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ON RIGHTS:
A DEFENSE AND ANALYSIS OF RIGHTS
THROUGH NATURAL LAW

by

RAMON E. LOPEZ

A thesis submitted in partial fulfillment of the requirements
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Abstract

One of the central questions in political theory deals with the nature of rights. What sorts of rights do people possess? How are these rights justified? How ought these rights be reflected and related when seen in political, economic, and social institutions? Following the publication of John Rawls' *A Theory of Justice* (1971) and Robert Nozick's *Anarchy, State, and Utopia* (1974), rights have once again returned to dominate much of contemporary political theory. However, natural law, which was the historical basis of the early Enlightenment theories of rights, is no longer the primary system appealed to when discussing rights. In fact, classical natural law has been all but discarded in most of political theory today.

There has also been renewed debate over the nature of public neutrality, and what the relationship ought to be between the public and private sphere. The mainstream view of how our liberties relate to our rights, as well as what kinds of rights we have over our private affairs, has come under fire from a newly emerging political philosophy known as communitarianism. This thesis will present a robust theory of rights that provides a new understanding of the relationship between positive and negative rights through a defense of classical natural law as an ethical foundation for political theory. It will side with the communitarian critics of public neutrality, and offer a practical method of determining when the state is justified in limiting private liberties due to public interest.

Dedication

For my mother, my inspiration. Thank you for always believing in me.

For my father, my role model. Thank you for always pushing me.

For my sister, my best friend. Thank you for always being there for me.

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Introduction

In 1948, in the shadow of World War II, the newly-formed United Nations adopted the *Universal Declaration of Human Rights*, proclaiming the “recognition of the inherent dignity and...the equal and inalienable rights of all members of the human family,” with its first article affirming that, “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” (“Universal Declaration of Human Rights”).

This declaration did not arise from within a vacuum; it can be seen as the culmination of hundreds of years of evolving perspectives concerning the nature of rights. The *Declaration of the Rights of Man*, and before it the *Bill of Rights* and *Declaration of Independence* have each affirmed that there exist certain rights and guarantees that ought to be afforded to all persons, regardless of social, cultural, political, or economic standing. While contemporary notions of rights are primarily rooted in Enlightenment political philosophy, the concept of fundamental human rights is not unique to that time period or civilization. Peoples across the globe and living in different eras and with different cultures have expressed that there are certain eternal moral duties we owe other persons simply due to their humanity.

There is something intuitively attractive about natural rights; implicit in its belief is the recognition of a basic dignity and the intrinsic worth possessed by every single human being. But while the language of rights may be compelling, powerful enough to fuel revolutions and found new states, we must step back and determine whether such statements are warranted. If natural rights are to be more than a foundation myth or cultural comfort, they must be justified.

Even with the idea of human rights pervading our cultural consciousness, in many areas of political philosophy the language of rights has been lost. Utilitarianism's dominance in the 19th and early 20th centuries within political philosophy limited rights to merely being guarantors of maximal utility, with Jeremy Bentham famously declaring "Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense – nonsense upon stilts" (Bentham).

With utilitarianism losing its standing in political philosophy during the latter half of the 20th century, many contemporary political theorists developed contractarian theories, the most famous of which being John Rawls' *A Theory of Justice*. The issue with these sorts of theories is that their use of "rights" is hollow, being based in individual preference or mutual agreement, as opposed to moral truths rooted in human nature. These are inadequate groundings for rights and are incapable of making sense of our moral intuitions, and later in this thesis I will expand upon this criticism regarding contractarian political theories.

Finally, there are some who see human rights as a cultural expression without any basis in reality. For them, there can be no objective ethical foundation for rights, with moral statements such as "good" or "bad" only denoting the approval or disapproval of the agent making the statement. If this perspective were to be true, it would have enormous implications on our justification of government, domestic and foreign policy decisions, as well as how we interact with other people within society.

In the first three chapters of this thesis I will review the history of and demonstrate the basis for natural law. In the West, natural law was the justification for most natural right theories throughout the early Enlightenment, and its origin can be traced back to Plato and Aristotle. While natural law became less influential in political philosophy in the 19th and early 20th centuries, being primarily relegated to Catholic ethical philosophy and legal theory, over the past few decades it has seen a resurgence in ethics and philosophy of law. Natural law theorists believe in an objective moral law rooted in human nature, one that is rationally accessible and defensible. I will argue in favor of classical natural law theory, one rooted in Aristotelian-Thomism, and from this basis work toward defining which sorts of rights and liberties may be seen as justified.

Because of its power, we can see the language of rights used on a daily basis. Understanding whether we have rights, and if so, where they originate, is vitally important, as their discussion is not just relegated to the academic sphere. Politicians, pundits, and journalists debate whether healthcare, welfare, property, speech, abortion, and a multitude of other related and unrelated goods can be seen as rights or not. How broadly can rights be extended? What sorts of moral responsibilities do we hold toward other persons? How do different kinds of rights relate to one another? The very basis for politics is rooted in questions concerning rights, and so rights can justifiably be seen as the foundation for any theory of justice. In the last two chapters I will deal with these questions, as well as develop a principle to determine what liberties exist within this framework of rights.

Literature Review

As a central aspect of political philosophy, rights have been the subject of numerous and far-reaching works. The two most influential contemporary books concerning rights are John Rawls' *A Theory of Justice* and Robert Nozick's *Anarchy, State, and Utopia*. Because of their importance I will address Rawls' egalitarian theory and Nozick's libertarian theory, though will spend more time on the former than the latter. Additionally, I will use communitarian and conservative political theory to critique the Enlightenment basis of both books, heavily relying on arguments made by Michael Sandel, Alasdair MacIntyre, and Leo Strauss.

Influencing my own ideas are contemporary works on natural law and natural rights, such as Christopher Wolfe's *Natural Law Liberalism*, Henry Veatch's *Human Rights*, and Edward McLean's *Common Truths*. Helping form the ethical basis for my arguments are Philippa Foot's *Natural Goodness* and Peter Geach's *Good and Evil*, while my historical understanding of natural law's development is rooted in Leo Strauss' *Natural Right and History* and Lloyd Weinreb's *Natural Law and Justice*. Additionally, ideas found in Aristotle's *Nicomachean Ethics* and *Politics* will be used extensively in this thesis, laying the foundation for my definition of the human good and the political life.

Important historical works in theories of rights that I will use throughout this thesis include Thomas Hobbes' *Leviathan*, John Locke's *Second Treatise of Government*, Rousseau's *Social Contract*, Immanuel Kant's *Fundamental Principles of the Metaphysics of Morals*, and Thomas Hill Green's *Lectures on the Principles of Political Obligation*. I will also make use of the conflicting theories of liberty laid out in John Stuart Mill's *On Liberty* and Patrick Devlin's *The Enforcement of Morals*, while bolstering my understanding of the conflict through Isaiah

Berlin's *Liberty*. Finally, I will be heavily relying on Azar Gat's *War In Human Civilization* to develop my anthropological understanding of human nature and Robert Axelrod's *The Evolution of Cooperation* to build upon it using game theory.

Summary of Coming Chapters

Chapter One: Natural Law is a brief introduction to natural law, reviewing its history and basic tenets. It is broken up into three sections titled *In Search of Ontology*, *Classical Natural Law*, and *Natural Right and New Natural Law*. The first section is a call for a return to a political discussion of the nature of morality and truth. Too often modern political thought has been beset by moral and ontological relativism, and if we are to truly engage in the political life and political philosophy, we must reject these concepts as they prevent us from reflecting upon either. The next two sections divide natural law into three broad categories while analyzing how each tradition emerged and identifying the one being defended in this thesis.

Chapter Two: The Human Good deals with the questions left from the first chapter. If there is a natural law, where does it come from? How do we know it? The first section, *Defining Goodness*, attempts to resolve these questions. The next two sections, *Human Nature* and *Teleonomy* deal with responding to criticisms some may have due to the teleological nature of the ethical perspective presented. In them, I argue for an objective, knowable human nature, as well as a neo-Aristotelian understanding of biology. This chapter is significant, as it establishes the moral basis for rights and more strictly defines what is meant by "natural law," setting the stage for the three following chapters.

Chapter Three: The State of Nature uses a number of different disciplines and subjects to gain a better understanding of human nature and what sorts of moral imperatives may be derived from that nature. The first section, *War in the State of Nature*, deals with whether war is a necessary part of human nature, for if it was it could cause intuitive problems for this thesis, as the arguments made are founded upon the idea that fulfilling human nature is what is morally good. The next section, *Enlightened Self-Interest and Fraternity*, argues against the ego-centered conception of how the individual relates to society and seeks to propose a more communal understanding of that relationship. Finally, *Evolutionary Reasons for Virtue* provides a robust account of what sorts of moral goods can be derived from human nature through evolutionary biology and game theory. It also establishes what I call “natural virtues,” which is an important concept that is expanded on in the following chapter.

Chapter Four: On Rights presents a new conception of the relationship of rights based on the foundations laid out in the previous three chapters. In *Negative and Positive Rights*, I explain the difference between the two kinds of rights, as well as review John Rawls’ egalitarian theory and Robert Nozick’s libertarian theory in relation to these concepts. In *A Parabolic Relationship of Rights*, I continue to detail Rawls and Nozick’s theories, as well as present my own theory after critiquing theirs. The chapter ends with *Inalienable and Social Rights*, which distinguishes these two different categories of rights that exist as a special class within negative and positive rights.

Chapter Five: On Liberty, the last chapter in this thesis, reviews what sorts of liberties can be actualized based upon these principles. *Negative and Positive Liberty* elucidates the complex relationship between these two kinds of liberty, as well as proposes a new way to look at liberty. It is followed by *The Private and Public Good*, which recounts John Stuart Mill and

Patrick Devlin's arguments for how public interests ought to manage private decisions before presenting a reformulated version of Mill's no harm principle. The last question that I attempt to deal with concerns itself with some of the critiques Devlin levels against Mill, and in *Public Neutrality or Public Values?* I am concerned with whether moral values can be expressed by the state in the public arena.

Natural Law

In Search of Ontology

A true understanding of politics can only begin with philosophy. Politics aims at the just; thus, we must have an understanding of justice. Politics calls for freedom; thus, we must have an understanding of liberty. Politics calls certain goods rights; thus, we must have an understanding of what makes a thing a right. While other disciplines can and ought to inform these judgments, ultimately they must be founded in a philosophic framework. Pure pragmatism is a hollow understanding of the political life and misses the purpose of politics. It is dangerous, for there are no normative limits that restrict its drive for efficiency, and yet is at the same time self-refuting, for while it rejects philosophy it relies on certain philosophic assumptions when prescribing a value to that efficiency.

Political theory cannot help but begin with philosophy. Indeed, as Leo Strauss pointed out, the development of political thought is conditional upon the development of philosophy (“Natural Right and History”¹ 81-82). Without philosophy, politics is mere myth. It is rooted in a deification of ancestral customs and laws without reflection as to their justification. Philosophy

¹ From here on “NRH”

emerged in ancient Greece when great thinkers questioned these traditions, and its allegiance is to *physis* (nature) rather than *nomos* (convention).

This was only possible due to the development of the concept of “nature,” with Strauss claiming that “philosophy as distinguished from myth came into being when nature was discovered, or the first philosopher was the first man who discovered nature” (“NRH” 82). Aristotle went so far as describing philosophers as “men who discoursed on nature” (qtd. in Strauss, “NRH” 82). To understand the nature of a thing is to understand how it actually is. It is to become what Strauss calls “trans-historical, trans-social, trans-moral, and trans-religious” (“NRH” 89). It is to move beyond opinion, belief, custom, and authority and attain truth. Through philosophy, Man can, “start to replace the arbitrary distinctions of things which differ from group to group by their ‘natural’ distinctions” (“NRH” 87).

Such a view is revolutionary. No longer must persons be slaves to the social arrangements in which they are born. Rather, reason can be used to recognize the nature of justice and freedom and rights. Debate can be had, unlike with myth, for myth creates atomized and incommensurable belief systems. With nature comes philosophy, and with philosophy comes the ability to participate in a rational dialectic, which is at the core of true politics. Politics is the communal aim toward the good, and so nature must be accessible and debatable in order to understand the essence of this good.

This attitude seems to have been lost in much of contemporary political philosophy. Indeed, it seems as if politics has moved from being seen as Man’s highest virtue to simply a procedural activity. Most contemporary theories of rights and justice arise through a social contract, through an agreement between persons that is unrelated to any sort of objective understanding of the nature of goodness.

Politics has become nothing more than a framework through which we select the most desirable public outcomes. Even discussions of justice have become rooted in preference, with Rawls' original position and veil of ignorance being merely tools by which we can determine what our most basic intuitions and desires may be, separate from particular experiences and biases. The true art of political life has been sacrificed in exchange for mechanistic institutions. And with this sacrifice comes the loss of the ability to engage in a serious discussion about the fundamental purpose of politics.

Strauss's analysis of Plato's *Republic* helps us understand why modern political philosophy is unable to effectively communicate within itself. Strauss disagrees with the more literal interpretations of the *Republic*, which state that Plato was in fact seeking to create a benevolent dictatorship with a philosopher at its helm. Instead, Strauss claims that Plato was actually arguing that, before any discussion of politics can begin, and before we move to the creation of political institutions, we must first agree upon ontology, upon nature, as philosophy is prior to politics ("History of Political Philosophy" 27-41).

If we do not begin by establishing a consensus as to what the good is, politics will devolve into distinct philosophic groups, each with its own ontology, talking past each other and incapable of coming to a basic understanding. Only once ontology is agreed upon can the work of politics begin. Whether this is indeed what Plato meant in the *Republic* or not is irrelevant – Strauss' point, the need for a common ontology, offers a poignant critique and demonstrates why it seems that much of modern politics consists of self-sufficient ideologies incapable of effectively relating to one another. It is for this reason that Alasdair MacIntyre proclaims that "Modern politics is civil war carried on by other means" (253).

Thus, this thesis must begin by establishing a cogent ontology. Political debate cannot begin with a debate on politics, but with one on metaphysics and ethics. Without such a debate, discussion is useless, and politics once again falls into myth. Without completely realizing it, it seems that by removing moral objectivity contemporary philosophy has returned to myth. Mythological thought experiments are devised to demonstrate how real world institutions ought to be constructed, rather than first investigating what the good is and then working toward advocating a system of justice based on that understanding. Debate is impossible, just as with myth, when preference, rather than moral truth, seems to dictate our political inclinations. Contemporary political philosophy has performed an about-face, aligning itself with *nomos* over *physis*, with the conventional over the natural. Just as mythology is without reason, so too is preference, with Strauss pointing out, “Orientation by pleasure becomes the first substitute for the orientation by the ancestral” (“NRH”109).

While getting too caught up in metaphysics and ethics would ultimately go beyond the scope of this thesis, potentially being a thesis of its own, I feel it necessary to tread the waters of more abstract philosophic concepts before discussing the nature of rights. Politics cannot begin without first investigating philosophy, and so a cogent metaethical basis must be established before moving onto discussing more concrete political principles. This first chapter is devoted to establishing the modern tenability of natural law, which, though the original basis of Enlightenment political philosophy, has been all but abandoned in contemporary discussions on the subject.

Classical Natural Law

Different interpretations of natural law can be seen in various cultures and peoples across the globe. The tradition that contemporary political philosophers and ethicists are most familiar with however, is the one developed in ancient Greece, Rome, medieval and early modern Europe. While cultural familiarity may be part of the reason for this, it is also because most see the European tradition of natural law as the most developed and philosophically defensible version.

Natural law is a concept that originally developed within Ancient Greek culture. It was rooted in the Greek concept of *kosmos*, or order, wherein the universe was seen as expressing particular normative laws. These were expressed by *moria* (fate), which can be crudely described as desert, and *dike* (justice), which can similarly be described as entitlement (Weinreb 15). Under *moria*, people were seen as deserving certain punishments based on their actions or the actions of their forebears, while according to *dike* society was seen as having the responsibility to entitling its citizens to certain protections and laws. The need to fulfill *moria* and *dike* were seen as necessary, as each were expressions of objective natural laws. These moral imperatives were just as natural as the laws of science or mathematics, as the universe always acted in a way that was in accordance with reason. Morality is the normative expression of this natural dictate of reason, and in order to live well and not be punished by the *kosmos*, one had to obey certain imperatives.

In *Natural Law and Justice*, Lloyd Weinreb points to the Homeric epics as reflecting a belief in natural law that already existed within Greek culture. In a famous line of the play *Antigone*, Antigone defends violating her father's decree that her brother would not receive

proper burial rights and be left as “a dinner for the birds and for the dogs” (qtd. in Weinreb 22) by appealing to a higher law:

...For me it was not Zeus who made that order.
Nor did that Justice who lives with the gods below
mark out such laws to hold among mankind.
Nor did I think your orders were so strong
that you, a mortal man, could over-run
the gods' unwritten and unfailing laws.
Not now, nor yesterday's, they always live,
and no one knows their origin in time.
So not through fear of any man's proud spirit
would I be likely to neglect these laws,
draw on myself the gods' sure punishment (qtd. in Weinreb 22).

Weinreb observes that the conflict between Antigone and her father is often seen as a personification of “the conflict between morality and law or between natural law and positive law” (Weinreb 23). She had a moral duty to act in accordance with this unwritten law, regardless of the consequence, and by violating the law her father eventually brings about his own downfall, proclaiming, “Take me away at once, the frantic man who killed my son, against my meaning. I cannot rest. My life has warped past cure. My fate has struck me down” (qtd. in Weinreb 22).

While the Ancient Greeks saw the natural law as the expression of the divine, their interpretation of this belief cannot be so simply understood as a version of divine command theory. The natural law is derived from divine law, which itself is an aspect of the rational ordering of the universe.

