

## OUR DEBT TO DE VITORIA: A CATHOLIC FOUNDATION OF HUMAN RIGHTS

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It is exciting to be here with you as we consider and study the foundation of human rights and the contributions from Catholic minds. Moreover, I am delighted to be a part of a community of scholars who recognize the extraordinary contributions of Catholic thinkers to this crucial topic. In particular, I salute those of you who acknowledge the significance and relevance of thinkers such as the two Franciscans: de Vitoria and Suárez. I am further delighted that a number of you have addressed their work at this conference.

Here we are, more than half a millennium later, recalling and celebrating their pioneering work to the eminent field of human rights that some argue is quite new.<sup>1</sup> Although for some, the events of sixty-three years ago, when the U.N. General Assembly voted on a resolution adopting an international charter of basic rights may seem like an eternity ago. Nevertheless, since the adoption of the Universal Declaration of Human Rights in December of 1948, most individuals have had some exposure to the phrase “human rights”—both the idea itself as well as some application of it in their respective lives or the lives of people with whom they are familiar. It is clear that recognition of this idea and its implementation did not enjoy much popular acclaim before the end of the Second World War, so it would be understandable to assume that human rights are essentially a product of the contemporary age subsequent to the Second World War.

This outlook was recently acclaimed in a review of Professor Samuel Moyn’s new book *The Last Utopia: Human Rights in History*,<sup>2</sup> appearing in a recent issue of the Columbia alumni magazine.<sup>3</sup> The title of the review is: “Human Rights: Newer than You Think,” and the author is quoted by the reviewer as stating that

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1. See, e.g., Michael B. Shavelson, *Human Rights: Newer Than You Think*, COLUM. MAG., Winter 2010–2011, at 56.

2. SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010).

3. Shavelson, *supra* note 1.

while there were early sources of human rights discourse, the popular concept is of recent generation.<sup>4</sup> Professor Moyn is quoted as saying, “It’s not that there weren’t early sources, but at the level of common speech, the idea of international human rights doesn’t become widespread until the 1970s.”<sup>5</sup>

In spite of this interesting perspective held by some contemporary scholars, we must acknowledge that a crucial source of human rights is to be found in the writings of Francis de Vitoria. One of his most influential works regarding the natural law and its application to human rights discourse is *De Indis*.<sup>6</sup> By failing to understand his contribution, it would be easy to assume that human rights concepts and principles and the laws addressing them are products of the contemporary age, thereby leaving Professor Moyn’s position intact. However, doing so would discount the extraordinary pioneering work of the Neo-Scholastic scholars of the sixteenth century to whom we owe a great debt—especially to de Vitoria.

Francisco de Vitoria (1483–1546)<sup>7</sup> lived during the age of the Conquistadors and the Reformation. He was for much of his adult life a Dominican friar and professor of theology at Salamanca.<sup>8</sup> Like the Jesuits Suárez and Bellarmine who were to follow, the source of de Vitoria’s legal principles dealing with human rights matters was founded in the natural law and the method of legal reasoning that accompanies this school of legal thought.<sup>9</sup> It was this foundation that led him to consider the notions of popular sovereignty and self-determination, essentially unheard of before his time, as vital elements of human rights doctrine.<sup>10</sup> Moreover, he reached conclusions about the legitimate claims of both native peoples and

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4. *See id.*

5. *Id.*

6. FRANCISCO DE VITORIA, O.P., *DE INDIS*, reprinted in VITORIA: POLITICAL WRITINGS 231 (Anthony Pagden & Jeremy Lawrence eds., 1991) [hereinafter DE INDIS]. This volume also includes other political and legal writings authored by de Vitoria that have a bearing on the points made in this Article.

7. C.H. McKenna, *Francis of Vittoria*, in 14 CATHOLIC ENCYCLOPEDIA 727 (1967).

8. *Id.*

9. *See generally* ON LAW: LECTURES ON ST I-II 90–105, in VITORIA: POLITICAL WRITINGS, *supra* note 6; *see also* JACQUES MARITAIN, THE RIGHTS OF MAN AND NATURAL LAW 59 (Doris C. Anson trans., 1943).

10. *See, e.g.*, FRANCISCO DE VITORIA, O.P., ON CIVIL POWER, Q. 1, Art. 6, reprinted in VITORIA: POLITICAL WRITINGS, *supra* note 6, at 17–18; *see also* DE INDIS, *supra* note 6, Q. 1, at 239–51. De Vitoria discusses the capacity of a majority of the native peoples electing to be led by the Spanish; however, if this were the case, it would seem that a majority could just as easily decide to retain their own system and method of governance. *See id.* Q. 3, Art. 6, at 281.

Europeans that established the foundation for fundamental rights that are addressed in the Universal Declaration of Human Rights (“Universal Declaration”).

