principles of practical reasoning.

John von Heyking takes a different approach to the mutuality of human rights and duties in Chapter 19. Departing from liberal theories of human rights, he endorses Hannah Arendt's claim, in *The Origins of Totalitarianism*, that 'rights are better protected by bonds of political community than by reference to abstract humanity'.[109] Rather than rejecting human rights as such, he argues that this criticism can be seen as requiring the embeddedness of rights claims within relations of political friendship. Examining the thought of Aristotle, Aquinas, and Eric Voegelin, von Heyking retrieves a classical natural law conception of the good regime, based on political friendship as the aim of law. Within this regime, a culture of ethical concern for others is cultivated – crucial for rights protections. Although human rights are necessary, due to failures in human virtue and friendship, such rights nevertheless depend upon standards of political friendship that habituate citizens into regarding others as having absolute worth. Thus rather than shared apprehension of basic goods, human dignity finds its experiential origins in the practice of friendship. Moreover, the principles of natural law – as articulated standards of natural right on which human rights are grounded – are given crucial determination through the authoritative custom of one's political community. This role for customary law has crucial ramifications for the specification of manifesto rights in particular, through the diverse civic relations and practices of different political communities, as well as their posited law.[110]

These arguments concerning civic friendship and political community supplement those developed by Mark Retter in Chapter 20. Confronting controversies over group moral rights, Retter argues that an explanation of such rights requires an embedded understanding of moral duties and rights within the context of common action for a common good. He develops MacIntyre's thought to explain why the common agency of groups for a common good, through various social practices, can ground a framework of natural justice with correlative duties and rights, including various group moral rights. This practice-based account of natural justice is completed by an appeal to the common agency of an institutionalised political community for an integrated political common good. According to Retter, human rights are a subset of moral rights, which 'cry out' as a matter of justice for political enforcement or realisation, whether against violations of fundamental natural law precepts or the dereliction of core political responsibilities.[111] These human rights include group rights claims where the protected aspects of personal human flourishing are pursued through the common action of groups, such as families, trade unions, religious communities, and institutionalised political communities. Indeed, on Retter's view, group rights are essential since all human rights presuppose a claim against the group moral right of one's political authority, to administer justice for the common good.

The right to act for a political community's common good and administer justice is always exercised through an institutionalised distribution and jurisdictional delimitation of political power, resting on some form of constitutional settlement. Chapter 21, by Julian Rivers, takes a closer look at the connection between natural rights and their realisation as constitutional rights. The development of natural rights in the early modern period, he argues, was intertwined with

[108] See, e.g., Finnis, *Natural Law and Natural Rights*, chs. 6–8.

[109] Chapter 19, Section 19.5. See Hannah Arendt, *Origins of Totalitarianism* (New York, NY: Harcourt Brace Jovanovich, 1979), 300.

[110] The concept of *determinatio* is explored further in Chapter 22 by Webber and Chapter 25 by Urbina.

[111] Chapter 20, Section 20.5.

emerging ideas about the separation of governmental powers in the common law tradition. Appeals were made to natural law theory by common lawyers to justify separations of governmental powers as a way of securing freedom under the rule of law. The connection between separating powers under a mixed constitution and securing natural rights was then applied in the American Revolution and developed by Immanuel Kant as a requirement of practical reason. Rivers applies insights from this intellectual history to contemporary debates on the role of judicial determination of human rights, arguing for a collaborative relationship between legislative and judiciary. Against 'modern-day Thomists', he insists 'that human rights are part of the body of positive law, not merely the moral precursor of political and legal action'; while, against 'modern-day Kantians', he insists 'that the judiciary cannot be omnicompetent to determine the conditions of realisation [for human rights]'.[112] Instead, the challenge is 'to identify and refine those doctrinal devices that allow each power to contribute distinctively to the collaborative process of rendering rights real'.