The relationship between natural law and the gods can be more easily analogized to Thomas Aquinas' understanding of the relationship between natural law and eternal law. Eternal law is the law that orders the universe in a rationally intelligible way; it is similar to what the Greeks meant by *kosmos*. While the eternal law – and the *kosmos* – are reflections of God's (or the gods') nature, this does not necessarily bind natural law to a deity. For the ancient Greeks, and for Aquinas, even the laws of logic, mathematics, and science were derived from the eternal law. God was simply the first cause of the universe, and if we were to accept that the universe could come into being without Him, all the necessary laws that order the universe would still exist, including natural law. As the later natural law theorist Hugo Grotius observes, "What we have been saying [about natural law] would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to him" (qtd. in Miller).

Aristotle is often seen as the intellectual foundation of natural law, though he never explicitly uses the term. In the *Rhetoric*, he references *Antigone*, stating,

...Universal law is the law of Nature. For there really is, as every one to some extent divines, a natural justice and injustice that is binding on all men, even those who have no association or covenant with each other. It is this that Sophocles'

Antigone clearly means when she says that the burial of Polyneices was a just act in spite of the prohibition: she means that it was just by nature (48).

Aristotle's ethics forms the basis for what has been broadly referred to within the natural law tradition as Aristotelian-Thomism, what I will call "classical natural law," though it has also been referred to as "ontological natural law" (Weinreb 4). Classical natural law can be roughly separated from the two other broad natural law traditions that followed it: natural right and new natural law. Aristotle understood ethics to be integrally related to being, with the goodness or badness of a particular entity being wholly related to what sort of thing it is. Aristotle claimed that, to determine what sort of life is the best life, we must first, "ascertain the specific function of man. For just as for a flute-player, a sculptor, or an artist, and, in general, for all things that have a function or activity, the good and the 'well' is thought to reside in the function, so would it seem to be for man, if he has a function" ("Nichomachean Ethics"15).

Man's nature forms an eternal moral law that can then be discovered through the use of right reason. Cicero, the first to truly formalize this doctrine, describes the natural law as such:

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoings by its prohibitions.... Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment (197).

This understanding of natural law was expanded upon by subsequent Roman and medieval philosophers, but can be seen as being completed by Thomas Aquinas. Aquinas defines law, and thereby the purpose of politics, to be “an ordinance of reason for the common good, made by him who has care of the community, and promulgated” (Aquinas).

As with all other things that exist, Aquinas believed humans to have a “natural inclination” (Aquinas), one that was rooted in the kind of thing we are. However, as humans are rational creatures, this inclination went from a “must” as seen in other living creatures to an “ought.” It is part of the nature of the bear to hibernate; for humans, we must *choose* to fulfill the natural law. This causes us to become moral agents, as choice is needed for something to be a moral actor.

Such an understanding of natural law necessitates a clear understanding of being, with Aquinas adopting Aristotle’s essentialism. Humans have a rational nature and thus ought to use this reason to determine the best sorts of ends. According to Aquinas, we can then determine what ends are justified by looking toward scripture, which reflects divine law, or human nature, which reflects natural law. He then distinguishes human law from these universal norms, understanding it as the Greeks understood *nomos* – as a custom or socially contractual arrangement.

The importance of being to classical natural law cannot be overstated. Grotius, one of the few Enlightenment-era natural law theorists who can be seen as representing this tradition, observes that, “the mother of right — that is, of natural law — is human nature” (qtd. in Miller). Fulfilling our natural inclinations, our nature, is what it is to live well and virtuously, and thus a robust analysis and defense of human nature must be made. Because the natural law “proceeds from the essential traits implanted in man” (Grotius qtd. in Miller), classical natural law is more

prone to attacks based on the fact/value distinction and is-ought dilemma than other versions of natural law.

Classical natural law did not survive long after Aquinas. Weinreb observes that, following the emergence of national states and power politics, “The philosophic controversies of the later Middle Ages may seem to be about arcane abstractions without significance” (Weinreb 64). And with the arrival of the Enlightenment, natural law was changed further, evolving into a different sort of natural law tradition. What I will be calling “natural right” was first articulated by Thomas Hobbes in the *Leviathan* and formed the basis for most early modern political philosophy. However, it sowed the seeds for natural law’s decline as the dominant theory in ethical and political philosophy due to its rejection of certain basic tenants of classical natural law, leading to the rise of contractarianism and utilitarianism.

Natural Right and New Natural Law

Unlike classical natural law, natural right had no necessary allegiance to Aristotelian essentialism. In fact, much of Hobbes’ political philosophy can be seen as a rejection of Aristotle. Here, natural right distinguishes itself from the classical understandings of natural law by denying the social aspect of Man. In *De Cive*, Hobbes rejects society as an integral aspect of what it is to be human, instead claiming that we do not “by nature seek Society of its own sake, but that we may receive some Honor or Profit from it” (13).

For Hobbes, natural law becomes limited to a “law of nature,” namely “That every man, ought to endeavor Peace, as farre as he has hope of obtaining it; and when he cannot obtain it,

that he may seek, and use, all helps, and advantages of Warre” (“Leviathan” 72). Hobbes believed all people to be governed by self-interest, which is the ultimate basis for his natural law. For classical natural law theorists, what fulfilled one’s nature was seen as moral. Because humans are rational animals, using reason to choose properly valued ends became the basis for the natural law. But because Hobbes rejects a normative view of action, at least within the state of nature, reason becomes purely instrumental, as opposed to an expression of an intrinsic moral good.

From Aristotle to Aquinas, fulfilling natural law’s moral imperatives was seen as intrinsically valuable, and in order to reflect the principles of justice states were obligated to create laws that reflected these abstract moral truths. But Hobbes changed the paradigm, writing that any law of nature was a purely descriptive activity and that, by understanding it, we could create the best sort of society possible. The laws of nature show us that each person will act in their own self-interest, leading to a state of war, a state that is ultimately against everyone’s interest (“Leviathan” 69). This was a more individualistic, ego-centered natural law, where one would not look to human nature, but abstract about “laws of nature” that reflected humanity’s selfishness. Thus a social contract must be formed, not in order to pursue public virtue, but in order to fulfill the individual’s desires.

Strauss points out that through this understanding of natural law, “justice appears to be derivative from selfishness and subservient to it” (“NRH” 107). Hobbes seems to channel more Epicurus in his natural law than Aristotle, with Epicurus having said, “The right [or the just] of nature is a *symbolon* of the advantage deriving from men’s not harming each other and not being harmed” (qtd. in Strauss “NRH” 111). Natural rights are simply abilities that we naturally make use of within the state of nature based on our self-interest. Hobbes’ natural law roots the law in

the will of Man, in our will to survive and live pleasantly rather than to die or live unpleasantly. It is this sort of modern interpretation of natural law that Strauss critiques, stating that “Traditional natural law is primarily and mainly an objective ‘rule and measure,’ a binding order prior to, and independent of, the human will, while modern natural law is, or tends to be, primarily and mainly a series of ‘rights,’ of subjective claims, originating in the human will” (“The Political Philosophy of Hobbes” vii-viii).

Hobbes radically departs from the classical natural law tradition in that he claims that man is neither a social nor political animal. The state, and society itself, are not integral expressions of human nature, as in classical natural law doctrine, but rather are groupings of individuals based on mutual self-interest. Classical natural law describes the state as, “exist[ing] by nature, since the first associations did too,” and sees, “this association [as humanity’s] end” (Aristotle, “Politics” 2-3). Instead of being an end, the state is a means by which Man can leave the brutality of the state of nature and construct civilization. It is for this reason that state of nature thought experiments dominate natural right theories and yet are seldom seen in classical natural law. However, because it begins in a state of nature, natural right can be seen as a bridge between natural law and contractarianism. Indeed, contractarian ideas were necessary to natural right theories in explaining the emergence of the state, as the state was not “natural,” and over the course of the Enlightenment contractarianism eventually replaced the doctrine that had brought it to prominence.

The final important difference between Hobbes and previous natural law doctrines is his rejection of teleology. With the rise of non-teleological physics and biology, much of science by Hobbes’ time had abandoned the notion of a *telos*, and its influence upon Hobbes’ writing is evident. Without some natural end to which Man ought to attain, Hobbes saw the ought as

simply the function of desire; we ought to, and in fact do, act in accordance with our preferences and interests (“Leviathan” 69).

While Locke is often contrasted with Hobbes, and there are numerous points of disagreement, he ultimately lies within the Hobbesian natural right paradigm because of his understanding of right. Hobbes roots all rights in self-preservation, and this is also the reason Locke gives for Man having left the state of nature. While Locke does describe the state of nature as “a state of perfect freedom” (“Selected Political Writings”² 18) this utopian vision is undone by conflict between different men’s interpretations of the laws of nature, and by their retribution of real or perceived wrongs.

Thus, we are eventually driven from the state of nature by fear and the desire for self-preservation, for the “enjoyment of [our rights are] very uncertain, and constantly exposed to the invasion of others” (“SPR” 72). Locke even follows Hobbes’ Epicurean view of morality, stating that, “Things then are good or evil, only in reference to pleasure or pain. That we call good, which is apt to cause or increase pleasure, or diminish pain in us; or else to procure or preserve us in the possession of any other good or absence of any evil. And, on the contrary, we name that evil which is apt to produce or increase any pain, or diminish any pleasure in us” (“Essay Concerning Human Understanding” 216). Unlike classical natural law theorists, Locke hardly mentions being, and the only objective moral laws come into place because of his assertion that we are each the property of God.

The major difference between the Hobbes and Locke is therefore the place God has in their respective states of nature. For Hobbes, God is irrelevant, thus leading to a purely descriptive and ego-based understanding of rights. There are no normative limits to the sort of

² From here on “SPR”

state that can come about through the contract, as the state must simply protect the people from the fear and brutality that characterized the state of nature. Locke on the other hand, by including God, adds a normative understanding to our natural rights. Rather being a descriptive analysis of what we desire, Locke adds a moral dimension to the laws of nature by claiming them to be expressions of divine law. We do not simply desire to not be harmed, for because we are each property and creations of God if another were to harm us it would be an act of immorality. This allows him to declare that morality *does* precede the state, and that in order to be just the state must recognize certain inalienable rights. However, such moral claims cannot be investigated by understanding Man's nature, as with classical natural law. Rather, Locke's ethical basis for rights is firmly rooted in his own interpretation of divine command theory, wherein it is immoral to infringe upon the rights of other persons because they are the property of God.

While Locke, unlike Hobbes, creates a moral framework within which a state must reside, it is one of natural right as opposed to natural law for two reasons. The first, as already described, is that it is created out of the desire for self-preservation. There is no higher reason for the state, and, "The great and chief end, therefore, of men uniting into commonwealths, and putting themselves under government, is the preservation of their property; to which in the state of Nature there are many things wanting" ("SPR" 72).

This can be seen in stark contrast to Aristotle's assertion that, "A state is not a mere society, having a common place, established for the prevention of mutual crime and for the sake of exchange...Political society exists for the sake of noble actions, and not of mere companionship" ("Politics" 44). An integral aspect to classical natural law is the sociability of man, and the constitutive role this plays in our nature. Man is not seen as being able to flourish without the political life, and so classical natural law is far more interested in the promotion of

that flourishing through the maintenance of virtues, rather than the defense of rights in order to maintain liberty, as natural right does. The individualism of the Enlightenment, due to the deification of each person's capacity toward reason, is what helped morph classical natural law into natural right.

The second reason Locke joins Hobbes as a natural right theorist as opposed to classical natural law theorist is derived from the first. Natural right, as its name implies, is concerned with *rights* as opposed to *duties*, with liberty as opposed to virtue. It is an early modern ancestor of the proceduralism Sandel has criticized in modern liberalism, for it creates procedures based on rights but refuses to consider endorsing a particular conception of the good life (“Democracy’s Discontent” 24). For Locke, “The business of laws is not to provide for the truth of opinions, but for the safety and security of the Commonwealth, and of every particular man's goods and person” (“SPR” 153). The law’s purpose is not to help mold great citizens or lead to a flourishing populous, but to create enough protections so that each member of society can independently pursue his or her own conception of the good life. Natural right is non-teleological because it does not see a natural end to which the citizens of a just society ought to strive. Rather, there is only a proceduralist framework that protects each member of society from harm, as such procedures reflect the rights we possess.

Public neutrality is essential to liberal enlightenment political philosophies, and is radically different from the way in which the ancients envisioned laws. Pre-Enlightenment political philosophy focused on maximizing virtue, while post-Enlightenment political philosophy focused on maximizing liberty. Without a focus on public virtue, Locke’s natural law is reduced to natural right, outlining a negative framework but leaving citizens to act independently in most everyday affairs.

While natural right reigned as a dominant political philosophy through the early Enlightenment, it increasingly came under attack. Its defense of a proto-preference-based morality and contractarianism eventually helped to give rise to two competitors: utilitarianism and contractarianism. Hume's is-ought dilemma led to a weakening of natural law, and the tradition was seen as largely sputtering out with Kant and his defense of radical freedom.

Recently, there has been a small revival in the study of natural law, begun by John Finnis' book *Natural Law and Natural Rights*. In it, Finnis develops what he calls "new natural law," a purely deontological and completely non-ontological reinterpretation of Thomas Aquinas. According to Finnis, there are "basic values of human existence" or "basic forms of human good" (85-90). These are fundamental, self-evident human goods that are integral to living a good life. Reflecting upon these goods is a non-inferential activity, needing no analysis of function, nature, desire, or thought experiments, as with classical natural law and natural right. Rather, Finnis develops methodological requirements needed to categorize certain things as basic goods, which can then be discovered through *a priori* reasoning. Because new natural law deals with self-evident moral truths, it is able to avoid classical natural laws' is-ought dilemma.

Based on this method, Finnis identifies seven basic goods: life, knowledge, play, aesthetic experience, sociability, practical reasonableness, and religion (86-90). From these basic goods Finnis argues that we can derive legal, moral, practical, and political values. Life, for example,

...signifies every aspect of the vitality (*vita*, life) which puts a human being in good shape for self-determination. Hence, life here includes bodily (including cerebral) health, and freedom from the pain that betokens organic malfunctioning

or injury. And the recognition, pursuit, and realization of this basic human purpose (or internally related group of purposes) are as various as the crafty struggle and prayer of a man overboard seeking to stay afloat until his ship turns back for him; the teamwork of surgeons and the whole network of supporting staff, ancillary services, medical school, etc.; road safety laws and programs; famine relief expeditions; farming and rearing and fishing; food marketing; the resuscitation of suicides; watching out as one steps off the kerb... (86)

So far new natural law theory has seen only a limited application to political philosophy (most notably by Robert P. George), having a greater effect on legal philosophy and ethics. However, it is important to note that in the latter half of the 20th century there has been a revival of natural law theory. More importantly, there has been a revival of Aristotelian ethics, metaethics, and teleology, which can help to provide a foundation for a return to classical natural law.

While I have my disagreements with natural right and new natural law, going in depth in my critique would go beyond the scope of this thesis, though certain aspects of each theory may be implicitly criticized as result of either my defense of classical natural law or my criticism of other theories. The purpose of the last two sections was simply to give a brief and simplified history of the evolution of natural law, and to roughly differentiate some of its broad traditions. However, my defense and analysis of rights is squarely rooted in classical natural law, as I believe it to be the best account of the theory itself and see it as the most robust in the face of criticisms. Thus, to justify my understanding of the nature of rights, I must first review the Aristotelian ethics upon which my theory is founded.

The Human Good

Defining Goodness

Classical natural law can be seen as being rooted in Aristotelian ethical naturalism, which has been reformulated over the past sixty years as neo-Aristotelian ethical naturalism³. NAEN was developed by a number of contemporary neo-Aristotelian philosophers, such as G.E.M Anscombe, Peter Geach, Henry Veatch, and Philippa Foot, and Rosalind Hursthouse. It returns to an understanding of morality that is rooted in Aristotle's ethics and metaphysics, with the "good" of a thing depending upon that particular thing's nature.

In the first half of the 20th century ethical statements were primarily judged through an emotivist framework, with "good" or "bad" essentially meaning "approve" or "disapprove" of. This causes certain intuitive problems however, as it would mean our moral judgments are reducible to preference-statements, with a statement such as "Murder is bad" being translatable to "I dislike murder." In fact, moral judgments would occupy the same sort of realm as any other sort of preferential judgment, thus meaning that "Murder is bad" exists in the same category of statements as "I dislike brussels sprouts," albeit with greater emphasis.

³ From here on NAEN

Richard Rorty has developed this perspective most famously in contemporary ethics. While often decried as a relativist or even a nihilist, Rorty's ethical beliefs are more similar to Adam Smith than Frederick Nietzsche. Rorty argues that while ethical statements are simply preference statements, the purpose of ethics is to remove oneself from one's own preferences and to perceive the preferences of others ("Postmodern Ethics"). Sympathy allows us to enter the mind of the "other," and by recognizing their suffering we can then be driven to alleviate it. However, as with the early 20th century emotivists, Rorty still denies that ethical statements describe any "moral facts," and that ultimately they only reflect emotional and cultural attitudes.

Aside from the intuitive problems faced by emotivism, there are certain conceptual difficulties that must be faced as well. Peter Geach notes that "good" and "bad" are not always used in a manner that reflects approval or disapproval. He observes that those who do hold this belief claim that "the features of the term's use which I have described derive from its function's being primarily not descriptive at all but commendatory. 'That is a good book' means something like 'I recommend that book' or 'choose that book'" ("Good and Evil"⁴).

This, however, is incapable of making sense of ways in which we use the term "good." Geach notes that we might say, "That man is a good burglar," without necessarily approving of or recommending burglary ("GE"). We may indeed find burglary to be bad, and understand that to be a good burglar is to be a bad person. However, we can still use "good" to describe a burglar without approving of the act of burglary. Geach says that, "'Hutton was batting on a good wicket', in a newspaper report, would not mean 'What a wonderful wicket Hutton was batting on. May you have such a wicket when you bat'." In fact, "Somebody who did not care two pins about cricket, but fully understood how the game worked (not an impossible

⁴ From here on "GE"

supposition), could supply a purely descriptive sense for the phrase “good batting wicket” regardless of the tastes of the cricket fans” (“GE”).