The Universal Declaration begins with an important and remarkable claim: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”<sup>11</sup> Two questions immediately occur about the meaning of this passage. The first question deals with the term *dignity*; the second follows and pertains to the meaning of *rights*. As we shall subsequently see, de Vitoria provided important groundwork for consideration of these two inextricably related matters that relate dignity and rights of the human person—God’s most beloved creation—which found their way into the Universal Declaration.

Regarding the significance of the term *dignity*, it cannot be restricted to understandings that involve self-respect, self-esteem, or pride. Those definitions would undermine the term’s import insofar as these explanations are self-relational, subjective, and focused on the individual person vis-à-vis the individual himself or herself. Indeed, if the term is to mean something in the context of universal human rights (i.e., claims that are universal and proper to every member of the human family including its most vulnerable—the unborn), it must convey the understanding that the entitlements properly belonging to a person are relational to others.<sup>12</sup> This point made by de Vitoria sets the stage for consideration of the *suum cuique*: the principle that necessitates that each person is to receive his or her due.<sup>13</sup> What is due one person cannot be correctly understood until what is also due others, who are in relation to the first person mentioned, is methodically considered. This is why the idea of human rights must be universal if they are to have both substantive content and meaning—a point comprehended well by de Vitoria and explained in *De Indis*.<sup>14</sup> What is claimed by one must be the sort of thing that can rightfully be claimed by others. Here we must take stock of what Jacques Maritain, who chaired the UNESCO committee that advised

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11. Universal Declaration of Human Rights, G.A. Res. 217(III) A, U.N. Doc.A/RES/217(III) (Dec. 10, 1948).

12. See, e.g., DE INDIS, *supra* note 6, Q. 3, Art. 1, at 278–84 (examining the interests of and relations between the native peoples and the Europeans).

13. BLACK’S LAW DICTIONARY 1585 (9th ed. 2009).

14. McKenna, *supra* note 7, at 727–28.

the drafting committee of the Universal Declaration, had to say about human dignity and rights in 1943:

The human person possesses rights because of the very fact that it is a person, a whole, master of itself and of its acts, and which consequently is not merely a means to an end, but an end, an end which must be treated as such. The dignity of the human person? The expression means nothing if it does not signify that by virtue of natural law, the human person has the right to be respected, is the subject of rights, possesses rights. *There are things which are owed to man because of the very fact that he is man.* The notion of right and the notion of moral obligation are correlative. They are both founded on the freedom proper to spiritual agents. If man is morally bound to the things which are necessary to the fulfillment of his destiny, obviously, then, he has the right to fulfill his destiny; and if he has the right to fulfill his destiny he has the right to the things necessary for this purpose.<sup>15</sup>

De Vitoria recognized these principles offered by Maritain many years earlier when he, de Vitoria, acknowledged that the native peoples of the Americas were, indeed, people to whom were owed the very same things which were owed to Europeans or, for that matter, to anyone else.<sup>16</sup>

With this fundamental understanding of the term *dignity* in mind (i.e., what is owed the human person because of the very fact that he or she is a human person), we can proceed to defining the term *rights*. *Right* or *rights* is an unpretentious word found in the daily usage of most people. Hence, it is a term of familiarity. Yet its significance is not always understood properly, and so it must be carefully defined when placed in the context of the often-heard phrase "human rights." Does it mean the ability to make *any* claim a person desires to make on one's own behalf? Or must it take stock of the claims made by a person in relation to the claims or potential claims that can be made by others? In the context of the claims that relate to the Universal Declaration, rights involve the qualities of the human person that relate to that which is proper, correct, and consistent with what is just rather than unjust. The application of objective reason has much to do with defining rights of persons and the justification of claims made

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15. MARITAIN, *supra* note 9, at 65 (emphasis added). As noted above, Maritain acknowledged the role of de Vitoria in charting the concept of human rights upon the natural law.

16. See DE VITORIA, *supra* note 6, Q. 1, Art. 6, at 249–50.

about them. Rights deal with the moral dimension of human nature and human existence and with the contexts of individual persons who live in societies with other persons. These points are well comprehended in de Vitoria's thinking and writing.

Thus, the right or rights claimed by a person is or are legitimate and morally proper when justice, reason, and facts fortify and intensify, or restrict or deny, the specific claim and its legitimacy. In short, rights have to do with the essence of what is due the individual person because he or she is an individual person—this is the *suum cuique* in operation. And what is due the person materializes in reality not because persons, societies, or civil authorities, or associations, or organizations determine what is due; rather, what is due is determined by the fact that the claimant is a person, and, therefore, the claim must be sustained because of the inherent nature and essence of the person and his or her accompanying human dignity as one person who lives in the midst of other persons.