As one of those 'modern-day Thomists' working within the NNL paradigm, Grégoire Webber argues in Chapter 22 for an expansive view of 'human rights law' to explain the relationship between moral and positive human rights. Rather than circumscribing human rights by reference to charters, treaties, and their judicial applications, Webber argues that the full range of positive law, including legislative and executive measures of everyday governance, should be understood as 'human rights law'. This is because human rights are correlative to the demands of justice, and straddle the two fundamental modes of derivation from basic human goods, applicable to all reasonable positive law: first, the deduction of absolute prohibitions on actions contrary to the basic human goods, which are fully specified as exceptionless moral duties incumbent on all persons; and, second, the specifications from basic human goods, as underdetermined choices partially constrained by principles of practical reason. Human rights incorporate not only absolute prohibitions as 'absolute rights', but also partial specifications of the basic goods in terms of 'incipient rights' (identified in Chapter 7 with *jus gentium* principles), and thus provide general principles for good law-making, applicable to all domains of governance. This distinction between absolute and incipient rights has ramifications for the distribution of powers: the legislative and executive powers have a primary role in specifying and realising incipient rights. In addition, Webber argues that failures to distinguish between these modes of derivation, and confusion between absolute and incipient rights, has engendered illusions in human rights practice. Instead of reflecting a general framework of justice in community, 'human rights have become associated with what is advantageous and beneficial for a person without concern for relationships between persons that are the object of justice and positive law', and by consequence 'everyday, pedestrian positive law is now generally understood to play little role in the realisation of human rights and is instead often understood to stand in an antagonistic relationship to human rights'.[113]

The relation between human rights and the obligatory character of positive law is considered by Stephen Hall, in Chapter 23, through an examination of the international legal principle of *jus cogens superveniens*.[114] Hall explains peremptory (non-derogable) international law in light of natural law doctrine on unjust law. In order to command compliance by moral obligation, a community's positive law must be practically reasonable – its purpose must be the preservation

[112] Chapter 21, Section 21.6.

[113] Chapter 22, Section 22.4.

[114] See Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, 1155 UNTS 331, Art. 53; International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries', in *Yearbook of the International Law Commission*, 2001, vol. II, pt. two, 85.

or promotion of the community's common good. When positive law is contrary to that common good in some way, it can become defective as law. While such law may remain intra-systemically valid, it may no longer be morally obligatory for citizens to comply. Further, as Hall argues, when 'an exercise of authority is radically defective by going further and requiring or permitting conduct which reason demands must never be performed, the community's members are always under a moral *obligation of non-compliance*'.[115] This situation includes the violation of absolute human rights, and explains why such rights, like the rights against torture or slavery, are widely recognized as *jus cogens*. Thus, by giving international legal recognition to the overriding normative force of certain ethical norms, '*jus cogens superveniens* supplements, and gives the teeth of positivity, to the natural law within the international legal domain'.[116]

1.3.5 *Rival Interpretations and Interpretive Principles*

Part V considers human rights interpretation. On questions of interpretation, a distinction should be made between correlative duties and rights that derive by necessity from fundamental natural law precepts, such as the prohibition on torture, or taking innocent life and those manifesto (or incipient) rights, understood by Maritain as articulating a moral consensus on *jus gentium* principles about realising the human good within the political community.[117] The former involves highly specified obligations applying to all human persons in relation to the wrongfulness of certain forms of conduct across analogous contexts. Their wrongfulness is typically the subject of robust moral consensus; and disagreements about application tend to converge on difficult cases, where questions concern whether the conduct constitutes a violation, and whether there are supervening reasons that mitigate wrongfulness. These can be highly contested debates, but they take for granted a core practical understanding of the wrongfulness in question. From that practical understanding, interpretative principles can be developed within a schematised theory that helps clarify when a violation has occurred. Expressing such wrongs in human rights language refocuses attention on the moral expectations of the victim, and what he or she can rightfully demand from the administration of justice.

In contrast, manifesto rights occupy what Maritian describes as an 'intermediate' position between general natural law principles and morally obligatory positive law.[118] These *jus gentium* principles involve a 'working out' of natural law principles in common pursuit of human flourishing across human societies and cultures; and provide a partially contextualised moral framework within which the positive law of contemporary societies provides determination. At this level of intermediate principle, it can make sense to speak of general manifesto rights to healthcare, or to primary and secondary education for instance, without unduly 'civilising the caveman'. These rights identify certain universal aspects of the human good to be protected or promoted, such as health and knowledge, but within the context of life in modern states. When *jus gentium* principles are articulated as abstract manifesto rights they express what Maritain calls 'yearnings of the Law of Nations'.[119] They have an aspirational quality that *points to* the

[115] Chapter 23, Section 23.1.
[116] Ibid.
[117] See Chapter 7 by Yowell; Jacques Maritain, *Christianity and Democracy and the Rights of Man and Natural Law*, trans. Doris Anson (San Francisco, CA: Ignatius Press, 1986), 148–52; Maritain, *Man and the State*, 97–101.
[118] Maritain, *Man and the State*, 98. See further ST, I-II, q.95, a.4; II-II, q.57, a.3; Thomas Aquinas, *Commentary on Aristotle's 'Nicomachean Ethics'*, V:XII, para. 1019; Cicero, *De inventione*, II, paras. 160–2; *Cicero*, *De officiis*, III, 17, para. 69.
[119] Maritain, *Rights of Man and Natural Law*, 152.

collaborative realisation of common conditions for various aspects of human flourishing. Their application is subject to extensive contingencies and requires significant determination through customary and positive law.[120] And yet those in positions of authority have moral obligations to take concrete steps, through governmental measures within their competence, to promote and realise a system that gives determination to manifesto rights, as a counterpart to the good-faith requirement to pursue the common good.