Due to these difficulties, as well as others, in 1956 Peter Geach wrote an influential article titled *Good and Evil*, in which he used modern developments in philosophy of language to defend the Aristotelian proposition that “good” and “bad” are intrinsic to and dependent upon the sort of entity being discussed. In his paper, Geach differentiates between predicative and attributive adjectives, with predicative adjectives being logically divisible while attributive adjectives cannot be divided in such a way. Essentially, if I was to say, “X is an A B” and can logically break that statement up into “X is A” and “X is B,” then the adjective is predicative. However, if I were unable to accomplish this task, it would be attributive.

Geach uses “X is a red book” to illustrate his point about predicative adjectives. “X is a red book” can be logically divided into “X is red” and “X is a book” (“GE”). To understand the “redness” of X, one does not need to know anything about the nature of X. The meaning conveyed by the adjective “red” is fully conveyed without reference to the thing it is describing, and this can be demonstrated by the fact that the adjective “red” can be taken separately from the noun “book” when talking about X.

When explaining how attributive adjectives are different from predicative adjectives, Geach uses the example “X is a big flea” (“GE”). Dividing the noun from the adjective loses the meaning of the adjective, as “X is big” and “X is a flea” is not the same as “X is a big flea.” If we were to compare this to another example Geach gives of an attributive adjective, “Y is a small elephant,” we would find that dividing “X is a big flea” to “X is big” and “X is a flea” and dividing “Y is a small elephant” to “Y is small” and “Y is an elephant” would lead us to conclude that X is bigger than Y (“GE”). However, big fleas are obviously smaller than small

elephants. To understand the full meaning of the “smallness” of X or the “bigness” of Y, we must first determine what sort of thing X and Y are. This is why we are unable to logically divide the adjective from its noun; the noun is needed to understand the full meaning of the adjective.

Geach then argues that the adjective “good” is necessarily an attributive adjective. To say “X is good” is relatively meaningless without an understanding of what the nature of X is. A good runner is dependent upon the fact that runners run – thus a good runner is one that runs well. A good swimmer is dependent upon the fact that swimmers swim – thus a good swimmer is one that swims well. Understanding what it is to be a runner or a swimmer is necessary when understanding what it is to be a good runner or a good swimmer. And so if we were to ask what it is to be a good human being, we must inquire as to the nature of human beings. This would also mean that human beings are intrinsically valuable, as for humans morality is derived from human nature, and, because morality is valued for its own sake, the nature from which it is derived must also be valued intrinsically.

This elegantly deals with the difficulty emotivist metaethics faces in the example of the good burglar. When discussing the “goodness” of a burglar, we must have an understanding of the nature of the burglar. Once we ascertain that it is the nature of the burglar to steal property, we can claim that a good burglar is one that steals property well. Through philosophy of language, Geach is able to elucidate an insight made by Aristotle millennia prior; that is, for something to be good it must be fulfilling its function, which is based in its nature. We can then understand why it is that a good burglar would be a bad human being – to steal is contrary to the nature of a human being. This allows us to use reason to investigate what it is to be a human being and then reflect upon the natural law that is derived from these functions in order to understand what moral imperatives may exist.

A popular criticism of this position has been that there cannot be some moral “fact” rooted in human nature, for if there were we would not see the self-evident cultural pluralism regarding morality throughout time and place. To this, I have two responses. First, there are actually a number of remarkable similarities between the fundamental moral beliefs of different cultures and peoples. For example, there has never been a human culture that praises lying or cowardice or murder as virtues. They may claim that certain people can be lied to, or that certain people may be killed, but it is always within a particular framework that sees them as not being innocent. This is because, while culture can change certain aspects of our moral intuitions, human beings, due to a shared nature, tend to have similar moral intuitions. It is this concept that Aquinas was referring to when discussing humanity’s “natural inclinations” (Aquinas).

The second defense I would raise is that, even though there are significant moral disagreements, this does not serve as proof that there are no objective moral facts. There is a difference between epistemology and ontology, and just because people disagree about a particular subject does not then mean that there is no underlying truth about the subject. Many people throughout history claimed the earth was flat, or believed that lightning bolts or earthquakes emanated from a supernatural source. Were a time traveler to approach an ancient Grecian and say, “Actually my good sir, that lightning bolt is not the weapon of Zeus, but is instead an atmospheric discharge due to static electricity built up in the clouds by dust particles,” a disagreement between the two would not render the time traveler’s argument wrong. Similarly, just because there is a difference in belief among different groups and individuals concerning morality does not lead us to the conclusion that there are no objective moral principles.

The natural law is determined through a philosophic dialectic, just as facts about the world are determined through a scientific dialectic. And, like science, we must always recognize

that a particular understanding of the natural law may not be accurate, as it may have been developed with limited information or through improper reasoning. However, we are still justified in acting as if it is true, as we are with scientific theories, if their claims have the greatest amount of warrant. But to say that the divergent opinions different peoples have had about ethics necessitates that that ethics must be subjective does not seem to follow. Strauss comments on this criticism, saying, “As little as man’s varying notions of the universe prove that there is no universe or that there cannot be *the* true account of the universe or that man can never arrive at true and final knowledge of the universe, so little seem man’s varying notions of justice to prove that there is no natural right or that natural right is unknowable” (“NRH” 98).

Still, some may argue that any ethic that bases itself in an understanding of human nature is problematic, as they claim that there is either no such thing as human nature, or that, if there is, we can have no knowledge of what that nature may be. Additionally, NAEN is dependent upon a teleological conception of human beings, which seems antiquated with Darwinian biology supplanting its Aristotelian predecessor. These are legitimate criticisms, and so before moving on I will address each of these, arguing for a knowable human nature and a modern interpretation of Aristotelian biology.

Human Nature

The question of human nature is central to the foundation of political thought. If we are to create political, economic, and social institutions to govern human beings, it is necessary for us to understand the limits of such institutions and the capability of those who exist within them to

maintain them. There have, however, been attacks upon the idea of a distinct and fixed “human nature,” with many claiming that humans are moldable and can act in different ways based on the particular cultural context through which they have been raised.

Because delving too far into this debate would drag my thesis into a metaphysical discussion, I will only go over a very brief and generalized argument in favor of human nature. First, it must be noted that arguments in favor of “essences,” a term that is often dismissed as archaic, have returned to the forefront of contemporary philosophy, albeit under a different guise. In 1969 W.V. Quine wrote an extremely influential paper titled *Natural Kinds* in which he defended the notion that there were natural orderings to things that caused them to exist in a particular fashion, separate from our categorization of those things (Bird). Natural kinds can be seen as a modern reinterpretation of essences, giving metaphysical support for an argument rooted in nature.

While it is true that humans have free will, thus giving us extraordinary volition and choice in action, it is also true that we cannot act outside of a particular framework. We cannot flap our wings and fly, nor can we see in ultraviolet or breathe underwater. They may seem like simple trivialities, but they reflect a greater truth. We exist in a particular fashion, one that is different than birds or bees or fish. While we can make free choices, those choices are limited by our nature. We cannot act beyond certain confines, as our human essence precedes our particular existences. Even our rational capacity that allows us to make choices is a limiting framework; it is one that restricts us to thinking in a specific manner. We can never actually experience what it is like to be, say, a bat. We can only know how it is to be a human being.

One of the reasons there are so many divergent opinions when it comes to human nature is that humans are incredibly complicated animals. This is further muddied by our ability to pass

down culture, making it difficult to determine whether a way of action is rooted in nature or custom, in *physis* or *nomos*. Thus, to simplify the argument in favor of natural kinds, I will first analyze a simple entity: atoms. If we look at a hydrogen and helium atom, we notice they exist in different ways. They interact and react in radically different manners, and hydrogen atoms act like other hydrogen atoms while helium atoms act like other helium atoms (I will leave out isotopes in order to simplify the example). This is because hydrogen atoms and helium atoms have different *natures* due to a difference in their actualization of properties. Natural kinds are things most people intuitively accept, and while humans may be more complex, they would still be able to classified as having a nature based on the ways in which they instantiate themselves.

While it is true that no human being is identical to another human being, as hydrogen atoms are, this is fully accounted for in Aristotelian essentialism. All humans have the same essence, what the scholastic philosopher Duns Scotus called *quiddity*, though we have different existences, what Scotus referred to as *haecceity* (Rommen). Our quiddity is what causes us to fall under a specific classification, that of “human,” while our haecceity is what differentiates us from all other entities within that category. All humans have the same nature, as they are human, but they each actualize that nature in different ways, causing the variety we see within the world today.

While our haecceity is in constant flux, as a person may learn a new skill or change their appearance, our quiddity is something that is intrinsic to us. We can never change the fact that we are human, and it is from this that we derive our moral value. Because morality is tied inexorably to *being*, the sort of entity we are, our quiddity is the basis for our moral imperatives and beliefs. We must then attempt to align our haecceity with our quiddity in order to live a good life. This is why the total utility a person possesses has no bearing on their moral value. Our

utility is a function of our haecceity, and is therefore non-moral, and because our quiddity is our humanness, all people are moral equals simply due to their humanity.

This is because ontology precedes all things. Before we speak, act, or even think, we are presupposing being. We are presupposing that there is *something out there*, that these things have particular natures, and that we can interact with them. Based on our interactions we are able to make predictions about those objects or forces. How is it that humans are capable of this mythological power of prediction? To hold explanatory power toward whatever is being observed is an awesome power, for it is to understand the nature of that thing. It is to gain a godlike perspective, and such a power is the closest humanity can ever get to omniscience. But such is the goal of philosophy. Philosophy is the historical dialectic towards what *is*, with what is being the nature of existence. And if all things have natures, certain states of being, how could it be that humans would be exempt from this truth?

Based on the definition of good given in the previous section, we can then analyze human nature to determine what sorts of actions are reflections of that nature, and thus which are morally justifiable. And, as our understanding of human evolution and biology develops, we will gain a greater awareness as to what moral imperatives we naturally possess. However, there already are a number of fairly obvious aspects of human nature that can be readily derived as morally worthy. Humans are alive, and thus life can be seen as something that is morally valuable. Humans are rational agents that make decisions for themselves, thus sanctifying liberty. Humans mold and change their natural environment through the output of energy and labor, thus creating property. We are also social animals, meaning human interactions are needed in order to live a good life. From our sociability we can then derive natural virtues, which will be elaborated upon in Chapter Three.

Teleonomy

However, even if we accept that humans have a nature, many still may deny that humans have a *telos*, or an end. Teleological biology has been derided, viewed as antiquated, and seems to have been completely replaced by a “modern” view. However, to paraphrase Mark Twain, the reports of teleology’s death has been exaggerated. Biology never seemed to be able to rid itself of teleological terminology, and Kant noted that, even if we cannot know whether there are final natural causes, it seems to be the best way to understand biological organisms (Ginsborg).

Richard Dawkins defines an adaptation as “approximately an attribute of an organism that is ‘good for something’” (290) while Simone Blackburn in the *Oxford Dictionary of Philosophy* notes that “the function of a feature of an organism is frequently defined as that role it plays which has been responsible for its genetic success and evolution” (149-150). When we ask what it is about life that makes it unique, we can see that it possesses attributes that aid in its success, whereby success I mean the survival and promulgation of its species. In a tongue-and-cheek example of this phenomenon, Peter Geach claimed that, “Men need virtues as bees need stings” (“The Virtues” 17). There are aspects of our nature that help us fulfill our natural end of survival, and it is these attributes that can be called “natural virtues.” Fulfilling these virtues allows a person to reach his or her natural end, causing them to flourish and increasing their likelihood of passing on their genes.

One of the reasons teleology has been so ignored in the biological sciences is that it implies a will or mind directing this end. A pair of scissors has the end of cutting paper only because a human mind imposes such an end upon it; if teleology is to exist within the modern, non-theistic scientific paradigm it must rid itself of any theistic overtones. This is the reason for

the rise of “teleonomy” as opposed to “teleology.” While teleology implies an artificial end, teleonomy is strictly defined as the goal-oriented or purposefully driven biological and psychological processes that living organisms derive from their genetic make-up; namely, from their nature.

The philosopher of science David Hull has written extensively on this change, humorously noting that “Haldane [in the 1930s] can be found remarking, ‘Teleology is like a mistress to a biologist: he cannot live without her but he’s unwilling to be seen with her in public.’ Today the mistress has become a lawfully wedded wife. Biologists no longer feel obligated to apologize for their use of teleological language; they flaunt it. The only concession which they make to its disreputable past is to rename it ‘teleonomy’” (280-316). With a teleonomical understanding of biology, we can study “natural ends” that exist within human nature. And, based on the definition of good provided by NAEN, fulfilling these functions would be what we mean when we talk about certain actions being “good” and “bad.”

In *Chance and Necessity*, Jacques Monod, a Nobel Prize winner in Physiology or Biology, describes how teleonomy is expanded from simple biological processes to relational states and actions:

Rather than reject this [goal-directedness] idea (as certain biologists have tried to do) it is indispensable to recognise that it is essential to the very definition of living beings. We shall maintain that the latter are distinct from all other structures or systems present in the universe through this characteristic property, which we shall call teleonomy.

[...] It will be readily seen that, in this or that species situated higher or lower on the animal scale, the achievement of the fundamental teleonomic project (i.e., invariant reproduction) calls assorted, more or less elaborate and complex structures and performances into play. The fact must be stressed that concerned here are not only the activities directly bound up with reproduction itself, but all those that contribute-be it very indirectly-to the species' survival and multiplication. For example, in higher mammals the play of the young is an important element of psychic development and social integration. Therefore this activity has teleonomic value, inasmuch as it furthers the cohesion of the group, a condition for its survival and for the expansion of the species. (200)

Even Aristotle can be seen as advocating a version of teleonomy when he claims, "It is absurd to suppose that purpose is not present because we do not observe an agent deliberating. Craft does not deliberate. If the ship-building craft were in the wood, it would produce the same results by nature. If, therefore, purpose is present in craft, it is present also in nature. The best illustration is a doctor doctoring himself: nature is like that. It is plain that nature is a cause, a cause that operates for a purpose" ("Physics"). Nature possess an intrinsic cause and can cause itself; it can be a watch, or in Aristotle's example, a ship, without a watchmaker (or shipmaker). Teleonomy is a better account of how we view biology, allows us to rid ourselves of the "directed end" that is seen in teleology, and, taken together with NAEN, gives us an objective and knowable moral good.

The question still remains: even if there is this natural purpose, this teleonomy, why ought we fulfill it? Why ought we be good? What compels us to do what we ought to do? This is

what divides the noble from the brutal. The brutal is chaos, undirected will tyrannically imposing itself upon things. It is will according to preference. As preference it has no reason, for preference, like myth, is unanalyzable. It acts without cause and without regard to effect. In contrast the noble is the direction of that will – it is conforming the will to the natural law that determines how that will ought to be refined. Only through noble action can we express the natural order of reality and truly flourish. And only through noble action can we express the principles of justice in society.

This also demonstrates the hollowness of utilitarianism as a moral theory. Utilitarianism seeks to maximize utility, usually defined as happiness or a lack of suffering, as its guiding principle for morality. Utility is chosen based on what we all naturally prefer, and while there are substantial differences between rule and preference utilitarianism, all forms can be broadly fit within this basic framework. But utilitarianism cannot be seen as a justification of rights or a proper moral framework for justice, as it is not our preferences that create moral norms, but rather these natural imperatives. And, as demonstrated in the previous section, the emotivist metaethical framework upon which utilitarianism is founded seems to be an inadequate basis by which to understand our usage of the term “good.” It is for this reason Foot writes that “utilitarianism never gets off the ground” if one accepts this understanding of metaethics (“Natural Goodness” 48).

This theory is by no means definitive, and while it has been gaining support over the years, it still must deal with a number of hurdles. The fact/value distinction, the naturalistic fallacy, and the is-ought dilemma, all derivations of the same, fundamental principle, still loom large within ethics. However, I do not see them as insurmountable. Over the past six decades the fact/value distinction has come under increasing fire by numerous philosophers, such as Philippa

Foot, Hilary Putnam, and Alasdair MacIntyre, and parts of it have been chipped away. There have also been a number of proposed solutions to the is-ought dilemma, and the naturalistic fallacy is not as forbearing as once believed. While these difficulties are important and must be addressed for my broader political theory to hold, such an endeavor would go far beyond the scope of this thesis. This chapter was merely meant to summarize NAEN and defend certain basic principles it espouses before moving on to the more politically oriented portions of my thesis.

Before that however, I must first demonstrate the practical tenability of NAEN. If it were to, say, show that warfare is morally praiseworthy as it is a part of our nature, no matter how logically coherent it may appear, because it so dissidently violates our most basic intuitions, NAEN would have to be viewed with suspicion. By fleshing out what sorts of moral goods can be derived from NAEN's principles, I will also begin to demonstrate what sorts of things qualify as "natural rights" and "natural virtues," both of which are the foundation for my theory of rights.

The State of Nature

War in the State of Nature

Stripping custom from nature when dealing with human beings can be incredibly difficult, and so throughout the years various thought experiments have been presented in order to better understand how humans naturally exist. State of nature thought experiments were extensively used by Enlightenment political theorists, and there has been a resurgence in their usage in contemporary political philosophy. These thought experiments are useful, as they allow philosophers to remove any conventional or governmental norms in order to conceptualize a more objective human nature. However, with modern advances and discoveries in anthropology and evolutionary biology, state of nature thought experiments must be reformulated in order to reflect these advances.

One of the most famous state of nature thought experiments was developed by Thomas Hobbes in the *Leviathan*. As mentioned in the first chapter, Hobbes' thought experiment contains an extremely bleak outlook on how humans would interact sans government. However, there are a number of issues with the Hobbesian state of nature, much of which has to do with his rejection of Aristotle's conception of Man as a political animal.