The principle of the *suum cuique* subsists in ancient legal precepts with which de Vitoria was familiar. For example, there is *juris praecepta sunt haec—nos este vivere; alterum non laedere; suum cuique tribuere*—these are the precepts of the law: to live honorably; to hurt nobody; to render everyone his due.<sup>17</sup> Another is a traditional definition of justice: *Justitia est constans et perpetua voluntas jus suum cuique tribuendi*—justice is a steady and unceasing disposition to render everyone his due.<sup>18</sup> The essential concept underlying these various formulations may be summed up in the following manner: justice—an issue of vital importance to most understandings of natural law (to which de Vitoria was a devoted adherent)<sup>19</sup>—is a critical element of legal systems and international order, particularly those concerned with the rights and the obligations of people. In the natural law, justice is often considered existing in the context of the *suum cuique*.<sup>20</sup> In essence, the justice that is due someone or something relates to what is due others with whom this person shares society and is therefore in relationship with other persons. In other words, the justice for one cannot be determined until what is just—what is proper, and what is improper—for others involved with the same question or issue is considered and determined. In consequence,

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17. BLACK'S LAW DICTIONARY, *supra* note 13, at 1841.

18. *Id.* at 1842.

19. McKenna, *supra* note 7, at 728.

20. See generally Rev. Robert John Araujo, S.J., *Justice as Right Relationship: A Philosophical and Theological Reflection on Affirmative Action*, 27 PEPP. L. REV. 377 (2000).

what is due one person cannot be considered until what is due others who find themselves in the same context is considered.

It should now become clear that in the framework of the most basic examination of human rights, the *suum cuique* in a natural law context plays a significant role. This is patent in the thinking and writing of de Vitoria who assessed the claims of the native peoples of America and the claims, often times but not always competing, of the Spanish colonialists.<sup>21</sup>

But if the notion of rights addresses claims, it must also take stock of duties, obligations, and responsibilities. This duties-responsibility facet of human rights claims may seem controversial to some, but it is a reality that de Vitoria saw and valued as he considered and evaluated what was happening between the Europeans and the native peoples of the Americas.<sup>22</sup> This responsibility, which is critical to the meaning of rights that belong to humans, serves as the guarantor and protector of claims made by one and all. My point about the nexus between claims and obligations cannot be overemphasized. The justifications underlying this point ensure that rights are reciprocal—perhaps not in all their precise details, but reciprocal nonetheless. In essence, then, the rights of the human person relate to a well-ordered claim versus a disordered claim. Hence, rights claims must always be understood next to rights obligations and responsibilities. The nexus between rights and responsibilities is essential to the Universal Declaration.<sup>23</sup>

There is no question that the Universal Declaration provides the foundation for the major international human rights instruments of the past half-century. Yet, many Americans may think with some amusement or intrigue that it took the rest of the world another two centuries to address the subject of human rights that seem integral to American legal institutions. The importance to American legal institutions is expressed, in part, in the component of the federal Constitution known as the Bill of Rights as founded on the Declaration of Independence. Indeed, the view that international human rights emerged from the American Revolution and the works of Enlightenment political philosophers, such as Locke and Rousseau, is characteristic of the contemporary understanding of the international

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21. McKenna, *supra* note 7, at 727.

22. See DE INDIS, *supra* note 6, at 231–92.

23. See G.A. Res. 217(III) A, *supra* note 11.

law texts we rely upon today in the contemporary world and its legal academies.

However, liberty, equality, and—at least for the French—fraternity, conceptions integral to human rights, are not solely or firstly the work of English and French Enlightenment thinking, as was acknowledged by Jacques Maritain.<sup>24</sup> These important political and legal principles have deep roots that go back in time to earlier thinkers—especially those from the Catholic Neo-Scholastic tradition such as de Vitoria.<sup>25</sup> The Neo-Scholastics lived and labored during the years of the European exploration of the New World. Their extant writings broadly contributed to the establishment of human rights. James Brown Scott, the distinguished American international jurist of the early twentieth century, had often noted that de Vitoria and Suárez, as commentators of legal and political institutions of the sixteenth and early seventeenth centuries who relied on the Scholastic tradition and natural law<sup>26</sup> principles, had been ahead of their times in advancing the ideal of universal rights principles based on the natural law.<sup>27</sup> But how did de Vitoria actually provide a foundation from which the contemporary identification and understanding of universal human rights could emerge in the twentieth century? In particular, how do his insights assist us today to understand what human rights are about?

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24. See generally MARITAIN, *supra* note 9.

25. See DE INDIS, *supra* note 6, Q. 1, Art. 1, at 239–40.

26. For an extremely helpful explanation of the role of natural law in international law, see James V. Schall, S.J., *Natural Law and the Law of Nations: Some Theoretical Considerations*, 15 FORDHAM INT'L L.J. 997 (1991–1992). In particular, this author states:

[T]he law of nations itself was a necessary derivative from natural law. It was based on the principle that human beings throughout time and space were the same in their essential structure, in that they each possessed reason, and that reason could be formulated, communicated, understood, and debated wherever men sought understanding. The theories and actions of anyone, even rulers, could and should be tested by reason. This testing would result in an agreed upon law if the reasonable solution could be found. It would result in violence, disagreement, and even war if it could not.