Based on this variegated account of the rights enumerated in human rights instruments, there should be enough subsidiarity for different political systems, and the multitude of associations within them, to pursue their own distinct realisation of manifesto rights, according to their own traditions and circumstances. There is even scope for reasonable disagreement about the appropriate application of so-called absolute rights. This potential for rival perspectives is multiplied by divergent moral traditions, which ground human rights on rival philosophical foundations.[121] Debates about human rights application can presuppose the resolution of intractable debates between philosophical traditions about the identity and fulfilment of the human person, and their proper relation to society and political authority. These conditions of ethical and political disagreement frame questions about the appropriate scope for authoritative decision-making by human rights institutions and the appropriate principles for interpretation. While it is crucial to acknowledge the importance of authority and legal institutions in giving determination to the moral requirements of and guidance from human rights norms, it is also important to be sensitive to the varying levels of specificity and contingency in human rights, and the legitimate space for reasonable disagreement and divergence in human rights traditions. At the same time, some form of unforced consensus is crucial to the ongoing legitimacy of human rights, across different polities, moral traditions, and cultures.[122]

Confronting the challenges posed by political disagreement, Catherine McCauliff examines the prospects for maintaining and developing moral consensus on human rights in Chapter 24. McCauliff takes inspiration from Maritain's belief that the UDHR constituted a practical consensus on enumerated rights in the face of divergent theoretical standpoints.[123] But her chapter critically examines the prospects for such a consensus when moving beyond mere enumeration to human rights application in our contemporary context. With reference to Maritain's thought in the economic domain, she argues that those prospects are hampered in circumtances of economic instrumentalisation and injustice from global capitalist structures, infused with the sin of usury. Nevertheless, there remains the hope – as Maritian had claimed – of developing practically embodied moral consensus through a common ethical life.[124] And

[120] On the role of customary and positive law in natural law theory, see, e.g., James Murphy, 'Nature, Custom, and Stipulation in Law and Jurisprudence' (1990) 43(4) *The Review of Metaphysics* 751; Mark Murphy, 'Natural Law, Consent, and Political Obligation' (2001) 18(1) *Social Philosophy and Policy* 70; Brian McCall, *The Architecture of Law* (Notre Dame, IN: University of Notre Dame Press, 2018), ch. 6.

[121] See Alasdair MacIntyre, *Three Rival Versions of Moral Enquiry* (London: Duckworth, 1990), 76.

[122] Dynamics of political disagreement and consensus are evident in centrifugal forces against legal standardisation of human rights, such as: the critique of 'human rights universalism' on the basis of 'Asian values': e.g., Bauer and Bell, *East Asian Challenge*; the divergent model in the African Charter, integrating human rights with peoples' rights; ongoing challenges to judicial decision-making by the European Court of Human Rights to enhance the subsidiarity for state parties: e.g., Robert Spano, 'The Future of the European Court of Human Rights: Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 *Human Rights Law Review* 473; and recent work by the US State Department's Commission on Unalienable Rights to articulate a foreign policy position on human rights in light of the American constitutional tradition: US Department of State, Final Report of the Commission on Unalienable Rights, 26 August 2020: https://2017-2021.state.gov/report-of-the-commission-on-unalienable-rights/index.html (accessed 11 January 2022).

[123] Maritain, 'Introduction'.

[124] Ibid., IX.

further contemporary support for Maritain's hope can be drawn from Charles Taylor. According to Taylor, we should be respectfully open to diversity in 'background justifications' within different moral traditions, to support an unforced consensus on human rights, as practical 'norms' that may be given determination through different 'legal forms'.[125] This is natural law theory in a different lexicon.