Hobbes makes the mistake of believing that we would be atomistic individuals, constantly at war with one another, and would only make short-term alliances that would fall apart as soon as one partner had their back turned. However, Peter Kropotkin's observations on how social animals help one another, even when it is to their apparent detriment, contains many interesting points and indicates that social creatures are capable of altruism (Kropotkin). A famous example Kropotkin gives of such acts is a species of bats that take care of one another and feed each other when one is injured or sick. In fact, according to Kropotkin, "Better conditions are created by the elimination of competition by means of mutual aid and mutual support" (Kropotkin). Humans are a social species, and would therefore desire, and even require, the presence and help of others. Indeed, such bonds are evolutionarily advantageous, and may even be the basis for why some animals evolve into social beings in the first place.

However, Hobbes does bring to light some of Man's more violent inclinations. It seems that human tribes throughout history have acted in similar ways as individuals within the Hobbesian state of nature. While we can be very friendly to within our own tribes, that does not mean we will be so gracious to foreign groups. Wolves run other wolf packs out of their territory, chimpanzees go to war with other groups of chimpanzees, and human tribes fight human tribes. All of the things Hobbes mentioned regarding our suspicion of others, scarcity, power, reputation, and equality are perfectly true, even if designated to a group of individuals rather than a single person. Each tribe would be wary of others, would want to gain great reputations, and would be forced to go to war with each other over suspicion of attack and a desire for resources.

Interestingly enough this does not necessarily translate into a pessimistic view of humanity. The lack of resources, and the wars that are a result of this lack of resources, only

show how we will act when our lives are in danger, as the “other” is constantly seen as a threat, and does not give us a good indication of human nature as it relates to how people ought to behave *within* society. While this war of “all against all” may exist between tribes and nations, human nature does not demand it. Because of the competition over resources the laws of the jungle require us to war with one another in order to survive. But just because a species engages in warfare does not mean that it is a part of that species’ nature, nor does it mean that war is a necessary function that must be fulfilled.

Both Hobbes’ pessimistic view of human nature and the more idyllic Rousseauian one are problematic because they do not take into account how environmental pressures will shape human behavior. Humans, like all living creatures, have an innate will to live, and so tribes will take whichever course of action seems to best allow for that possibility. In cases in which there is a high population density and fierce competition of resources, such as in the ancient Middle East, constant warfare is apparent. But the warfare is emblematic of the peoples’ will to survive, rather than an expression of an inherently violent nature. This can be demonstrated by looking at areas in which those environmental pressures do not exist.

It has been noted by anthropologists that in areas with low population densities, though with enough resources to maintain survival, warfare becomes scarcer. *In War Before Civilization: The Myth of the Peaceful Savage*, Lawrence H. Keeley writes, “some of the most peaceful nonstate societies in the world had very low population densities... Most of these peaceable groups prevented intergroup disputes and conflicts from escalating into armed violence by fleeing from their adversaries. But this option can be exercised only under conditions where possessions are portable and essential resources, however scarce, are widely distributed”

(16). Dependent upon the environmental conditions present, human beings can be more or less likely to use violence as a means to reach their desired end.

A number of recent psychological studies have been conducted that show that violence is not integral to human nature, and is rather a learned response. Researchers at Wake Forest University demonstrated that the more children were exposed to violence from a young age, the more likely they would be in replicating that violence in the future (“Violence is Learned”). It is for this reason that the World Health Organization has gone so far as to label violence as a “disease,” and one that should be fought with the same methods one would use when dealing with a communicable pathogen (Stohlberg).

The reason people become violent when exposed to violence is that it turns violence into the social norm. Violence is a tool that can be used, and when imbedded into a cultural framework it is seen as the most useful tool to achieving some desired end. However, under the right environmental conditions warfare and violence diminishes, because, as Azar Gat points out in *War In Human Civilization*, “aggression is a means, a tactic – and only one among many – for the achievement of the primary biological ends. As a means, its utilization depends on its usefulness” (38). The primary biological ends are the teleonomical processes that determine what sorts of actions are moral, and so while aggression and warfare are activities that we may participate in, they are not constitutive aspects of human nature. They are only actualized when their actualization is useful for the human being to achieve their desired ends, and are therefore contingent qualities.

Thus, violence should be seen as a neutral force, a tool to be used for the right purpose (though it is often abused). When violence is used to achieve proper ends, and that violence does not violate human function, then it is morally justified. However, if a person chooses to use

violence to achieve some desired end that is not justified by the natural law, then it would be an unjust expression of this tool. From this we can see why using violence to stop a criminal or going to war against another country committing genocide may be morally justified. Violence itself is not a necessary part of human nature, as Hobbes proposed, or a deviation from human nature due to the influence of civilization, as Rousseau proposed. It is a neutral tool that is used when it is the most effective option available, and can be either justified or unjustified depending upon the context in which it is used.

Violence is used primarily against other tribes because they constitute “the other,” and reflect an existential threat to the survival of oneself and one’s loved ones in a region where there is fierce competition over resources. Thus, reflecting upon what sorts of virtues may come about through the interaction of individuals who live in different tribes is muddled by the threat they see in one another. To truly understand how a just society must act and what sort of moral imperatives our relationships generate, we must look at our relationships within the tribe.

Enlightened Self-Interest and Fraternity

Within the liberal tradition, most theorists have viewed social interaction as an expression of enlightened self-interest. People work to benefit others within society because, in the long run, society benefits them. This was the view held by many classical liberals, such as John Locke, and has remained prevalent in contemporary liberal tradition, as in the work of John Rawls and Robert Nozick.

It seems, however, that there are a number of intuitive and practical difficulties with this position. Enlightened self-interest fails to take into account the moral aspect of sociability, thus cheapening an integral part of the human experience. Human relationships turn into nothing more than a contractual agreement between two willing parties for the sake of mutual benefit.

This conception ignores *areté*, or public virtue, that comes from the participation in political life and the maintenance of social bonds. Aside from this intuitive challenge, there are also certain practical difficulties faced by egoistic and enlightened self-interest. Take the famous “Prisoner’s Dilemma” from game theory:

Figure 1: The Prisoner's Dilemma

		Player B	
		Cooperate	Defect
Player A	Cooperate	3 , 3	0 , 5
	Defect	5 , 0	1 , 1

According to enlightened self-interest, because each individual is willing to work to benefit the group should such actions benefit themselves, oftentimes those in society would choose to cooperate, thus gaining a benefit of 3. But because enlightened self-interest is premised entirely on the interests of the individual, the temptation to defect will always remain. There is no moral imperative to restrict one’s actions, and should a person be presented with a situation in which they can successfully defect, they will.

Enlightened self-interest is burdened by the “free rider” problem. If everyone else within society is cooperating, and the risk of being caught is minimal, it is in the interest of the individual to defect. Plato raises this issue in *The Republic*, stating, through Glaucon, “For surely

every man thinks injustice much more profitable personally than justice” (41-42). The life in which one is able to commit injustice but be seen as just is the best life, where one can “do injustice and not be punished for it” (Plato 40). And, because enlightened self-interest treats people purely as preference-seeking automatons, seeking to ultimately benefit only themselves, individuals will become suspicious as to the motives of others within society. Such a relationship seems to be a shaky foundation to rest society upon.

The most glaring issue both conceptions face is that they ignore the bonds forged between people. When first presented with the Prisoner’s Dilemma many ask, “What is the relationship between the two individuals?” Friendship, loyalty, and community have been ignored, even when such social goods can be a solution for the challenges faced by enlightened self-interest. Fraternity seems to be a better understanding of social relationships, as it takes these bonds of membership into account.

When presented with the Prisoner’s Dilemma, friends and family, connected through those bonds of membership, would automatically choose to cooperate, not necessarily because it benefits them, but because they trust and care for one another. Thus, a moral element is introduced into social relationships, and basic social interactions that aid in the maintenance of this fraternity are seen as virtuous, including kindness, honesty, and charity. Tribal groups that evolve these more complex and altruistic relationships would be better equipped to survive than those that do not, as nearly every time the group will be able to reap the greatest amount of rewards through social cooperation. While the evolutionary cause of these relationships can be seen as being rooted in evolutionary self-interest, the experience and practical effect is one of altruism.

Charles Darwin pointed this out, stating, “It must not be forgotten that although a high standard of morality gives but a slight or no advantage to each individual man and his children over the other men of the same tribe, yet that an advancement in the standard of morality and an increase in the number of well-endowed men will certainly give an immense advantage to one tribe over another” (537). While competition exists between differing tribes, “better conditions are created by the elimination of competitions by means of mutual aid and mutual support” within the tribe (Kropotkin).

This can be demonstrated through a simple thought experiment. Imagine we have two tribes: Tribe A and Tribe B. Tribe A is filled with kind, generous, brave, and honest people who look out for one another and deeply care for each other. In contrast, Tribe B is comprised of people who work purely for their own self-interest and self-preservation. They lie and cheat and steal whenever it best suits them, only helping to benefit the community when it benefits themselves. Which of these tribes will be more successful? Does the war of all against all transfer into society, or is that relationship different, even from within the state of nature?

All living creatures have natural laws that exist because of their nature. Ants are a eusocial species, and therefore it is good for them to have no sense individuality or freedom. If, somehow, an ant colony were to decide to become a libertarian society, the ants would all die because it is contrary to the ant’s natural law. Just as a bridge that is built without an understanding of the physical laws will fail, so too will a society that is built without an understanding of humanity’s natural laws. Tribe B would fail precisely because it is in the nature of Man to be social, to care for his community and to sacrifice for it. This virtuous nature cannot be forced on a person, as we are each autonomous rational beings with the right to freedom of choice, but for a society to truly function and succeed it must build these bonds.

There is no culture in the world that sanctifies cowardice or dishonesty, none that does not see loyalty and charity as virtues. This is because these particular character traits are good, as they are a part of the natural law and are therefore necessary for human societies to function. It is for this reason that they are referred to as virtues. These character traits are “natural virtues” – virtues that naturally maintain human society and allow for its members to flourish.

Fraternity faces the difficulty of the free rider to some extent, but there are certain mechanisms in place that mitigate its effect. A society that raises its children with a basic altruistic moral code inculcates a powerful cognitive framework within its members. Such a framework causes those who decide to defect to experience shame if caught, and guilt if not. These two internal pressures increase the cost of injustice, as individuals become less concerned with social retribution and more conflicted based on their own personal disappointments. And for those that break from this cognitive framework, the cost of being caught has been raised, as defecting is now viewed as immoral behavior.

Additionally, enlightened self-interest is incapable of making sense of extraordinary examples of sacrifice, sacrifice that seems to be beyond the simple calculation of self-interest. During the recent Arizona shootings, where a gunman targeted Representative Kathy Giffords, Dorwan Stoddard sacrificed himself for his wife. When the gunman began firing into the crowd, Stoddard leapt in front of incoming bullets, shielding his wife from the gunfire (Shaffer). This was not done because it was in his self-interest; it seems absurd to assume that in the brief time between hearing the gunshots and protecting his wife, Stoddard considered whether risking his life to save her's would increase his overall utility. Indeed, such a perspective seems to cheapen the nobility of the action.

It cheapens this action because it degrades the relationship from one that is intrinsically valuable to one that is only instrumentally valuable. It fails to give proper respect to an aspect of human relationships that ought to be valued for its own sake. Enlightened self-interest degrades and demeans these connections because it sees them only as functions of personal utility, rather than as expressions of deep, intrinsically valuable emotional connections. Stoddard did not die for his wife because she was instrumental to his happiness. He died for her because he loved her and cared for her.

As Strauss said, “[Man’s] sociality does not proceed, then, from a calculation of the pleasures which he expects from association, but he derives pleasure from association because he is by nature social” (“NRH” 129). We care for others, and because we are a social species this gives us happiness. Those who put primacy on self-interest have this relationship backwards, believing that we are social *because* of the pleasure gained, rather than understanding that the pleasure derived is simply a result of our social nature. The reason for our happiness is our sociability, not the other way around. Enlightened self-interest assumes that the ultimate desire of human beings is personal happiness, and this is often justified through arguments from natural selection. Because all animals seek to preserve their own life, they are ultimately interested only in their own wellbeing, and will help benefit another on the sole condition that it benefits themselves. However, recent advances in sociobiology and evolutionary biology seem to contradict this understanding of the evolutionary process, pointing toward a more altruistic interpretation of the evolutionary process.

Evolutionary Reasons for Virtue

Kin selection theory has become a major school of thought within evolutionary biology, dominating contemporary discussions on how social values evolved. For years, critics of the evolution of altruism have argued that true altruism can never exist, for if an animal acted based on altruism, free riders would take advantage of such acts and not contribute to the altruistic actors. Theoretically altruism may be desirable, as evidenced by the prisoner's dilemma, but critics claimed that it was evolutionarily impossible, as altruism was a genetically undesirable trait and would be weeded out of the general population.

But in 1964 W.D. Hamilton published an enormously influential paper titled *The Genetical Evolution of Social Behavior*, where he suggested that altruism is based upon kinship. In his essay, Hamilton posited that, if there was a gene that predisposed an animal to act altruistically, it would make sense for that animal to act altruistically toward its kin, as they would be more likely to carry that genetic trait. He then expressed this in the mathematical formula $r > c/b$, where r is the relatedness, c is the cost, and b is the benefit. A sibling, for example, shares 50% of a person's genes, meaning it would take two brothers to cause the individual to sacrifice him or herself in an altruistic manner. J.B.S. Haldene, who postulated this concept in 1955, once declared, "I would lay down my life for two brothers or eight cousins" (Mirsky).

While this is how such a principle would work in the vacuum of a mathematical thought experiment, in the real world there must be biochemical reactions that predispose us to act altruistically. This gives an evolutionary explanation for the emotional bonds created by individuals within a society, as they are reflections of the "altruism gene." This also explains the

emergence of “the other,” and why unknown parties are viewed with suspicion. They are not seen, as are members of the in-group, as possessing the potential for reciprocal actions.

Humans originally evolved as members of small hunter-gatherer tribes in which most of the members of the tribe were related. Because of this, humans evolved the ability to act altruistically within society, and while we no longer live in such close-knit kin-based tribal units, the same biological mechanisms are still in place. Two individuals do not need to be biologically related to share an altruistic bond, for if a person is a major player in another’s life, as are close friends or romantic partners, the emotional bonds still generate the same sort of kin-based altruistic connection. This is because trust is built, allowing the recognition of reciprocation to come into effect. Additionally, because our family units were originally in the form of tribes, and because those tribes normally made up the entirety of our narrative, humans came to associate those who contribute to their narrative with kin, who in turn are, evolutionarily, the best sort of people to trust. Thus, people who add positively to our narrative are associated as part of our in-group and therefore become suitable for altruistic acts.

It must also be noted that evolution is not ego-driven. Too often people think that, because natural selection selects the fittest, animals focus on maintaining themselves and themselves alone. But the life’s will to live is only instrumental to its will to pass on its genes. Humans will sacrifice themselves for their tribe because, in many cases, their tribe is more genetically “valuable” than they are. If a person has two siblings, two cousins, and a child, their tribe would contain 175% of their genes, while the individual would only possess 100% (50% for each sibling, 12.5% for each cousin, 50% for the child). As Azar Gat points out,

Evolutionarily, it is even worthwhile for an individual to sacrifice itself if, by that act, it saves more than two brothers, four half-brothers, or eight cousins. Taking risks for them is worthwhile even at lower ratios. The evolutionary rationale thus favors not individual survival but ‘kin selection’ or ‘inclusive fitness’ of the same genes in oneself and in ones kin. In evolutionary terms, it is ultimately the survival and propagation of the *genes* that count (44).

This is what Richard Dawkins means when he talks about “the selfish gene.” It is a mistake to believe in an individual-centered view of evolution. Rather, the “selfish” aspect of an animal, the aspect that “wants” to continue to survive, is the gene. For this reason, Dawkins nearly named his book “The Immortal Gene” instead of *The Selfish Gene*, as genes that cause animals to act selflessly have a greater likelihood of surviving. However, as noted above, the practical biochemical responses that may predispose people to act in this fashion can also attach themselves to non-family members. Thus, once human beings move away from purely kin-based relationships the void must be filled with civic-minded relationships, with bonds that exist because of a sense of a shared community, for “this natural kinship is deepened and transfigured in the case of man as a consequence of his radical solidarity” (129), meaning “Man cannot reach his perfection except in society, or, more precisely, in civil society” (“NRH” 130). It is this sort of connection that the communitarians speak of when discussing bonds of membership.

This evolution of altruism is reflected in a game theory experiment conducted by Robert Axelrod. Axelrod set up a game theory computer tournament that utilized the Prisoner’s Dilemma, inviting mathematicians, economists, political scientists, psychologists, and sociologists to design a program to compete in this game theory tournament. The player could

design his or her program to act in any way it wanted once it entered the game, and many designed wildly complex programs in order to try and deal with all the different variables that could conceivably come into play. Each program would also be, at some point in the tournament, paired with a mirror of its programming, as well as RANDOM, which would choose to cooperate or defect at random points during the game. The payoff matrix utilized in the tournament was the basic one I presented near the beginning of the last section (Axelrod 30-31).

The winner of this tournament was one of the simplest strategies submitted: TIT FOR TAT. TIT FOR TAT will always cooperate unless the other player defects. If the other player defects, then the following turn TIT FOR TAT defects as well. However, the next turn TIT FOR TAT is willing to cooperate again, essentially “forgiving” the other player for its transgression (Axelrod 31-32). Additionally, when Axelrod looked at all the other programs, he found that there was one commonality between most of the higher-ranked programs. They were “nice,” as in they were never the first to defect and attempt to take advantage of the other player. Out of the fourteen submitted entries, the top eight ranking players were all “nice,” with nice programs averaging between 472 and 504 points while not nice players averaged only 401 (Axelrod 33-34).