*Id.* at 1017.

27. See John P. Doyle, *Francisco Suárez: On Preaching the Gospel to People Like the American Indians*, 15 FORDHAM INT'L L.J. 879 (1991–1992); Ramón Hernández, O.P., *The Internationalization of Francisco de Vitoria and Domingo de Soto*, 15 FORDHAM INT'L L.J. 1031 (1991–1992); see generally JAMES BROWN SCOTT, *THE SPANISH ORIGIN OF INTERNATIONAL LAW* (2000) (1934); JAMES BROWN SCOTT, *THE SPANISH ORIGIN OF INTERNATIONAL LAW: LECTURES ON FRANCISCO DE VITORIA [1480–1546] AND FRANCISCO SUÁREZ [1548–1617]* (1928).

These issues and the answers to them are critical to the welfare of human rights as we consider the fact that some present day advocates of “human rights” claim positions that violate fundamental claims protected by the Universal Declaration including family matters, religious freedom, and conscience, the right to emigrate, and the most essential right of all—the right to life—the right that guarantees all other human rights.<sup>28</sup> What is at stake is the solidarity of each member of the human family with all others. This is a point that de Vitoria realized and expressed in his writings.<sup>29</sup>

An important and relevant illustration of solidarity and human rights that are addressed in the Universal Declaration and that establish cornerstones of contemporary international law is the Charter of the United Nations. As is stated in the Charter, a major purpose for the United Nations Organization is to “achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for *human rights* and for fundamental freedoms for all.”<sup>30</sup> It should come as no surprise that in the advancement of universal human rights, “friendly relations between nations” is essential, and states “in cooperation with the United Nations” must pledge themselves to “universal respect for and observance of human rights and fundamental freedoms.”<sup>31</sup> These are principles that are quickly identifiable in the work of de Vitoria as he addressed the peaceful relations between the peoples of the New World and those of Europe.<sup>32</sup> Both peoples had, in his estimation, legitimate claims which might lead to conflict. Because of their respective claims and the potential for conflict, it follows that both groups also possessed responsibilities owed to the other. Through recognition of these responsibilities, both sides had the capacity to defuse the potential for conflict. Again, *De Indis* illustrates de Vitoria’s awareness of these matters and how the recognition of

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28. See *DE INDIS*, *supra* note 6, Q. 1, Art. 6, at 250; *id.* Q. 2, Art. 4, at 269, 271; *id.* Q. 3, Art. 1, at 278.

29. For example, de Vitoria addresses the respective legitimate claims of the native peoples and the Spanish and suggests a type of dependency or need for the two to collaborate and cooperate with one another. See *id.* Q. 3, Art. 1, at 278–84.

30. U.N. Charter art. 1, para. 3 (emphasis added).

31. G.A. Res. 217(III) A, *supra* note 11, pmb1.

32. See *supra* note 29 and accompanying text.



respective responsibilities could alleviate the tensions between the two groups and thus avert conflict.<sup>33</sup>

What is often overlooked today in most discussions of “human rights” is the fundamental question: What are they, i.e., what is essential to and what is constitutive of a “human right”? Another question quickly follows: Who or what confers them? A third ensues: What is their source? These questions can be answered by considering the jurisprudence contained in the natural law, which informed de Vitoria and his fellow Neo-Scholastics and which inspired the jurisprudential thinking of de Vitoria and many others since his time.<sup>34</sup> While they did not acknowledge the source, I am confident that it was, surely in part, natural law reasoning that enabled the drafters to agree on the rights identified in the Universal Declaration.<sup>35</sup>

What the natural law is and what constitutes it are matters that must be addressed here and which have a bearing on the title of my address—a debt to de Vitoria. But de Vitoria himself was in debt to the institution of natural law.<sup>36</sup> In the Roman Catholic intellectual tradition from which I speak, it is in considerable part a means by which the human mind formulates legal principles—the positive, human law—that can then be applied to govern a specific subject matter or jurisdiction.<sup>37</sup> In essence, the natural law is planted within the objective reasoning process innate to the human person which enables and equips the person to develop a just positive—i.e., human—law. The positive/posited law will then be imbued with the essential substantive principles that are desirable for the just governing of society in which rights and responsibilities coexist side

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33. *See id.*

34. *See* DE INDIS, *supra* note 6, Q. 1, Art. 1, at 239; *id.* Q. 1, Art. 3, at 244–45; *id.* Q. 2, Art. 1, at 254; *id.* Q. 2, Art. 2, at 260; *id.* Q. 2, Art. 3, at 264; *id.* Q. 2, Art. 4, at 269; *id.* Q. 2, Art. 5, at 273–74; *id.* Q. 3, Art. 1, at 278–81; *id.* Q. 3, Art. 2, at 284; *id.* Q. 3, Art. 6, at 288.