In Chapter 25, Francisco J. Urbina considers the natural law concept of *determinatio* and how it explains legal doctrines of deference in human rights adjudication. The enumerated rights in human rights instruments require, he argues, specification, implementation, and concretisation at the national level. This process of *determinatio* allows human rights to be sensitive to particular circumstances in a society and other relevant considerations at the point of application, and this entails a degree of deference to national authorities. Accordingly, the *determinatio* concept is critical for understanding doctrines of judicial deference and restraint in international human rights law, such as the margin of appreciation, regional consensus, and incrementalism. These are not concessions to state sovereignty enabling space for impunity; they are 'part and parcel of a sound model of *determinatio* needed for a reasonable and efficacious implementation of human rights law'.[126]

The role of moral language and implicit metaphysical frameworks in the application of human rights are examined in Chapter 26. Iain T. Benson outlines a shift away from core commitments of a natural law outlook – on human nature, reason, cosmos, metaphysics and education – which had been intelligible within and transmitted through a tradition. With the displacement of that tradition, there has been a drift in lexicon – for example, from 'virtues' to 'values', and 'person' to 'individual'. The confusing and obfuscatory character of our abstracted moral lexicon, divorced as it is from metaphysical roots lived out within the embedded commitments of human associations and their traditions, has permeated moral thought with a range of confusions and reductions that render moral objectivity fundamentally problematic. In particular, the primacy given to individual subjectivity in 'values language' means that when applied to human rights claims, it undercuts the moral objectivity of such claims. There is significant danger that these confusions permeate human rights reasoning, leading to issues of coherence in application. Resolution of such problems, however, presupposes fundamental philosophical enquiries and recovery of a metaphysical tradition that can sustain the moral language embodied in human rights discourse, and protect it from the dangers of ideology – ideas accepted without attention to origins and first principles. That recovery, Benson argues, requires genuine respect for the subsidiarity of what Habermas calls 'life-worlds', which make up the diverse associational life of human communities. Benson concludes that a diffidence in strands of contemporary philosophy, in the post–World War II era, has facilitated globalist movements to control human communities from the top down, in ways antithetical to human rights and freedom.

Given the arguments in the previous chapters, there is an important role for *judicial morality* to sustain the legitimacy of human rights institutions. Justice Peter D. Lauwers takes a closer look, in Chapter 27, at how judicial morality safeguards against result-selective reasoning, which is particularly pervasive in human rights adjudication because of its morally laden and emotive character. Drawing from research into the psychology of judging, he argues that a key purpose of the rule of law is to constrain discretionary judicial power. Nevertheless, there are 'margins of judicial manoeuvre' to engage in result-selective reasoning, which are expanded through the

[125] Taylor, 'Unforced Consensus on Human Rights'.
[126] Chapter 25, Section 25.7.

indeterminacy of human rights texts, the displacement of rules by standards, and proportionality analysis. Since the rule of law's constraints are not self-enforcing, there is a need for renewed professional commitment to judicial morality, which incorporates certain 'modes of judicial responsibility': to do no harm, and then, to do the right thing, for the right reason, in the right way, at the right time, in the right words. When judges neglect judicial morality, they undermine judicial impartiality and the rule of law.

The remaining chapters in Part V offer natural law perspectives on the justification, scope, and interpretation of specific types of human rights, or their application to specific problems.

Given that any authoritative application of human rights law that determines priority between rights presupposes some qualitative ordering of human goods, there are important questions about whether there is a supreme human right and what this right might be. In Chapter 28, Rafael Domingo makes the case for religious freedom as a 'first-class right, or the first right, since it protects the most profound beliefs of each individual and the transcendent dimension of human life, which essentially informs and undergirds the dignity of every human being'.[127] He supports this position through critical engagement with the work of Ronald Dworkin and Brian Leiter on freedom of religion.

Another domain of human rights, crucial for the integral development of the human person, relates to the ends and group agency of family life. This entails not just the right to marry and form a family, but also the rights of parents and children as members of the natural family. Jane Adolphe examines the rights of the family in Chapter 29. According to Adolphe, a good-faith interpretation of the ordinary meaning of international human rights provisions on the family reveals a natural law understanding of the human person and family life.

Vexed questions arise in connection with socioeconomic rights, particularly regarding their enforceability or justiciability, whether there is a human right to be free from poverty, and what this entails for development aid.[128] In Chapter 30, Gary Chartier formulates a natural law theory that emphasises decentralisation in governmental authority, and the indirect facilitation of socioeconomic well-being through direct protection of the basic socioeconomic rights of human persons 'to use their bodies, and thus to labour, voluntarily and to acquire, maintain, use, and exchange physical objects'.[129] This theory can be fruitfully compared with the understanding of socioeconomic rights offered by Maritian. This is based especially on the dignity of the human vocation to work and ordered by the 'yearnings of the Law of Nations' to transform modes of production from the 'wage system' of employment towards just relations between workers through 'associative ownership' of the means of production.[130]

At the time of writing, we face a singular challenge to the protection and realisation of human rights in the Covid-19 epidemic. The expansive exercise of state powers in reponse to the ongoing health crisis – including expansive lockdown measures, restrictions on gatherings and travel, and vaccine mandates – raises significant human rights concerns, especially as proportionality justifications for the emergency measures become more dubious. Another dimension relates to the equitable distribution and access to vaccines across the international community, particularly in the case of least-developed countries that rely on international aid to acquire those vaccines. What does it mean to look at this problem through a 'human rights lens' that aims to respect equal human dignity and realise the right to health within the international community?