Axelrod wanted to use more programs, and interested in performing another experiment set up a second tournament. This one generated more interest based on the results of the first, which were published for prospective players to study. In the second tournament, sixty-two players entered, with computer scientists and evolutionary biologists joining the other disciplines. More ingenious programs were submitted but, once again, TIT FOR TAT wound up winning the tournament (Axelrod 41-42). And, just like in the first tournament, nice programs did better than not nice programs, with all but one of the top fifteen programs being nice and all

but one of the bottom fifteen programs being not nice. The correlation between the success and “niceness” of a particular program came out to be a statistically significant .58 (Axelrod 43-44).

How does this then transfer to how humans evolved social norms and virtues? Within society, it seems as if it is far more beneficial to help others than to be self-interested. TIT FOR TAT cannot be seen as a program rooted in enlightened self-interest, as it will never defect first, even if it seems as if it might be in its interest to do so. Other programs, such as TESTER or TRANQUILIZER, which would cooperate until they believed it to be a statistically beneficial moment to defect, would more accurately reflect enlightened self-interest (Axelrod 45-48). TIT FOR TAT reflects fraternity because it is loyal to those programs which earn its trust, though will punish programs that attempt to take advantage of it. This is why “Love, affection, friendship, pity, are as natural to [Man] as concern with his own good and calculation of what is conducive to his own good” (“NRH” 129).

To apply this to how evolution would select different ways of cooperating, Axelrod asks us to:

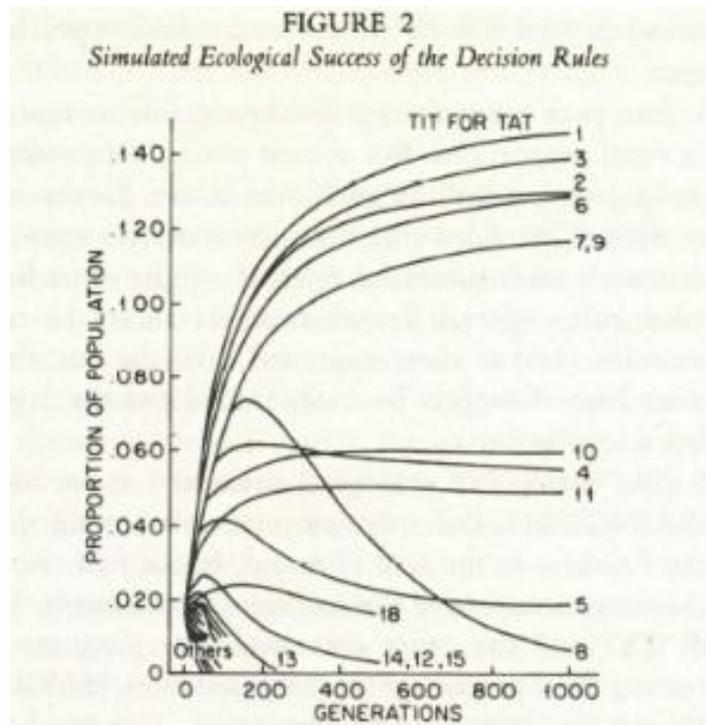
Imagine that there are many animals of a single species which interact with each other quite often. Suppose the interactions take the form of a Prisoner’s Dilemma. When two animals meet, they can cooperate with each other, not cooperate with each other, or one animal can exploit the other. Suppose further that each animal can recognize individuals it has already interacted with and can remember salient aspects of their interaction, such as whether the other has usually cooperated. A round of the tournament can then be regarded as a simulation of a single

generation of such animals, with each decision rule being employed by large numbers of individuals...

The value of this analogy is that it allows a simulation of future generations of a tournament. The idea is that the more successful entries are more likely to be submitted in the next round, and the less successful entries are less likely to be submitted again. To make this precise, we can say that the number of copies (or offspring) of a given entry will be proportional to that entry's tournament score (49).

Axelrod then imputed the programs into the system, accounting for 1,000 "generations," and graphed the results (51):

Figure 2: Ecological Success of the Decision Rules



All of the successful programs, namely programs 1, 3, 2, 6, 7, 9, 10, 4, 11, and 5 are nice programs. The only not nice program that made it into the top fifteen in the second tournament, HARRINGTON (program 8), did well until about the 200th generation before collapsing, reaching near the bottom by the 1000th. This experiment demonstrates that human beings that evolved the ability cooperate and made use of their natural virtues would be more likely to survive than those who did not. Thus, human nature has evolved to be one that is social, and humans possess certain obligations to others within society.

Even before the formation of the state, human beings acted socially. We possessed moral obligations, and, due to the evolution of altruism, maintained a fraternal relationship. This is not to say that there was no conflict within groups; many hunter-gatherer societies had higher rates of homicide per capita than any of the developed nations of the world today (Gat 24). But the way in which we evolved gives us great insight into human nature. It seems easy to root natural rights in human teleonomy – life, liberty, and property are processes that we can see naturally existing in Man. But natural virtues are a function of human nature as well, and carry just as much moral importance when determining what sorts of rights exist. So, while the state may actualize rights derived from our natural rights, it may also derive rights from the natural virtues outlined in this chapter. Only through the actualization of these virtues through public institutions can the “mutual trust” be formed that is required to create the conditions through which individuals can flourish (“NRH” 130-131). And “Without such trust, the classics thought, there cannot be freedom” (“NRH” 131), for the common recognition of rights within society would degrade as citizens become disconnected from each other. The following chapter will demonstrate how both natural rights and natural virtues become rights enshrined by the state, and what sorts of obligations these rights generate within society.

On Rights

Negative and Positive Rights

These virtues that become necessary to maintain social cohesion and individual survival predate the creation of the state. Within the state of nature there may be no government, but there is society, as humans are necessarily social animals. To speak of them otherwise, as atomized individuals without social bonds, is to speak of some mythological creature, and any understanding of rights derived from such a thought experiment would be just as mythical.

Just as classical liberals have argued, I will be presenting a conception of rights that begins with each individual possessing certain natural rights. When actualized by the state these natural rights are called negative rights, or rights of prohibition. Person A has a negative right to X if person B is *prohibited* in acting in some way Y toward person A. Thus, our negative rights are rights to things we naturally possess, such as “life, health, liberty, or possessions” (Locke 19).

Based on the previous chapter’s analysis of morality, we can look to attributes people naturally possess and identify them as basic human goods. These would include the rights Locke

lists, and give a basis for how a “right” to these goods develops. Because things like life or liberty are aspects of human nature, and because fulfilling these aspects are morally praiseworthy, to infringe upon other individuals’ teleonomical functions is immoral. For example, life is a morally positive good, meaning that if a person were to take the life of another without justification, they would be acting unjustly. We have a moral duty to fulfill these functions, which, taking into account the moral good of sociability, extends to others as well.

All rights begin in duties. Indeed, discussions of duties are the other side of the coin when it comes to discussions of rights. To say “Person A has a right to X” can be translated as “All persons whom are not Person A have a duty to refrain from preventing Person A from making use of X.” The reason human beings have natural rights is because they are prized as integrally valuable human goods. And, because we are each ontologically distinct entities and are the owners and/or producers of these goods (owners in the case of life, as we own ourselves, producers in the case of property, as we produce it ourselves), others have a moral duty not to take these goods from us. This duty that people have toward one another, what has been referred to as a “natural obligation,” is what is being described when we refer to “natural rights.” Strauss gives a defense of this analysis of rights, saying that, “It is man’s natural solidarity that is the basis of natural right in the narrow or strict sense of right” (“NRH” 129).

Claiming that a “right” begins in a “duty” differentiates this understanding of rights from classical liberalism. And, because rights are formed from duties, positive rights can be formed from other sorts of moral duties that predate the state. Just as natural rights are actualized by the state into negative rights, natural virtues can be actualized by the state in the form of positive rights, or rights of obligation. Person A has a positive right to X if person B is *obligated* to act in

some way Y toward person A. An example of a positive right would be welfare, as some people are obligated to pay for others' basic living expenses.

While positive and negative rights are derived from natural rights and natural virtues, which reflect our natural obligations, the sorts of duties from which they are derived are different. In the case of positive rights, the duty is a positive one, while in the case of negative rights the duty is a negative one. This seems somewhat obvious, but it has important implications when determining what sorts of rights must be actualized in order to reflect justice in social institutions.

If a person were to murder another person, we would consider this to be an immoral act. However, if that person were to refrain from murdering the other person, we would not consider this "moral," but instead neutral. A person is not a good person simply because they refrain from harming others; similarly, a state is not fulfilling the principles of justice simply because it does not harm its citizens. Only after we have fulfilled our negative duties and have become morally neutral can we then move on to fulfilling our positive duties and become virtuous. A state must first provide a framework of negative rights, which justifies its representation of the people, and then create positive rights, which give citizens the opportunity to flourish.

Most modern libertarians have critiqued positive rights as artificial creations of the state, claiming that because of this they do not possess the moral weight of negative rights. By creating positive rights we diminish negative rights, as individuals are no longer able to act as freely when obligations are forced upon them, and by sacrificing rights with moral worth for those with preferential worth we are moving toward injustice. However, it has been noted that even negative rights rely on the state, as without the state's defense they would be difficult, if not impossible, to actualize. However, this critique has certain difficulties, as the descriptive negative rights are

ultimately rooted in the normative natural rights, meaning that just because they are not actualized does not mean they ought not to be actualized.

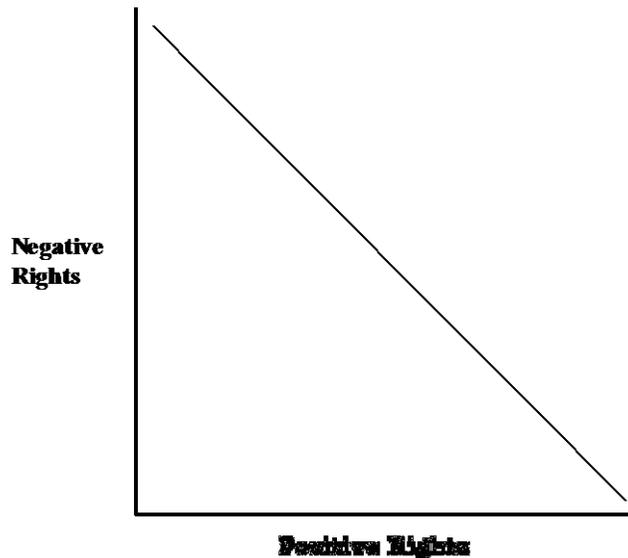
While I believe this defense provided by supporters of negative rights is adequate, it also seems that it can be applied to positive rights as well. Just as the prohibitions created by negative rights are the legal reflections of natural rights, the obligations created by positive rights are the legal reflections of natural virtues. Just like natural rights, natural virtues precede the creation of the state and can be seen as carrying just as much moral weight as negative rights.

Both natural rights and natural virtues are ultimately derived from the moral duties we owe to other persons due to their humanity, though one sort is negative and the other is positive. For example, banning murder would be the creation of a negative right, which reflects the natural right to life, which is derived from our moral duty to respect the lives of other persons. However, positive rights are just as justified, as creating a welfare program would be the creation of a positive right, which reflects the natural virtue of charity, which is derived from our moral duty to care for the wellbeing of other persons.

The duties that we have toward each other are natural, as they are derived from our nature. However, the actualization of these duties, in the form of negative and positive rights, requires the state. In a smaller, tribal society, the kin-based bonds that are forged create a great deal of pressure on those within society to express these human goods. But due to the development of mass society, a state is needed to properly order, organize, and actualize them; for without some compelling force, neither our natural rights nor our natural duties could be fully actualized.

Libertarians not only deny the moral worth of positive rights, they see the generation of such rights as inversely related to negative rights. This view can be graphically represented as:

Figure 3: Libertarian View of Rights



According to the libertarian interpretation of the self, which expresses itself through negative rights, the self is restricted when coerced by the state to aid others within society. This in turn limits the freedom of the individual.

If, for example, an individual making \$40,000 a year were obligated by the state to pay \$10,000 of that income in taxes, of which a portion went to actualize positive rights such as welfare or public education, the person's negative rights would decline, as the individual has control over a smaller portion of his or her property. The self is invested in negative rights because all negative rights are expressions of the self. Life is the self expressing itself in the world, liberty is the self expressing its rational agency, and property is the self investing itself in external goods. As Locke noted in his *Second Treatise of Civil Government*, "Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men" (28-29).

The suspicion classical liberals and libertarians have toward increasing positive rights can be best shown through Friedrich von Hayek's *Road to Serfdom*, which postulates that as more economic liberties are chipped away, more political liberties will eventually be lost. Sacrificing negative rights for positive rights, or as Hayek puts it, liberty for serfdom, eventually leads to the loss of all rights. For him, and other defenders of negative liberty, "The system of private property is the most important guarantee of freedom, not only for those who own property, but scarcely less for those who do not" (136).

Nozick exemplifies the libertarian conception of the self, arguing in *Anarchy, State, and Utopia* that the reason the state cannot interfere in our free choices is that we own ourselves. Because we own ourselves, any form of taxation that is not consented to is a form of theft. He chides "end-state" theories of justice, which look only toward the end result of social institutions when discussing whether they are just or not, rather than looking at the first principles (28-30). Inequality will naturally arise and is justified in existing if that inequality was achieved through just social mechanisms. As long as people have freely entered into mutually beneficial arrangements, the government has no right to redistribute the resulting distribution of wealth. Nozick argues that wealth does not fall like "manna from heaven," and that no institution is justified in then confiscating and redistributing the wealth generated from individual achievement in the interests of distributive justice (198).

In contrast, egalitarians, or modern liberals, reject this sort of representation, instead claiming that the self is rooted in positive rights. For many egalitarians, negative rights do not accurately reflect the rights persons ought to be afforded, and are instead used to maintain entrenched power interests. This has led many to deny the notion of natural rights, with T.H. Green proclaiming that, "it is only as members of a society, as recognising common interests and

objects, that individuals come to have [moral] attributes and rights, and the power, which in a political society they have to obey is derived from the development and systematisation of those institutions for the regulation of a common life, without which they would have not rights at all” (“Principles of Political Obligation”⁵ 85).

This goes beyond the duties-rights relationship I have proposed, as Green holds that there must be a *recognized* social interest, some sort of progressive mentality, for rights to be developed, rather than rights being reflections of *natural* obligations. It is true that a person cannot have natural rights if there is no society, but this is merely a trivial point. The reason for this is simply that there would be no one to hold that right *against*, no one who would have an obligation that then forms that right. But it is not society that creates our natural rights (or our natural virtues). Society only creates institutions that actualize the rights and duties we already naturally possess through our relationships with other persons.

Without rights of obligation and the freedom of action that comes with it, Green states, “I literally should not have a life to call my own” (“PPO” 85). For him, negative rights are inconsequential to a flourishing society or a functioning individual, and by strengthening laws that protect negative rights the state would be institutionalizing unearned advantages and limiting the least-well off from actualizing their potential.

Green best describes the egalitarian conception of the self when he argues,

...that I may have a life which I call my own, I must not only be conscious of myself and of ends which I present to myself as mine; I must be able to reckon on a certain freedom of action and acquisition for the attainment of those ends, and

⁵ From here on “PPO”

this can only be secured through common recognition of this freedom on the part of each other by members of a society, as being for the common good (“PPO” 85).

It is not enough for the self to manifest itself in a *freedom from*; according to egalitarians it must also have a *freedom to*. Libertarians see the self as expressed best by negative liberty, or the freedom from interference, while egalitarians see the self as best expressed by positive liberty, or the freedom to achieve one’s goals or rational desires. Positive rights are created by society in order to actualize people’s ability to make use of their positive liberty, and without such rights, “the very consciousness of having ends of his own and a life which he can direct in a certain way, a life of which he can make something, would remain dormant in a man” (“PPO” 85).

Egalitarians owe a great deal to Kant and his understanding of freedom in their defense of positive rights. John Rawls and other egalitarians cite Kant’s positive freedom, which is the ability to act in a rationally designed way, as a better understanding of freedom than is proposed by libertarians. If, for example, a person is not able to have access to education or healthcare, even if no one is infringing upon their negative rights, it seems intuitively difficult to claim that they are truly free, as their ability to act is restricted by things outside of their control, such as their poor health or lack of education. They are unfree because they are unable to actualize their will; they are restricted, not by individuals, but by the structure of society.

To give the proper opportunity to people, egalitarians call for the creation of positive rights. These rights give individuals the ability to actualize their will and to achieve their desired ends. This is a reason for Rawls’ difference principle; the best off in society are only able to

better themselves if it is to the greatest advantage of the worst off. By creating this principle, Rawls creates a trigger that can allow for those who are restricted by their status from making use of their liberty to have a means by which they can better their condition. And, because egalitarians see the self as being best expressed through positive liberty, Rawls believes that persons behind the veil of ignorance and in the original position would naturally choose such egalitarian institutions.

A Parabolic Relationship of Rights

Both the libertarian and egalitarian conception of rights and the self have justifiable defenses and compelling critiques of one another. This is because they are each targeting one particular aspect of the self and are missing out on the corresponding half. We are autonomous individuals, and thus deserve negative rights, yet are social creatures, and thus ought to construct positive rights to reflect our moral obligations. We are rational creatures, and thus have freedom from interference, but are at the same time creatures with great potential, and thus must take into account our freedom of action.

Lloyd Weinreb observes that both libertarians and egalitarians focus on the two necessary properties of justice, each focusing on one yet denying the other. Nozick embraces desert; Rawls embraces entitlement. Nozick argues that each person deserves the fruits of their labor, that they have basic rights that create recognition of desert toward their justly acquired property. Rawls argues that we are each entitled to achieve the desired ends that we set for ourselves, and that society must institute entitlement programs to provide us with the means to do so. Desert, when

turned into the form of a right, becomes a negative right; entitlement, when turned into the form of a right, becomes a positive right.

However, Weinreb believes Rawls and Nozick to be missing out on each other's insights into the nature of justice. Justice is not desert or entitlement, rather, "Justice is fulfilled when persons get what they deserve and deserve what they get; an unqualified just rule entitles those who deserve and no others" (Weinreb 10). Justice occurs when we deserve what we are entitled to and are entitled to what we deserve.