35. Jacques Maritain, who chaired the UNESCO symposium that provided the drafters of the Universal Declaration with background perspectives on human rights, once said, “It is related that at one of the meetings of a [UNESCO] National Commission where [h]uman [r]ights were being discussed, someone expressed astonishment that certain champions of violently opposed ideologies had agreed on a list of those rights. ‘Yes,’ they said, ‘we agree about the rights *but on condition that no one asks us why.*’ That ‘why’ is where the argument begins.” Jacques Maritain, *Introduction* to United Nations Educational, Scientific and Cultural Organization, Human Rights: Comments and Interpretations, U.N. Doc. UNESCO/PHS/3(rev.) at 1 (July 25, 1948) (emphasis added).

36. *See supra* note 34 and accompanying text.

37. *See generally* HEINRICH ROMMEN, *THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY* (Thomas R. Hanley trans., 1998).

by side. This juxtaposition, in turn, enables people to flourish in ordered societies. It is this ordering that is inclined to bring harmony to the specific society for which the positive law was made. Reliance on the natural law provides assistance to individuals and their civil society as they seek that which is publicly and privately good. In the end, the inevitable human law product of natural law reasoning should be a society in which individuals live together in peace and prosperity because this fundamental type of reasoning is inclined to seek virtue and to eschew vice.

How does the natural law and its reasoning process on which de Vitoria relied so often accomplish this? Answers can be found from the works of those who have labored in this vineyard over the centuries. Professor Charles Rice acknowledges that natural law is a “guide to individual conduct” and “serves as a standard for the laws enacted by the state.”<sup>38</sup> The celebrated Canonist Gratian, who compiled his collection of juridical principles during the twelfth century, notes in the *Decretum* that, “Natural law is common to all nations because it exists everywhere through natural instinct, not because of any enactment.”<sup>39</sup> In his commentary (the “Ordinary Gloss”), Gratian explains that the natural quality of law means “an instinct of nature proceeding from reason.”<sup>40</sup> In the *Summa Theologiae*, Thomas Aquinas identifies natural law as those precepts that are “appointed by reason.”<sup>41</sup> The first principle of this practical reason is this: “[G]ood is to be done and pursued, and evil is to be avoided.”<sup>42</sup> Aquinas also notes in his discussion of the natural law

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38. CHARLES RICE, FIFTY QUESTIONS ON THE NATURAL LAW: WHAT IT IS AND WHY WE NEED IT 33 (1995).

39. GRATIAN: THE TREATISE ON LAWS (*Decretum* DD. 1–20) WITH THE ORDINARY GLOSS 6 (Augustine Thompson, O.P. & James Gordley trans., 1993). He then went on to define “civil law” as that which “each people and each commonwealth establishes as its own law for divine or human reasons.” *Id.* at 7. The law of nations was given the explanation that “almost all nations make use of it,” and it

deals with the occupation of habitations, with building, fortification, war, captivity, servitude, postliminy [the law under which something lost as a result of captivity is restored to the original owner from whom the item was taken], treaties, armistices, truces, the obligation of not harming ambassadors, and the prohibition of marriage with aliens.

*Id.*

40. *Id.* at 6.

41. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Pt. I-II, Q. 94, Art. 1 (Fathers of the English Dominican Province trans., Christian Classics 1981) [hereinafter *SUMMA THEOLOGICA*]; see also *id.* Pt. I-II, Q. 94, Art. 2 (arguing that practical reason is a self-evident principle).

42. *Id.* Pt. I-II, Q. 94, Art. 2 (emphasis omitted). As Ralph McInerney has stated:

that, “other matters of law are ordained to the moral common good.”<sup>43</sup> The notion of the common good that is essential to this discussion might be characterized in the following manner: the good for each person must take stock of the good for the other person—this is indispensable to a proper understanding of human rights that must include a sense of reciprocity in which the Silver Rule<sup>44</sup> [“Do to no one what you yourself dislike”] and the Golden Rule<sup>45</sup> [“Do to others whatever you would have them do to you”] have a role.

Aquinas also considers the common good—a vital element of the natural law thinking that strongly influenced de Vitoria.<sup>46</sup> In the context of Aquinas, the object of justice is to keep people together in a society in which they share not only relationships with one another but relations that are right, i.e., righteous. As he states, “justice is concerned only about our dealings with others.”<sup>47</sup> The notion of justice as being the mutuality or reciprocity shared among the members of society and essential to the dignity of each person was further refined by Aquinas when he argued that “the virtue of a good citizen is general justice, whereby [each person] is directed to the common good.”<sup>48</sup>

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Natural law is a dictate of reason. Precepts of natural law are rational directives aiming at the good for man. The human good, man’s ultimate end, is complex, but the unifying thread is the distinctive mark of the human, i.e., reason; so too law is a work of reason. Man does not simply have an instinct for self-preservation. He recognizes self-preservation as a good and devises ways and means to secure it in shifting circumstances.