[127] Chapter 28, Section 28.1.
[128] Pogge, *Freedom from Poverty*.
[129] Chapter 31, Section 31.5.1.
[130] Maritain, *Rights of Man and Natural Law*, 169–86.

Thana C. de Campos-Rudinsky considers the equitable distribution of vaccines in Chapter 31. She argues for a 'moderate vaccine cosmopolitanism', based on the principle of solidarity that grounds 'human rights obligations of mutual care among nations (also known as the duty of international cooperation)';[131] while the complementary principle of subsidiarity entails 'being concerned with different people in different ways, according to their different needs and their different relationships to us'.[132] Her position leads to 'extra-territorial obligations to care for vulnerable outsiders, when the state has the capacity to do so without abandoning its vulnerable nationals'.[133]

1.4 CHALLENGES AND PROSPECTS

Neither human rights nor natural law are, strictly speaking, denominational. Each contributor to this handbook has views on the challenges and prospects for engagement between natural law and contemporary human rights theory. There is no monolithic natural law perspective, but an ongoing argument between adherents of the natural law tradition about the significance of its commitments and conclusions for the theory and practice of human rights.

Accordingly, Part VI on 'Challenges and Prospects' presents another voice in this ongoing dialogue. In Chapter 32, Jonathan Crowe gives his view on how to define the natural law outlook, what shape that outlook should take if it is to offer a compelling justification for human rights, and what that outlook can contribute to human rights theory. In particular, he argues the case for 'a diachronic view of natural law that emphasises its socially embedded character' and takes a 'wide conception of human nature that incorporates biological and social dimensions'.[134] While there are genuine concerns from natural law sceptics about the human rights concept, Crowe maintains that these can be defused by 'emphasising the priority of duties over rights, while also recognizing how social institutions shape the content of rights claims'.[135] This not only addresses concerns from natural law theorists, but also the root causes of the malaise in contemporary human rights theory – with polar tensions between over-determined, rationalist accounts of natural rights resting on the 'individualist fallacy' and political conceptions that fail to take the moral roots and limits of human rights institutions and law seriously, and thereby sacrifice the ethical domain to authoritative public pronouncements applying abstract rights.

In addition to Crowe's perspective, we conclude here by identifying the key benefits we see accruing from a natural law theory of human rights:

1. The ability to explain the political consensus on human rights enumerated in the UDHR, despite disagreement on theoretical foundations and their application to contingent circumstances.
2. The ability to give a compelling explanation for the equal dignity of human persons, which has a central place in human rights culture; while also explaining the diverse normative significance of that dignity through an account of human agency and goods.
3. The capacity to capture the diversity in subject-matter across human rights by reference to general aspects of human flourishing, while also recognizing the contingency of application of such universal principles by reference to the concept of *determinatio*.

[131] Chapter 32, Section 32.5.
[132] Ibid.
[133] Ibid., Section 32.4.2.
[134] Ibid., Section 32.6.
[135] Ibid.

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4. The focus on justifying human rights as claim rights correlative to moral duties – defined by the demands of justice in a community. This avoids the individualist fallacy, which proceeds from individual rights to the allocation of duties without adequate justification of why such rights make demands on the actions of others and the community; while resisting the reduction of human rights to a political consensus or legal regime, which fails to explain the overriding moral force attributed to human rights claims.
5. The ability to distinguish between absolute human rights derived from natural law precepts, and those manifesto rights expressing *jus gentium* principles that require determination through customary and positive law. This navigates between naturalistic moral rationalism, which sees human rights as fully determinative; and political/legal conceptions, which allow political/legal authority to make human rights determinations without recourse to the demands of justice.
6. The capacity to identify problems associated with excessive judicial, legislative, or executive determination of human rights, and to articulate a more refined account of the appropriate balance between constitutional powers in applying human rights, particularly in and through communities that may have differing conceptions of human goods.
7. The ability to capture the potential dynamism in human rights, by relating their universality to natural law principles, and recognizing that manifesto rights partially concretise such principles at an intermediate level, which requires further specification in different societies.
8. The ability to justify human rights norms across diverse traditions and cultures, and to allow for pluralism in traditions of human rights embodied in different societies – expecially when it comes to the application of manifesto rights.