This can be observed through a quick example. All people are *entitled* to a fair trial in which they are presumed innocent. However, if a person murders another, they *deserve* to be punished for their crime. A just trial would be one in which a person who deserves to be punished for a crime and was entitled to a fair trial in which he or she was presumed innocent was ultimately convicted. In this case both qualifications of justice were fulfilled; the individual got what he or she deserved without being stripped of this basic entitlement. However, an unjust situation would emerge from a case in which either only desert or entitlement were fulfilled. If a guilty party were found to be innocent, that party would not get what he or she deserved, and thus the situation would be unjust. Similarly, if the guilty party were not afforded the entitlement that all persons accused of a crime ought to be afforded, and were punished due to a rigged trial, that would be an unjust situation as well. Both desert and entitlement must be present in a just institution.

Rawls' theory denies desert, claiming that people do not have a right to their natural talents due to the natural lottery. A person may be naturally intelligent, athletic, or attractive, but that individual does not deserve those attributes, or the fruits derived from them, as he or she never worked for them. But, if we do not deserve the fruits of our labor, why is it that the just

course of action is to redistribute it? If we do not deserve the fruits of our own labor, how can we deserve the fruits of someone else's?

Rawls' theory is also problematic when viewed through the metaethical framework I proposed in Chapter Two. For him, the principles of justice are chosen in the original position behind the veil of ignorance. But how is it that those principles reflect the good? There is no understanding of nature or function in Rawls' theory, especially not behind the veil of ignorance. The principles of justice are chosen based on the preference of the actor that is behind this veil, and the reason an egalitarian system is chosen is because the mini-max principle in game theory dictates that it would be the most rational choice. But why is it that this preference-seeking automaton is able to determine the principles that govern the creation of social institutions? For this is no longer a person, as behind the veil of ignorance we are stripped of our life narrative and become nothing more than a preference generator.

By rejecting entitlement, Nozick's theory does not do much better. According to Nozick, anything we produce or inherit justly is rightfully ours. But, surely, there are things that we may possess that were unjustly acquired. Nozick has a solution for this, and claims that any unjust acquisition would have to be rectified through compensation. But it is impossible to know what sorts of injustices that have not been recorded have aided in the social and economic conditions in which we currently reside. It is impossible to know what we deserve and what we do not deserve. How is it that I can claim to deserve a piece of property or social role if at some point down the line an injustice occurred that allowed me to possess that good? Additionally, Nozick's theory does not deal with non-economic systems that may lead to an injustice. In a racist town, one storeowner may not deserve all the customers that visit his or her store if a nearby store with better prices is never visited due to the race of that storeowner.

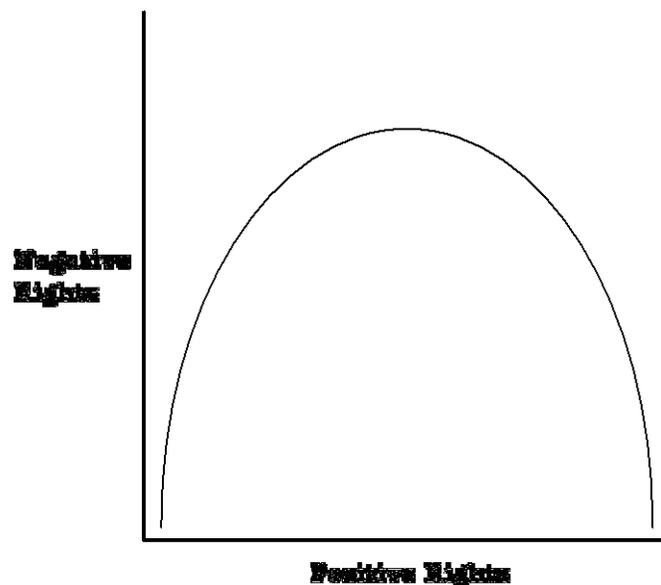
Nozick's theory also has a problem when dealing with the nature of freedom. There are numerous cases in which it seems apparent that a person is not free even if they have "willingly" entered into a contractual agreement. Price gouging is an example of this, where a person is forced to pay exorbitant amounts of money for relatively cheap goods because they need them to survive. A person cannot be said to be truly free if they have no other option, aside from death.

An extreme example of this aspect of freedom that negative liberty fails to take into account is the private firefighting brigade founded by Marcus Licinius Crassus in ancient Rome. Due to the city's layout and the materials used in housing construction, Rome suffered from constant fires. When a house caught on fire, Crassus would bring his firefighting brigade to the site and offer the owner a paltry sum for his house. The owner, with no means to put out the fire himself, would be forced to sell his home and belongings in order to at least come away from the situation with some money in his pocket. Following the agreement, Crassus' firefighting brigade would put out the fire, fix the damage, and then sell the house for an enormous profit (Plutarch 319). Because of this and other businesses, Crassus became the wealthiest man in Rome, with his total riches rivaling the treasury of Rome. While this would be a completely legitimate transaction according to Nozick's theory, it seems problematic, as it appears as if the owner of the house was not able to act freely.

Any theory of justice which is based in rights must include both desert and entitlement, both liberty and equality, both positive and negative rights. And while it is true that negative and positive rights can restrict and oppose one another, this is not necessarily so. To see positive and negative rights as diametrically opposed to one another creates a false dichotomy. Indeed, Isaiah Berlin comments on this in his *Five Essays on Liberty*, writing that, "the evils of unrestricted laissez-faire, and of the social and legal systems that permitted and encouraged it, led to brutal

violations of ‘negative’ liberty...[there is a] failure of such systems to provide the minimum conditions in which any degree of significant ‘negative’ liberty can be exercised...For what are rights without the power to implement them?” (“Liberty” 38). It seems that a more accurate graphical representation of the relationship between positive and negative rights would be the following:

Figure 4: Parabolic View of Rights



As positive rights are created, more negative rights are capable of being actualized. However, at a certain point too many obligations are formed between individuals, limiting their ability to make use of their negative rights. At this point, negative rights peak and begin a decline, and it is the moral imperative of every society to find this golden mean in which its citizens can best flourish.

Normatively, we each possess an equal number of natural rights, which are institutionalized as negative rights. However, these rights cannot be actualized unless they can be defended. In anarchy we may each normatively have full control over our negative right to property, but, because there is no coercive force to prevent that right from being infringed upon,

the right is unable to be actualized. Thus, we must create certain positive rights in order to actualize our negative ones. For example, we obligate individuals to serve in the military through the draft in dire times of war in order to protect our negative rights from being lost, or obligate persons in society to refrain from harming others.

However, the parabolic relationship of rights does not lead to some sort of minarchist state, seeing military obligation and respecting the rights of others as the only positive rights to which people have access. Oftentimes, the effects of different policies concerning rights are looked at only from the level of the individual. At this point, it seems obvious that creating an obligation between persons reduces our ability to make use of our negative rights. But this is a poor way of understanding how rights should be instituted. Rights must be looked at on the aggregate level to have a full grasp of the effects they may have, as we are socially interconnected beings, and our rights are incapable of being fully understood from within a vacuum. This is what MacIntyre noted in *Theories of Natural Law in the Culture of Advanced Modernity*, emphasizing that,

human beings are essentially sociable, that I achieve whatever I achieve as an individual by being and acting as an individual who is bound to others through a variety of familial, social, and political relationships expressed in a joint activity aimed at achieving our common good. My good therefore is the good of someone who is a part of an ordered set of social wholes. My own good can only be achieved in and through the achievement of the common good... (qtd. in McLean 300)

We are incapable of defending or making use of our rights or pursuing desired goods as atomistic, isolated individuals. When dealing with crime, for example, we cannot only look at the action, the infringement of rights, but the climate in which the crime occurred. Areas in which crime are high suffer normally from this social ill due to low education, high unemployment, and rampant drug addiction. If we hope to protect people's negative rights, the solution is not to create harsher laws against this sort of criminal activity, as the crime is a symptom of a greater disease.

The solution, the way to protect the negative rights of those being negatively affected by criminal activity, is to create positive rights. By investing in education, by instituting short-term welfare programs, and by helping those with drug problems overcome their addictions, we see both the actualization of negative *and* positive rights. Negative rights become actualized because less people are harmed by crime, while positive rights are actualized as people now have access to education and social services.

But negative and positive rights do not only have a positive relationship in the cases that involve criminal activity. An argument from fear, derived from Nozick's own theory of rights, can be used to demonstrate how positive rights like unemployment benefits or social security can be justified. Nozick points out that, while certain actions can be compensated for, the fear that is induced cannot be (70). Additionally, a particular individual does not necessarily have to cause a person fear; rather, a state of affairs can lead a person to live in a state of fear. This is a loss of negative rights, as some outside force, whether a person or state of affairs, has caused people harm. If one person threatened another to the point of instilling fear in them, they can be prosecuted, as they have harmed that person. Similarly, social situations can lead to this infringement of rights.

A society that does not contain a safety net, especially for those who are most disadvantaged, causes its citizens to live in a constant state of fear. Thus, positive rights to things like unemployment benefits and social security can be justified, as they actualize our negative right to not live in a state of fear. Obviously it is impossible to fully rid society of fear, but certain social institutions can be created that help minimize its prevalence.

Positive rights are the actualization of natural virtues, expressed by society through the state. Marriage, for example, is a positive right, creating obligations between two individuals, as well as obligations in the form of recognition by the rest in society. This positive right is expression of the virtue of love. Welfare is the expression of the natural virtue of charity or kindness. Public education is the expression of the natural virtue of education. Each legitimate positive right can be viewed as expressing the natural obligations we already owe our fellow citizens in the form of a government institution.

But, at a certain point the number of positive rights actualized begins to limit our ability to make use of our negative rights. Create too many entitlements, and society loses its sense of desert. Generate too many positive rights, and people become bogged down by all the obligations they have toward one another. There must be a balance reached between the actualization of too many or too few positive rights, which can only be discovered through trial and error.

While positive and negative rights are the primary sorts of rights we possess, there are two other important categories of rights that buttress them. In fact, these two rights give us the ability to gauge whether we have created too many positive rights by organizing a strict framework of firm and constant rights.

Inalienable and Social Rights

Within natural rights, there exist a special category of rights called inalienable rights. Unlike other sorts of rights, these are rights that not even the rights bearer is normatively able to cede. For example, we consider property and liberty to be natural rights. Yet if the population of South Carolina were to vote to add a 5% sales tax on goods we would not find it morally objectionable even though it infringes upon this right to property, as when we enter into a social contract we cede certain rights in the creation of the state. However, if in the early 1800's the population of South Carolina were to vote to strip all African Americans of their liberty and enslave them, we would intuitively see this is an unjust abuse of the democratic process. This is because in the second case certain individuals are being stripped of their inalienable rights, which can never occur in a just society.

What is it that constitutes an inalienable right? Inalienable rights are rights that arise due to integral aspects that form our human dignity. The loss of humanity, through the loss of one's life or basic worth as a human being is inalienable and therefore cannot be normatively lost through any action taken by the polity. Our worth comes from our human nature, which can never be lost due to any action others may take. The self is rooted in a human foundation; the self can never rid itself of its human essence. Humanness is an intrinsic and necessary attribute we all share, and, as established in Chapter Two, is where we derive our moral worth.

This translates into three rights that must always be protected and can never be taken away from a member of a just society. We cannot lose our right to life, as without it we would cease to be; we cannot lose our right to personhood, as without it we would lose our free agency; we cannot lose our moral equality, as without it we are demoted to being lesser moral beings.

Each of these three inalienable rights can be seen as being rooted in Kant's second formulation of the categorical imperative, "So act as to treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as a means only..." (Curtis 46). This is because human beings are intrinsically valuable and must be seen as ends in themselves. As Ernst Cassier put it,

There is, at least, one right that cannot be ceded or abandoned: the right to personality. ... If a man could give up his personality he would cease being a moral being. ... There is no *pactum subjectionis*, no act of submission by which man can give up the state of free agent and enslave himself. For by such an act of renunciation he would give up that very character which constitutes his nature and essence: he would lose his humanity" (Cassier 175).

Because of our intrinsic value, life must be seen as inalienable, for as Kant notes, "Someone who contemplates suicide should ask himself whether his action can be consistent with the idea of humanity *as an end in itself*. If he destroys himself in order to escape from painful circumstances, he uses a person merely as a *means* to maintain a tolerable condition up to the end of life. But a human being is not a thing, that is to say, something which can be used merely as means, but must in all his actions be always considered as an end in itself" ("The Metaphysics of Morals" 88). This means that institutions such as the death penalty or euthanasia ought to be banned, as they would infringe upon the inalienable rights of the rights-bearer. A person cannot be killed, and cannot even kill themselves, without being used as a means to some end.

We have an inalienable right to personhood because it is impossible for an individual not to maintain cognitive autonomy. We are each ontologically distinct entities, and even when enslaved a person is free in his or her mind. Seneca the Younger claimed that “It is a mistake to imagine that slavery pervades a man's whole being; the better part of him is exempt from it: the body indeed is subjected and in the power of a master, but the mind is independent, and indeed is so free and wild, that it cannot be restrained even by this prison of the body, wherein it is confined” (Seneca 69). Thus slavery and other forms of bondage cannot be allowed within a just society. Additionally, freedom of expression must be held as sacrosanct, as it is an expression of that autonomous self.

Finally, moral equality is inalienable because a person’s moral worth is not derived from the status of the agent or what actions the agent may have taken. A person’s moral worth is not derived from these accidental attributes, but from the intrinsic human nature possessed. We do not have moral worth because of the sorts of things we produce, or what our overall utility may be; rather, we possess moral worth simply because we are human beings. And, because the self is grounded in the human essence, a person can never lose their humanness. Thus, it is impossible for one person to become less morally valuable than another, as each person’s moral worth is derived from the same human nature.

This necessitates a democratic form of government, as every person must have equal say in the actions taken by the government. Because we each relinquish an equal number of natural rights in the creation of the state, we have essentially bought “stock” in the government, meaning that, as “share-holders,” we ought to have a say in how it is run. Additionally, any social institution created, such as education, marriage, and the military, must be open to all people as long as some quality they possess does not restrict their ability to participate in or qualify for said

institution. However, trivial differences that are integral to that particular individual, such as racial/ethnic background, sex, or sexual orientation, cannot be used to exclude the person from participation in these institutions. This is the reasoning behind why segregation, even when accepted by the majority, must be rejected in the interests of justice.

An important practical effect that ought to be noted is how inalienable rights affect tax policy. The top tax rate would have to be capped at 50%, for if individuals were to be compelled to pay more than half of their earnings to the government, they would be working for society rather than themselves. As articulated by Locke, property is an extension of the self, and if people are to be treated as ends in themselves they must have decision-making power over most of the wealth they generate. There are two sorts of slavery that exist: “hard slavery” and “soft slavery.” A person is enslaved when they are coerced in a way in which they become a means to another group or individual. If their person were turned into the property of another group or individual through the use of force, as with slaves in the American antebellum South, then it would be characterized as “hard slavery.” But if a person were to have the majority of their labor turned into the property of another group or individual, this would be characterized as “soft slavery.” The most common form of this is wage slavery, but it is not only restricted to the poorest in society.

People must have full control over the majority of their wages, for if they did not they would not have control over an expression of themselves. During the Gilded Age, there were instances in which workers were paid in company scrips that could only be redeemed in company stores (VandeCreek). While they were able to purchase goods, they did not have full discretion as to where they wanted to spend their money, and thus were in a state of soft slavery. Similarly, some may say that the wealthy receive much of what they pay in taxes back in the

form of social services. But the infringement does not come from the benefit derived from the labor; it comes from the lack of ability to have complete control over what the benefit may be.

Inalienable rights also give us a mechanism by which to judge a people's right to revolution. Those within a particular society have the right to revolution if and only if their inalienable rights are being infringed upon and it seems unreasonable to assume that these rights could be regained through the use of the legal process. For those living in Nazi Germany who had lost their inalienable rights, it did not seem possible for their rights to be regained through Nazi legal institutions. Thus, any revolution within Nazi Germany would have been fully justified.

However, things change when looking at revolution within democratic regimes. If we take the Civil Rights movement, we can see that it was a movement organized to redress the wrongs committed against African Americans and to regain certain inalienable rights that had been infringed upon. However, because they lived in a democracy, which necessarily contains the possibility for reform within existing institutions, violent revolution would not be justified. It was reasonable to assume, even at the United States' founding, that liberties that were not originally afforded to minorities and other groups would eventually be extended to those groups. Violent revolutions based on the loss of inalienable rights are thus only justifiable in non-democratic regimes; within democratic ones the mechanisms needed for peaceful reform already exist.

Just as inalienable rights exist as a special category within natural rights, social rights exist as a special category within natural virtues. Social rights are rights without which we would be unable to properly maintain our inalienable rights, and so, like inalienable rights, they must be maintained if any state is going to have even the most rudimentary claim to justice. These would

include rights such as the right to a fair trial or the right against unwarranted or extreme search and seizure. These are social obligations we hold to one another and cannot be justified as natural rights, but are necessary to maintain our inalienable rights. James Madison spoke of social rights while introducing the Bill of Rights to Congress, stating that, “Trial by jury cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature” (“Bill of Rights”).

To sum up this chapter: positive and negative rights must be weighed and balanced against one another in order to have a proper ordering of rights. Each represents the actualization of a basic category of moral obligations, with negative rights reflecting natural rights and positive rights reflecting natural virtues. As positive rights are actualized, the aggregate level of negative rights that have the opportunity to actualize increases, but at a certain point too many obligations are created and people are no longer able to make use of their negative rights. Additionally, within negative and positive rights there are special sorts of rights: inalienable and social rights. These rights are reflections of humanity’s basic dignity and moral value, and are rights that can never be altered in a just society.