Ralph McInerny, *The Principles of Natural Law*, 25 AM. J. JURIS. 1, 5 (1980).

43. SUMMA THEOLOGICA, *supra* note 41, Pt. I-I, Q. 94, Art. 3; *see also id.* Pt. I-II, Q. 95, Art. 1 (discussing human law).

44. *Tobit* 4:15 (New American Bible).

45. *Matthew* 7:12 (New American Bible); *see also Luke* 6:31 (New American Bible).

46. *See, e.g.,* John F. Morris, *The Contribution of Francisco de Vitoria to the Scholastic Understanding of the Principle of the Common Good*, 78 MODERN SCHOOLMAN 9 (2000).

47. SUMMA THEOLOGICA, *supra* note 41, Pt. II-II, Q. 58, Art. 2.

48. *Id.* Pt. II-II, Q. 58, Art. 6. In his first encyclical, *Summi Pontificatus*, Pope Pius XII developed this theme on the eve of the Second World War when he stated that

it is the noble prerogative and function of the State to control, aid and direct the private and individual activities of national life that they converge harmoniously towards the common good. That good can neither be defined according to arbitrary ideas nor can it accept for its standard primarily the material prosperity of society, but rather it should be defined according to the harmonious development and the natural perfection of man. It is for this perfection that society is designed by the Creator as a means.

While legal theorists may express some disagreement about whether moral considerations are to be considered in legal theory (for example, Oliver Wendell Holmes' great critique comes to mind<sup>49</sup>), there is little dispute about the role that reason and objective reasoning have to play in legal theory. Reason and cognitive function have played a crucial role in the evolution of law, and they have been prominent participants in natural law philosophy. Aquinas acknowledges that law may be understood as "an ordinance of reason for the common good, made by him who has care of the community. . . ."<sup>50</sup> Reason—also something of crucial concern to the Neo-Scholastics such as de Vitoria—continues to play an important role in legal theory and practice. Inevitably, the use of reason—reason that is right because it is righteous—leads the legal thinker to the notion of the common good—a principle that supports and reinforces the existence of law that is concerned with the identification and protection of authentic human rights.<sup>51</sup>

What is presented here is only a small portion, i.e., a tip of the iceberg, of the history of legal philosophy and legal theory that pertains to the initiation and development of human rights jurisprudence and the natural law foundation upon which this jurisprudence is built. Thus, my modest contribution is intended to introduce readers to the fact that international law, which is the source of human rights law as we know it today, has a strong foundation in the natural law tradition.<sup>52</sup> Of course, de Vitoria was steeped in this foundation. As Pope Pius XII, a seasoned diplomat of the first half of the twentieth century, notes in his first encyclical, *Summi Pontificatus*,

the new order of the world, of national and international life, must rest no longer on the quicksands of changeable and ephemeral standards that depend only on the selfish interests of groups and

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Pope Pius XII, *Summi Pontificatus* [Encyclical Letter on the Unity of Human Society] ¶ 59 (1939) [hereinafter *Summi Pontificatus*].

49. See Oliver Wendell Holmes, *The Natural Law*, 32 HARV. L. REV. 40 (1918).

50. SUMMA THEOLOGICA, *supra* note 41, Pt. I-II, Q. 90, Art. 4.

51. A review of classical and contemporary writings on natural law will demonstrate the connection between natural law and the common good. This illustration comes out of the adoption of the 1787 Constitution of the United States, and the impact of John Locke. See JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 73 (Thomas P. Peardon ed., 1997) (1690); see also U.S. CONST. pmbl.

52. See J. L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 16–25 (Sir Humphrey Waldock et al. ed., 6th ed. 1963).

individuals. No, they must rest on the unshakable foundation, on the solid rock of natural law and of Divine Revelation.<sup>53</sup>

De Vitoria recognized the wisdom of the natural law, and this is why he saw the pressing need for both European and native peoples to encounter one another in peace so that their families and their lives could prosper in the authentic exercise of self-determination.<sup>54</sup>

Indeed, de Vitoria's training embraced the spirit of St. Matthew's Gospel—to go forth and teach all nations, "baptizing them in the name of the Father, and of the Son, and of the holy Spirit."<sup>55</sup> But he did not see this scriptural exhortation posing a threat to the ordered relationship between native peoples and Europeans. It is evident that de Vitoria asked himself the question: are the native peoples of the newly discovered worlds and who are being engaged by Europeans for the first time willing to accept the faith that I wish to give?<sup>56</sup> This question led him to ask and then answer many more about the status of native people and to explore what might be their due. Some Europeans of de Vitoria's time obviously held the view that the native peoples were not due anything because they were not Europeans; therefore they could be subjugated and enslaved, and their wealth and property could be confiscated. Although others of his more enlightened compatriots thought that while subjugation or enslavement was not proper, they concluded that there was nothing wrong in imposing Christianity upon the native peoples. However, de Vitoria saw things very differently because his perspective was thoroughly permeated by the objective reasoning of the natural law and the existence of human dignity that belongs to all, including the native peoples. His answers to the questions surrounding the status of the native peoples and their due most likely astonished many of his contemporaries. Yet almost half a millennium later, his views still make an extraordinary and necessary contribution to human rights discourse of the present age.

A fundamental assertion that de Vitoria makes in *De Indis* is the fact that the native peoples of the so-called New World are not a savage or subhuman race but are individuals and human persons who, like their fellow Europeans, were created in the divine image of

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53. *Summi Pontificatus*, *supra* note 48, ¶ 82.

54. *See supra* note 10 and accompanying text.

55. *Matthew* 28:19 (New American Bible). De Vitoria quotes this scripture passage at the beginning of *De Indis*. *See DE INDIS*, *supra* note 6, at 233.

56. *See DE INDIS*, *supra* note 6, Q. 2, Art. 4, at 265–72.

God.<sup>57</sup> In short, they had the right to make the same claims based on human dignity as did their European contemporaries. In asserting this claim, they possessed the right to life and to human existence as much as anyone else. This deduction led de Vitoria to other conclusions that were not universally shared by his fellow Europeans. For example, the native peoples had property which could not be removed by force but only by consent.<sup>58</sup> The conclusions he makes about the rights and dignity of the human person helped to establish some principles vital to the foundation of human rights doctrines that would be articulated in the Universal Declaration and then codified in subsequent human rights instruments of the twentieth century. We are in enormous debt to him.

He paved the way for recognition of the *universality* of rights by extending to the native peoples what the “civilized” European claimed as his due. I emphasize the modifier *universality*, which is tied to the *suum cuique*. De Vitoria reached conclusions that were remarkable for his day because they foreshadowed formal declarations about and codifications of the human rights many years later in the twentieth century. In this regard, if principles of the Universal Declaration set in motion elements of human rights doctrine codified in subsequent juridical instruments, then it is the work of de Vitoria that often serves as the springboard for what is contained in the Universal Declaration.

De Vitoria’s perspective is remarkably invigorating on another front in that it does not portray any particular individual or group as being solely victim or victimizer. For example, while critical of some actions taken by some Europeans in the New World, he acknowledges that they have some rights in trying to encounter that which is new to them—in short, the Europeans had a reasonable and justifiable claim to explore and meet new peoples such as the New World and the native peoples that lived there.<sup>59</sup> This is a truth about human nature that is often lost in today’s discourse on rights. Thus, it is important to take stock of how de Vitoria considers the rights of both the native peoples and the Europeans while at the same time acknowledging their respective duties or responsibilities to one another. De Vitoria, in essence, got it: there can be no rights without

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57. *Id.* Q. 1, Art. 5, at 249 (discussing a child bearing the image of God). If the child does, it would seem that the native person would bear God’s image as well.

58. *See id.* Q. 2, at 251–52.

59. *See id.* Q. 3, Arts. 1–2, at 278–86.

attendant responsibilities. What were some of the ways in which he expressed this crucial insight?

We first begin with how he understands the native peoples and whether they are, from his way of thinking, the equals of the Europeans in fundamental and essential ways. De Vitoria concludes that the native peoples are rational human beings quite capable of their own self-determination.<sup>60</sup> Because of this, the native peoples are the masters of their dominions and the owners of the property they use. The European could come to the native not as conqueror but as bearer of things—religion, education, commerce—that could contribute to the lives of the native people *if* they, the indigenous people, so elected.<sup>61</sup> His views may have inspired several popes from the fifteenth through the twentieth centuries when they issued encyclicals urging Europeans and people of European heritage to desist in their enslavement of native peoples.<sup>62</sup>

While it would be permissible for the Europeans to claim and secure uninhabited territories for the sovereign back home, the European explorer could *not* dispossess the natives of their lands, their culture, and their way of life in the name of an alleged superior civilization. Some Europeans thought otherwise, but de Vitoria did not. Doing so would be akin to the error identified by Pius XII in his encyclical *Summi Pontificatus* when he declared:

[I]t is indispensable for the existence of harmonious and lasting contacts and of fruitful relations, that the peoples recognize and observe these principles of international natural law which regulate their normal development and activity. Such principles demand

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60. See *id.* Q. 1, at 250–51; *id.* Q. 3, Art. 6, at 288–89.