In the end, rights are only valuable insofar as they respect the dignity of persons, meaning that they are the means that allow individuals to make use of liberty, which in turn gives those individuals the opportunity to flourish. But a remaining question that must be dealt with is how that liberty relates to the rights that are created. Do rights always actualize liberty, and if so, what kind? And is the state ever justified in regulating individuals’ private behavior? The next chapter will deal with these questions, and propose a method by which legislatures can determine whether a certain right ought to be actualized.

On Liberty

Negative and Positive Liberty

As was defined earlier, negative liberty is *freedom from*; it is the liberty a person enjoys when there are no infringements upon his or her ability to do what he or she chooses. Hobbes' definition of freedom is of this negative sort, with him stating that, "Liberty, or Freedom, signifieth (properly) the absence of Opposition; (by Opposition, I mean externall Impediments of motion;)" ("Leviathan" 147). For libertarians, negative liberty is a necessary prerequisite in any system that deals with rights or justice, as moral choices cannot be made without them. We cannot understand what it is to seek justice or possess a right without first making a moral choice, leading Tibor Machan to state that such moral choices are secured when, "the rights of the individual members of a human community to life, to voluntary action (or to liberty of conduct), and to property are universally respected, observed, and defended" (46).

In contrast, positive liberty is *freedom to*; it is the liberty a person enjoys when they are capable of actualizing some rationally desired goal. When making the distinction between positive and negative liberty in his essay *Two Concepts of Liberty*, Isaiah Berlin describes positive liberty as, "The freedom which consists in being one's own master," where I am capable

of, “conceiving goals and policies of my own and realizing them” (“Liberty” 161). Negative liberty is seen as “crude” by egalitarians and communitarians, as it does not take into account the freedom to achieve one’s potential and gain mastery over oneself. T. H. Green argues that, “the mere removal of compulsion, the mere enabling a man to do as he likes, is in itself no contribution to true freedom...the ideal of true freedom is the maximum of power for all members of human society alike to make the best of themselves” (“Liberal Legislation” 199).

Both positive liberty and negative liberty seem to be necessary norms within a democratic society. They are both at the heart of the metaphysical notion of democracy. Negative liberty asks, “What can others do to me?” while positive liberty asks, “What can I do?” Democracy seeks to balance these two forms of liberty, which paradoxically appear to both contradict and sustain each other. It is only in democracy that positive and negative liberty are able to fully actualize their respective goods of equality and freedom. For in a democracy, we believe that we can rule ourselves without ourselves being ruled, or, to put it in different terms, we attempt to gain mastery over society while preventing society from gaining mastery over us. This is what Alexis de Tocqueville observed in *Democracy in America*, saying,

It is possible to imagine an extreme point at which freedom and equality would meet and be confounded together. Let us suppose that all the members of the community take a part in the government, and that each of them has an equal right to take a part in it. As none is different from his fellows, none can exercise a tyrannical power: men will be perfectly free, because they will all be entirely equal; and they will all be perfectly equal, because they will be entirely free. To this ideal state democratic nations tend (Tocqueville).

This foundational democratic concept has an interesting parallel in Immanuel Kant's work on the ethics of love. Kant argues that, because human beings are ends in themselves, and because treating a person solely as a means to one's ends is immoral, a sexual relationship whose purpose is pleasure is immoral. This is because body parts, or even the body as a whole, cannot be disconnected for the person, as persons are one intrinsically valuable, wholly integrated unit. Thus, when we give a part of ourselves up to another during sexual activity, namely our bodies, we are instrumentalizing our value ("Duties Toward the Body" 286-287).

Kant then argues that the only time in which sexual activity can be justified is within the institution of marriage. This is because when two individuals are wed, they enter into the institution as free and equal partners. They give themselves to each other, wholly and unconditionally, and through this process are now able to participate in sexual activity while maintaining their value as ends in themselves. Because each owns the other, neither is owned by anyone, protecting the dignity of both persons ("Duties Toward the Body" 287-288). In a sense, this is the sort of unity we seek when setting up a democratic regime.

We wed ourselves to society, all entering into the contract as free and equal persons. By giving ourselves to one another, we give ourselves to no one. Because Man is social, he must live with others, but because he is rational, he seeks to make decisions for himself. It is the perfect intersection of these fundamental human goods that allows us to make use of our dignity. And for the liberties associated with both of these attributes to be actualized in a complementary fashion, a democracy must exist, as within a democracy Man can both give himself to others and be ruled by none. This ideal that Tocqueville spoke of in regards to democracy can also be seen as the ideals of justice, rights, and liberty. As desert and entitlement reach their "extreme point"

perfect justice is actualized; as negative rights and positive rights reach their “extreme point” the parabolic relationship emerges; as negative liberty and positive liberty reach their “extreme point” a holistic understanding of liberty comes into being.

Throughout this thesis I have made a number of dichotomous distinctions which I find expressed in either libertarian or egalitarian political theory. Each sphere of thought focuses on one of these two categories, while rejecting the other. It is part of the purpose of this work to find the golden mean between the two, as both foundations are needed. The following table is a representation of the relevant distinctions made between libertarianism and egalitarianism, as well as the corresponding ideas I have been proposing:

Figure 5: Relationship of Human Goods

Libertarianism	Natural Law	Egalitarianism
Desert	Justice	Entitlement
Freedom	Dignity	Equality
Negative Rights	Parabolic Rights	Positive Rights
Negative Liberty	Holistic Liberty	Positive Liberty

To properly understand each of these values, we must investigate how each can inform the other and even aid in each other’s maintenance. But in contemporary liberal theory, libertarianism and egalitarianism seem to have attempted to rid themselves of the values of the other. This dichotomy is at the core of the dispute between libertarianism and egalitarianism and is thus important in the discussion of rights and liberties. And, as demonstrated in this table, there are commonalities between negative and positive liberty, and it is the purpose of

democratic regimes to reflect a holistic understanding of liberty – one that takes into account the autonomous self and the potential each self holds.

Siding with one form of liberty over the other misses out on valuable contributions that both make to the concept of liberty, and in many cases makes the discussion of liberty absurd. Negative liberty makes little sense, for when isolated it can become contradictory. Negative liberty holds that autonomy is the greatest good, that each individual must be treated as an individual, and that any sort of law that prevents us from doing whatever we may choose to do is unjust. But under this framework, it seems as if banning a crime such as murder would be unjustified, as by doing so we would be infringing upon the liberty of another. If we were to create a law that banned murder, we would have to use force and coercion to prevent those who would like to murder from murdering.

Some may say that this is an unfair critique, that such an imposition is justified because the murderer is attempting to infringe upon the liberty of another. But as Ronald Dworkin points out, law “diminishes a man’s liberty when we prevent him from talking or making love as he wishes, but it also diminishes his liberty when we prevent him from murdering or defaming others” (Rosen & Wolff 130). It does not matter that the murderer is seeking to infringe upon the liberty of another person to live; the point is that regardless as to whether we prevent the murderer from killing or do not, someone’s liberty will be lost, as, “Every law curtails *some* liberty, although it may be a means to increase another” (“Liberty” 41). It is true, as Berlin humorously noted, that “freedom for the pike is death for the minnows” (“Liberty” 173).

Liberty as autonomy, or negative liberty, cannot be the sole principle by which we create laws that govern personal behavior, for if it were we would have no basis to govern any behavior at all. To ensure the liberty of some, the full autonomy of others must be diminished, as “There is

no relation of man to man in which man is absolutely free to act how he pleases or how it suits him” (“NRH” 129). While “Man’s freedom is accompanied by a sacred awe” (“NRH” 130), it must be restricted, as with it comes “a kind of divination that not everything is permitted” (“NRH” 130). What Strauss calls our “natural conscience” is the inner voice or intuition which reflects the moral law, as it is an aspect of our nature, thus making “restraint...as natural or as primeval as freedom” (“NRH” 130).

Another critique of negative liberty comes from positive liberty itself, though it eventually leads positive liberty down its own path of contradictions. Positive liberty can be understood as a self-mastery, where reason governs the passions. While positive liberty is about achieving one’s ends, one’s potential, those ends must be rationally determined. As Berlin points out, if positive liberty asks, “What can I do?” it is inevitably led to the question “Who is my master?” (“Liberty” 36). Even if there is no outside force controlling me, my lack of education or poor health may limit and control my decisions; these restrictions will gain mastery over me. I cannot be considered as free if difficulties outside my control have somehow restricted my ability to act. But if internal limits, such as knowledge, can control us, then perhaps our desires can exert this same sort of control. If reason is not ruling, can we truly be called free?

According to this strong interpretation of positive liberty, freedom is not simply about acting as one may wish. If the self acts only based upon the desire, then the desire governs the self; the individual has become enslaved to his or her passions. To be truly free, one must act in accordance with reason, which would then reflect certain categorical imperatives, as reason is common to all people. This is why humans can be, paradoxically, “forced to be free” (Curtis 20). In this view, it is up to the community to implement laws to help mold and govern the behavior of those who would enslave themselves. “The individuals see the good they reject; the public

wills the good it does not see. All stand equally in need of guidance. The former must be compelled to bring their wills into conformity with their reason; the latter must be taught to know what it wills” (Curtis 25). If, Rousseau proclaims, people were to act in accordance with their own will, rather than what he calls the General Will, which is a manifestation of the rational, moral law, then, “[they] should not have been free” (Curtis 33).

This exaltation of positive liberty without any reference to the autonomy of the individual leads to what Alexis de Tocqueville calls “soft despotism,” where the government bends and guides citizens to fulfill what it sees as a “free” course of action (Tocqueville). Isaiah Berlin points out that,

It is one thing to say that I know what is good for X, while he himself does not; and even to ignore his wishes for its – and his – sake; and a very different one to say that he has *eo ipso* chosen it, not indeed consciously, not as he seems in everyday life, but in his role as a rational self which his empirical self may not know – the ‘real’ self which discerns the good, and cannot help choosing it once it is revealed (“Liberty” 180).

The danger in positive liberty is that it can mean the complete loss of liberty. Once one accepts that the individual has no right to autonomy, and that it is the function of government to perfect Man, one is placed in, “a position to ignore the actual wishes of men or societies, to bully, oppress, torture them in the name, and on behalf, of their ‘real’ selves, in the secure knowledge that whatever is the true goal of man (happiness, fulfillment of duty, wisdom, a just society, self-fulfillment) must be identical with his freedom – the free choice of his ‘true’, albeit

submerged and inarticulate, self” (“Liberty” 180). Liberty as potential, or positive liberty, degrades into totalitarianism without the benefits negative liberty provides, as “this monstrous impersonation...is at the heart of all political theories of self-actualization” (“Liberty” 180).

And so how is it that these two forms of liberty are to be reconciled? Rather than a liberty as autonomy or a liberty as potential, we must balance the two in favor of liberty as dignity. Liberty as dignity means that people must have a relative level of autonomy in order to make moral decisions, but must also have adequate means of supporting their attempts to achieve certain ends once those ends have been decided upon. Liberty as dignity is ultimately rooted in Kant’s second formulation of the categorical imperative – that people should never be treated solely as means, but also as ends in themselves (Curtis 46). Rights must then be actualized in such a way that would balance negative and positive liberty, which would be accounted for in the parabolic theory of rights.

If we apply liberty as dignity to some of the situations in which liberty as autonomy and liberty as potential failed to account for our intuitive conception of liberty, we can see why it succeeds. Liberty as autonomy is unable to prevent the murderer from killing an innocent person because it would refute itself by infringing upon the murderer’s autonomy. However, liberty as dignity is perfectly able to intervene, as stopping one person from killing another does not infringe upon the dignity of the first, though being killed is an infringement of one’s dignity. Additionally, while liberty as dignity can seek to provide the necessary prerequisites that allow for an individual to achieve his or her goals, it does not fall into the danger of totalitarianism as liberty as potential does, for such heavy-handed compulsion would ultimately treat individuals as means to an end (even if it is the proper end to which they ought aspire). While there can be a public endorsement of certain moral goods through restrictions in private behavior, these

restrictions are necessarily limited, and certain activities that may be considered immoral can be allowed to remain legal so that the dignity of individual moral choices remains. The principles behind this balance will be expounded upon in the following section.

The Private and Public Good

While the preceding analysis gives us a reasonable understanding of the relationship of liberties, there is still the question of what sort of practical principles would be best able to reflect these theoretical ideals. What sorts of limitations, if any, can the state and society reasonably put on individuals acting within a private setting? According to the dominant Millian approach, society ought to embrace a “no harm principle,” wherein, “the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others” (Mill 48). Such an approach acknowledges that each individual is his or her own rational, autonomous agent, treats people as ends in themselves, allows for people to participate in “private experimentation,” and recognizes the fallibility of laws and traditions.

However, a problem with this argument, one that has been noted by numerous political theorists, is that defining “harm” can be an especially difficult enterprise (Rosen & Wolff 135-136). Additionally, our private choices have enormous implications toward our public behavior, and ignoring the social bonds that connect those within society could be detrimental to the civic health of society. If every person chose, in their private lives, to lie to one another, the public realm would cease to function. If a large percentage of the population were racist, no matter how egalitarian public institutions may be, those private beliefs would generate public injustice.

While there are some distinctions that can be made between the public and the private, they are ultimately intertwined and necessarily affect one another.

This was the sort of criticism one of John Stuart Mill's greatest critics, Patrick Devlin, leveled against him in his book *The Enforcement of Morals*. Devlin argued that, because certain traditional standards helped to shape and mold us, and because it is due to our customs and social history that we are able to enjoy certain rights, we owe a certain fealty to tradition and custom (104-105). A people have a right to defend their way of life, to maintain a common moral framework. A state is not simply a collection of neutral institutions which act as a skeleton for society – it is an expression of the social norms that currently exist, and thus can endorse certain ways of behaving (Devlin 109).

Devlin presents a thought experiment in which there exist a band of one hundred people, ninety of whom are virtuous and ten of whom are vicious. He considers what would happen if this band was a social club, saying that if that were the case the solution would be easy, as “the vicious ten would be expelled and no one would think the expulsion harsh” (106). However, in a society, “a man has his whole social life” (106); society is different from a social club as it makes up the entirety of the individual's narrative. Additionally, it seems extreme and impractical to kick out the offenders, as “Men can no longer be driven into the desert” (106). And so Devlin proposes an alternative solution. According to him the ninety are justified in restricting some of the ten's negative liberty in order to “reform” them and actualize their positive liberty. Otherwise, the ninety virtuous, and their descendents, would be left, “relying on the strength of their own virtue to resist contamination” (106), potentially, “convert[ing] to the vicious” (Devlin 106). A key difference between Devlin's position and an extreme position derived from positive liberty is that, unlike with positive liberty, Devlin is not seeking to perfect

those who are vicious, but rather defend the rights and liberties of those who are virtuous.

Devlin then critiques Mill's argument from epistemic uncertainty, where moral diversity is needed in order to have a competition of values, which would eventually demonstrate to society which values are the best. He says that,

A man does not as a rule commit bigamy because he wants to experiment with two wives instead of one. He does not as a rule lie with his daughter or sister because he thinks that an incestuous relationship can be a good one but because he finds in it a way of satisfying his lust in the home. He does not keep a brothel so as to prove the value of promiscuity but so as to make money (Devlin 107).

Devlin, like Mill, sees freedom as instrumental, and thus concludes that there are certain things that one can reasonably assume are not being done out of a belief that they are reflections of the good life (108). He also notes the traditional Burkean argument that tradition has survived *because* it reflects what is good, and thus if one took a stand from epistemic uncertainty one would have to endorse tradition within society as it has greater warrant than "progressive" changes. Finally, Devlin exemplifies the belief rooted in positive liberty that, "Freedom to do what you know to be bad is worthless," as such freedom is ultimately enslavement (108).

But, while some of the problems Devlin brings up about Mill's harm principle have merit, his theory delves into dangerous territory. Though he does not embrace positive liberty for the sake of those who have enslaved themselves, he ultimately treads near its totalitarian temptation. Devlin, seeing people not as individuals, but as parts in a social moral fabric that must maintain itself, declares, "Can then the judgement of society sanction every invasion of a

man's privacy, however extreme? Theoretically that must be so; there is no theoretical limitation. Society must be the judge of what is necessary to its own integrity if only because there is no other tribunal to which the question can be submitted" (118).

Both Mill and Devlin's proposals on how to balance the public good with private interests are problematic, though in the end Mill's approach has proven far more popular, and with good reason. Devlin's argument leads to the danger of a tyranny of the majority, a risk that has been identified in democracy from Plato, through Tocqueville and Mill, and still widely acknowledged in contemporary political theory. Devlin fails to take into account the right of individuals to have a private life, even if aspects of that life may impact others indirectly. However, Mill's no harm principle fails to recognize the paradox of public neutrality, which I will elaborate upon in the next section. He also has a problem in determining how to deal with indirect harm, and through this critique I have developed my own principle of liberty.

It has been implied in previous sections and chapters that negative rights increase negative liberties and positive rights increase positive liberties, with some theorists even using the terms "rights" and "liberties" interchangeably. Indeed, such a view is common among those who choose to make such a distinction. For many it may seem self-evident that each sort of right and liberty are connected, as having a prohibitory right allows one to have the liberty of remaining unmolested, while having an obligatory right aids one in achieving one's goals. And while it does seem that there is a strong correlation between negative rights and liberties and positive rights and liberties, it is not absolute.

Let us look at speeding laws as an example. When the state creates a speeding law, banning a person from going above a certain speed along a particular road, it has created a positive right. We are each obligated to drive at or below a given speed; if the state actualized

negative rights when it comes to speed limits we would be allowed to drive as fast as we wished. And yet by creating this positive right, the state actually increases negative liberty. Compelling people to act in such a way diminishes some negative liberty – the freedom to drive as fast as we wish – but by doing so the state drastically reduces the number of accidents each year. Whenever a person crashes their car into another person’s car, the second person has had their negative liberty infringed upon.

Mill’s no harm principle only looked at the individual, and whether a particular individual would cause harm to others should a regulation governing our private affairs be lifted. But, in the case of speeding laws, one individual may be able to speed as much as they want and never get into an accident. This is why we must take into account the aggregate increase or decrease of negative liberty. While a particular individual may not hit or be hit should speed limits be lifted, through the creation of a positive right the overall amount of negative liberty can actually be increased.