61. See *id.* Q. 3, Art. 2, at 284–86.

62. See, e.g., Pope Paul III, *Sublimus Dei* ¶ 4 (1537), available at <http://www.papalencyclicals.net/Paul03/p3subli.htm> (on file with the Ave Maria Law Review). While noting that Christians were encouraged by Jesus to “Go ye and teach all nations,” he stated that in any missionary activities, Christians must acknowledge that “the Indians are truly men and that they are not only capable of understanding the Catholic Faith but, according to our information, they desire exceedingly to receive it.” The Pope hastened to add that, “the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property . . . that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and have no effect.” *Id.* Other popes reiterated the concerns of Paul III during their pontificates. For example, in 1435, Eugene IV condemned the slave trade occurring in the Canary Islands; subsequent popes such as Urban VIII (Bull of April 22, 1639), Benedict XIV (Bull of December 20, 1741), and Gregory XVI (Constitution Against the Slave Trade, November 3, 1839) did the same. For a collection of these documents, see JOHN EPPSTEIN, *THE CATHOLIC TRADITION OF THE LAW OF NATIONS* 418–26 (1935).

respect for corresponding rights to independence, to life and to the possibility of continuous development in the paths of civilization.<sup>63</sup>

A second very important point is de Vitoria's declaration on the universality of rights.<sup>64</sup> In defense of this position, he relied on the scriptural account of Jesus telling the lawyer the parable of the Good Samaritan and responding to the question: "who is my neighbor?"<sup>65</sup> As de Vitoria notes, the response to the lawyer's question of "who is my neighbor?" is this—everyone is my neighbor.<sup>66</sup> In this, we also see the relational aspect of rights which de Vitoria knew was essential to their sustainability.

A third crucial point advanced by de Vitoria focuses on the issue concerning the relation between the native and the alien.<sup>67</sup> If people are peace-loving, they are entitled to call some place of their choosing home. Within this discussion, de Vitoria offers his views on the freedom of movement of one person into the territory of another. Assuming that the traveler has no ill purpose in mind, the ability of the traveler to enter and meet and deal with the local peoples was another of the rights supported by natural reason. Thus, he identified the legitimacy of peaceful exploration of the Europeans.<sup>68</sup> Once again taking account of the times in which he lived and wrote, de Vitoria articulates clearly the notions about human rights and obligations of every person that are widely acknowledged today in relevant human rights instruments.

The concept of "self-determination" is important to natural law theory. It also enjoys a protected status in the world of international law.<sup>69</sup> It is a notion that synthesizes the interests of the individual and relates them to those of the community.<sup>70</sup> The interests of both converge on the ability of individuals to exercise their selections about how they wish to live their lives and to be free from the interference

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63. *Summi Pontificatus*, *supra* note 48, ¶ 74.

64. *See* DE INDIS, *supra* note 6, Q. 3, Art. 1, at 279.

65. *Luke* 10:25–37 (New American Bible).

66. *See* DE INDIS, *supra* note 6, Q. 3, Art. 1, at 279.

67. *See id.* at 278–79.

68. *See id.*

69. For helpful background discussion about "self-determination" as a right encompassing the practice of self-government, see Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1 (1993).

70. For a current and careful examination of "self-determination" as principle and right, see ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 141 (1995).



and imposition of others.<sup>71</sup> Professor Brownlie has noted the overlap of interests between the individual and the identifiable group.<sup>72</sup> He defined self-determination as “the right of cohesive national groups (‘peoples’) to choose for themselves a form of political organization and their relation to other groups.”<sup>73</sup> It is vital to note here that these ideas were emphasized time and again by de Vitoria in his advocacy for the rights of the native peoples whom the Europeans could encounter in peace and brotherhood but not in efforts to subjugate or enslave.<sup>74</sup>

This Catholic voice of the Neo-Scholastics is certainly a part of our legal discourse today concerning the importance and role of human rights. But it is challenged by other views that are purely of human origin, an origin that does not go beyond the self which made it. In one sense the self can turn to the voice of the surrounding culture. But what happens when that culture is riddled with error—error that belittles or denies the rights which belong to every person created in God’s image.<sup>75</sup> One does not have to think too long or too hard about those legal cultures that were based not on the transcendent principles inscribed on the human heart and discoverable by the natural reason of the mind, but, rather on human whim and caprice. That which is purely of human origin can be flawed. However, the refreshing tonic that can make the world a better place for not just some but all remains within our grasp—especially if we ponder the wisdom of individuals like de Vitoria. He has shown the way; let us acknowledge our debt to him.

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71. See generally Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992).

72. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 599 (5th ed. 1998) (“It is not necessarily the case that there is a divorce between the legal and human rights of groups, on the one hand, and individuals, on the other.”).

73. *Id.* Brownlie continues by stating, “The choice may be independence as a state, association with other groups in a federal state, or autonomy or assimilation in a unitary (non-federal) state.” *Id.* As Professor Cassese has pointed out, “there is no self-determination without democratic decision-making.” CASSESE, *supra* note 70, at 54.

74. See DE INDIS, *supra* note 6, Q. 1, Art. 1, at 239–40.

75. See *Genesis* 1:27 (New American Bible).