Another example that can be seen takes place within the economic sphere. While it can be argued that a laissez-faire system best reflects the greatest actualization of negative rights, if the market is left to its own devices the aggregate level of negative liberty will be diminished. Without the food, safety, health, and environmental regulations that are put into place, which are all positive rights, people will inevitably be harmed due the excesses of the market, limiting their negative liberty.

The reverse is also true. If a government chooses to create a new entitlement program in order to increase positive liberty, it is possible for positive liberty to actually diminish due to the poor management or structure of the program. By taxing its citizens, the government reduces their ability to make use of their money to achieve their desired goals. To offset this, the

government is obligated to use the funds in such a way that a greater number of people are able to make use of more positive liberty than they would be able to do otherwise. But if such a program proves to be less efficient than the market in actualizing the ends people seek, it would be preferable to keep more negative rights than positive rights, which would then lead to a greater amount of positive liberty. Thus, the principle of liberty also gives us a practical way to determine when to stop actualizing positive rights, as a program such as the one described would go past the golden mean that is targeted in the parabolic theory of rights.

When it comes to the actualization of positive liberty, it is almost always better to focus on creating programs that help the least well off. This is because within society they are the segment that is most limited in their ability to achieve their ends, meaning that they would gain most from said programs. As the income levels of those for whom positive rights is being created increases, the marginal utility of the positive rights actualized decreases. Thus, the entitlement programs that most efficiently actualize positive liberty target the poor and disadvantaged.

We can then apply this sort of reasoning to private choices, such as drugs, alcohol, or prostitution. One may determine that the amount of negative liberty that would be increased by banning alcohol, through fewer deaths due to drunk drivers or abuses caused by alcoholics, would not counterbalance the collective negative liberty lost by all those who are able to enjoy alcohol socially. Additionally, one would have to take into account the increase in crime and gang violence that would come from banning alcohol, as seen during the Prohibition Era.

In contrast, one may determine that heroin ought to be banned, even though Mill's no harm principle would claim it exists in the private sphere and is therefore available for private experimentation. While particular individuals may be able to use it in ways that would not cause harm to others, because of its highly addictive nature, and because it cannot be enjoyed casually

as a social drug, as alcohol can be, on the whole heroin may be seen as lowering liberty within society. Legalizing it would cause its use to become more widespread, and addicts would be predisposed to committing violent acts against others within society in order to get money to pay for the drug.

The principle of liberty allows for a proper understanding of the role liberty plays in the private and public sphere. However, it alone is not adequate. While Devlin's argument concerning public moral principles eventually went too far, his rejection of public neutrality in favor of public values has some warrant, with such a concept being adopted by contemporary communitarians. In the next, and final section, I will argue against public neutrality and in favor of a principle of morality that can be used to supplement the principle of liberty.

Public Neutrality or Public Values?

As outlined in the very first section of this thesis, by denying ontology much of contemporary political philosophy has fallen into relativism, and when institutionalized as a principle this relativism takes the form of public neutrality. Modern contractarianism and utilitarianism look to the preferences of individuals to determine what sorts of political arrangements ought to be constructed, and neither bothers to ask what integral virtues are needed to live a good life. Man's purpose has been removed from the objective sphere; it is now commonly understood as a subjective undertaking.

This is why relativism becomes the logical end of Enlightenment political philosophy. When morality is rooted in the individual, the individual becomes the sole arbiter of that

morality. When discussing the crisis of liberalism, Strauss notes that this crisis exists because “liberalism has abandoned its absolutist basis and is trying to become entirely relativistic” (Wiggins 140). There are no intrinsic goods; there are no objective final ends. Morality without teleology is rationality without reason. We are each the makers of our own ethic because we are rational agents, but there is no final reason that influences our decisions aside from our own cost-benefit analysis as to how we want to live. Morality without teleology degrades into a series of preference statements, and society without that final cause of public virtue becomes limited to a union of self-interested agents.

This mentality is what helped lead to the paradigm shift in ethics and politics during the Enlightenment, where politics began to be seen purely as a means to power. If there are no intrinsically valuable final human ends to which politics must aspire, then all things become instrumental. Politics becomes a means to whatever ends we desire it to fulfill, and because each person has a different ordering of preferences, politics devolves into a series of power relationships in pursuit of those preferences, rather than a civic expression toward the public good. Strauss writes that the wise and virtuous only rule because, “their whole life is devoted to the pursuit of something which is absolutely higher in dignity than any human things – the unchangeable truth” (“NRH” 151). For the ancients, justice is a transcendent good rooted in human nature, and its fulfillment calls the wise to public life. Without this transcendence, when *nomos* replaces *physis*, politics loses virtue and is left only with the power authority provides.

Strauss identifies Machiavelli as the turning point when he argued that public goods can and ought to be manipulated by those in positions of authority within society in order to maintain their power and prestige (“HPP” 272-277). The idea that politics was a series of power relationships was rooted in liberal thought by Hobbes, for whom morality was derived from

power, as power was the basis of the social contract. While later liberals are far less authoritarian than Hobbes, his language concerning power changed the way political philosophers looked at politics. The laws of nature were based in a desire to preserve oneself, and so society came to be viewed as a grouping of individuals unified only due to their self-interest and need for self-preservation. No longer does the city exist for the pursuit of virtue; it exists so that we do not have to return to the terror of the state of nature (“HPP” 272-277). The more power a person possesses, the more likely that person is to survive, and so the political community becomes atomized, with each individual seeking his or her own ends. Power and individuality are inseparable, and both are at the heart of liberalism.

This view finally came to its full expression with Nietzsche's master-slave morality and will to power. Liberalism's deification of the individual allowed for the rise of Nietzsche's Übermensch, a person so removed from social mores that he constructs his own hero morality and is capable of separating himself from the slavishness of the community with which he is a part. It also seems that Nietzsche's will to power is the end result of liberalism's acceptance of Hobbes' reasons for communal relationships. The purpose of living and the driving force of humanity is to gain power. Power, security, and happiness exist for the individual and the individual alone.

Nietzsche can be seen as a messenger, heralding liberalism's destruction of the political life. He does not necessarily propose ideas because they are his own; rather, he comments on the modernity he saw coming to fruition. He sees modern society for what it actually is, and, assuming that we have all accepted this way of life, demonstrates how horrific our decision truly is. One of the reasons much of philosophy in the twentieth century can be seen as a response to Nietzsche is because he forces us to see the logical result of the Enlightenment.

Public neutrality is an outgrowth of these principles, removing questions about the nature of the good life from the public sphere, replacing them with democratic mechanisms and procedures. Such institutions may allow us to maintain our rights, but they do not meet the existential needs of human beings, for we are, as Aristotle famously stated, “political animals” (“Politics”). Power has become justice, for as long as the preferences we generate and impose on others in the public sphere exist within the liberal framework, they are seen as just. In much of contemporary political philosophy, it seems that Calicles and Thrasymachus have won out over Socrates.

If there is no objective good, or final human end, then politics must be about power. We each seek to impose our own preferences into public policy, knowing that those preferences are incommensurable with the preferences of others. But for us, as rational agents, to seek our own happiness we must do so; if we do not we run the danger of seeing others' preferences, which may retard our own, become institutionalized. If there is no objective good that social institutions can reflect, and if politics is about the competition for power, each preference begins to compete and force its way into the state's public sphere. The danger to political stability this framework generates is the reason for liberalism's reliance on public neutrality.

Public neutrality serves as a bulwark against the undemocratic impulses the need for power creates, for it limits political power projections from becoming totalitarian in nature by sanctifying decisions made in the private realm. Because most contemporary political philosophy, including both libertarianism and egalitarianism, accept some version of public neutrality, their imposition of preferences in the public sphere is restricted from extending too far into the private realm. Without this framework, contemporary Enlightenment ideologies would move from what Strauss calls “gentle” nihilism to the “brutal” nihilism of other Enlightenment

ideologies, such as communism and fascism.

However, there are some serious theoretical issues with public neutrality. MacIntyre observes that it is a modern deception; public neutrality itself constructs a particular kind of citizen with a specific sort of virtue (68). There will always be public virtues that help to develop a certain mindset through which citizens understand morality and politics; there can be no such thing as a truly neutral public sphere. Public neutrality falls into the same contradiction that befell liberty as autonomy; to claim that no moral imperatives can be imposed upon the public sphere is itself an imposition of a particular moral imperative on the public sphere.

To limit public values also seems to miss part of the purpose of the political life. Virtue must be practiced, and the law allows for legislators to create institutions that aid citizens in practicing virtue. For Aristotle and many pre-Enlightenment political philosophers, the idea of purposefully attempting to remove public virtue from the discussion would have seemed antithetical to the entire idea of politics. Thomas Aquinas notes, “it is evident that the proper effect of law is to lead its subjects to their proper virtue: and since virtue is ‘that which makes its subject good,’ it follows that the proper effect of law is to make those to whom it is given, good, either simply or in some particular respect” (Aquinas). Politics does not exist in a vacuum. A just society cannot be formed simply through the correct application of certain principles within public institutions – the citizens of that society must maintain a virtuous character. No matter how just the public institutions may be, if the society is filled with racists or sexists it will fall into injustice, as such a society “fails to cultivate the qualities of character that equip citizens to share in self-rule” (“Democracy’s Discontent” 24).

Contemporary liberalism, which includes both libertarianism and egalitarianism, while at times rejecting the notion that it does inculcate certain virtues, has to an extent come to terms

with its effect on the nature of its citizenry. John Rawls discusses this in *Political Liberalism*, where he argues that liberalism, when used as the framework for political systems, creates “liberal citizens,” who would then be predisposed to participate in “public reason” – a way of making political decisions that is exclusive to liberal societies (312). This idea is expanded upon by Macedo, who labels the political behavior people adopt in democracies as “liberal virtues” (4).

However, these are only “procedural” virtues, with Sandel criticizing the Rawlsian conception of the state as merely a “procedural republic”, where “our political discourse...has come to reflect the liberal resolve that government be neutral on moral and religious questions, that matters of policy and law be debated and decided without reference to any particular conception of the good life” (“Democracy’s Discontent” 24).

The virtues contemporary liberals talk about are not virtues in the classical sense – character traits that promote living the good life. These virtues are nihilistic virtues; they are virtues of non-interference and relativity, where the only public good recognized is tolerance. Because liberalism affirms the right of every individual to pursue his or her own conception of the good, certain procedures, called “liberal virtues,” are implemented to limit society’s ability to influence its citizens’ private moral decisions or conception of the good life. We have wholeheartedly adopted Mill’s no harm principle and advocate for citizens to participate in private experimentation without reference to whether it allows for the maintenance of a civic and virtuous society.

But we must be careful not to tread the road Devlin traversed. There is a reason for contemporary liberalism’s wariness toward public values – throughout history public values have, in many cases, been used as a tool of oppression. We must not glorify the ancient form of

liberty without understanding the reasons for its eventual rejection. Much of what the Enlightenment brought us – the power and dignity of the individual to make his or her own choice – must be sanctified in any theory of rights and justice. But a reformulation of the way in which we think about public value must still be had. There must be a paradigm shift in our conception of politics away from Hobbes’ discourse on power and back toward the ancients’ understanding of public virtue.

The only sort of private behavior that can be legitimately legislated against would be private behavior that degrades the dignity of the individual – and even then not all cases would be justifiably legislated against. The scope of the principle of morality must be closely managed, left wide enough to allow society to reflect its moral values, yet narrow enough not to infringe upon certain basic rights. In these cases *phronesis* – the application of practical wisdom – will have to be used to determine what sorts of activities ought to be legislated against. The principle of morality takes two forms:

1. The principle of morality as applied to dignity – A private activity may be made to be illegal if it degrades the dignity of a human person.
2. The principle of morality as applied to public values – A private activity that does not degrade the dignity of a human person, but is seen as violating the common moral norms, can be disincentivised through legislation.

The principle of morality is closely tied to liberty as dignity and the principle of liberty. If, for example, society were to see the private decision of drunkenness as an activity that it

would like to regulate or eliminate, it would have to first look to the principle of liberty. Would banning alcohol increase or decrease liberty overall? If it is determined that banning alcohol would increase liberty, at that point the principle of morality would not need to be appealed to and alcohol could be justifiably banned. However, if it were found that liberty would decline if alcohol were banned, the principle of morality would come into play.

Society would have to investigate whether the first principle of morality could be justifiably appealed to in order to ban alcohol. Because morality is derived from human nature, human nature is intrinsically valuable, as morality is valued as an end. Because human nature is intrinsically valuable, persons must be treated with dignity, and thus are always as ends in themselves. However, it does not necessarily require an external actor to degrade a person's dignity; individuals are perfectly capable of acting in ways that degrade their own basic dignity. Thus, because laws are put in place to protect and enhance the dignity of the citizenry, should the consumption of alcohol be seen as degrading the person's dignity, turning the individual into solely a means to an end, then alcohol could be justifiably banned. However, drunkenness does not turn people into means, and thus could not be banned based on the first principle of morality.

The final principle that can be appealed to is the second principle of morality. Because public neutrality is contradictory, and because a democratic state is a reflection of society, the state is able, through the consent of the people, to create public values through the creation of incentives and disincentives. Thus, "sin taxes" can be imposed, public service announcements can be made, and certain restrictions can be set in place for sectors of the economy that are seen as promoting a way of life that does not express what the good life may be.

Returning to the first principle of morality, an emblematic example of a prohibition that can be made based on this principle would be the prohibition on prostitution. It can strongly be

argued that, after taking into account all relevant factors, prostitution would increase the overall level of liberty within society. However, it also seems that, based on Kant's arguments concerning love and sex⁶, paying a prostitute for sex would degrade the dignity of both parties, turning them into simply a means to an end.

Because a society's laws reflect its moral beliefs, one may choose to ban the practice of prostitution even if it conforms to the principle of liberty. To do so would be a public recognition that persons cannot be bought, sold, or rented, that love and sex are integral and meaningful human values, and that society does not see the unadulterated objectification of another person as a good character trait to possess. Aristotle observes the power of the law to inculcate certain moral virtues in the *Nicomachean Ethics*, writing "Legislators make citizens good by forming habits in them, and this is the wish of every legislator, and those who do not effect it miss their mark, and it is in this that a good constitution differs from a bad one" (32).

It may be asked, if prostitution can be banned because it degrades human dignity, can something like one-night stands be banned as well, as they are quite similar in the fact that they turn the consenting parties into a means? This is where the importance of *phronesis* comes into play. First, it seems as if it would be incredibly difficult if not impossible to enforce such a law, and to do so would require an enormous invasion of privacy – so much though that people's social rights would most likely be violated. Second, while the immoral transaction is readily apparent in the case of prostitution, the state cannot know what is in the minds of consenting adults who need no other incentive but one another when it comes to sex. The transaction of money, goods, or labor for sex is a blatant demonstration of the lack of a bond between the two

⁶ One could of course reformulate Kant's argument to see love, or perhaps a non-marital romantic relationship, as being enough to view one's significant other as an end when engaging in sexual activities, rather than strictly defining marriage as the only indicator.

parties. Without such a transaction, the state has no means of determining the exact state of mind of the two parties involved.

The principle of morality gives a community the ability to affirm its values through the state. We cannot see ourselves as wholly independent individuals, and must acknowledge the interconnectedness of all people within society. The egalitarianism proposed by Rawls and the libertarianism proposed by Nozick are hollow because they miss the fundamental point of politics – to promote the common good, and aid citizens in living the good life. However, the principle of morality should not simply be thought of as a “socially conservative” or “traditional” principle. Indeed, it can, and should, be a mechanism for social change and justice.

We can look, for example, at the Civil Rights movement in America in the middle of the 20th century. In order to prevent southern states from continuing to institute policies that discriminated against African Americans, the Congress passed the Civil Rights Act in 1964. Much of the bill’s constitutional justification was rooted in the 14th and 15th amendments, which, respectively, guaranteed equal protection and voting rights (“Civil Rights Act”). However, Titles II and VII, which prohibited businesses from discriminating against clients or engaging in discriminatory hiring practices, were more difficult to justify, as the 14th and 15th amendments applied to federal, state, and local governments, not to private citizens or businesses (“Amendments 11-27”). Many libertarians since have made the case that, while discrimination is immoral, we cannot regulate private behavior in such a manner, and that private businesses should be allowed to discriminate if they so choose.

To justify Titles II and VII, Congress turned to the commerce clause of the Constitution, which grants the federal government the ability to regulate interstate commerce. Because businesses engage in interstate commerce, it was argued that the federal government is justified

in preventing them from engaging in discriminatory activities because it puts a burden on that commerce. The Supreme Court upheld this argument in *Katzenbach v. McClung*, stating that, in the case of the food industry, “racial discrimination by such restaurants burdened interstate trade” (“*Katzenbach v. McClung*”). Even businesses that do not explicitly engage in interstate commerce could be regulated, with the court ruling in *Heart of Atlanta Motel, Inc. v. United States* that, “Congress had power to enact appropriate legislation with regard to a place of public accommodation such as appellant's motel even if it is assumed to be of a purely "local" character, as Congress' power over interstate commerce extends to the regulation of local incidents thereof which might have a substantial and harmful effect upon that commerce” (“*Heart of Atlanta Motel, Inc. v. United States*”).

While the Civil Rights Act and these subsequent rulings helped to bring about the sort of racial reform that had been sorely needed for generations in America, they seem to have missed the point about exactly *why* racial discrimination is wrong. Because of our strict adherence to public neutrality, private businesses could only be compelled to end discrimination by stretching the commerce clause, a constitutional power that deals with economic regulation, beyond its original intent. Rather than expressing what was truly problematic about private discrimination – that it devalues the intrinsic worth of certain human beings, that it violates people’s inalienable right to moral equality, and that it breaks apart social bonds by creating “otherness” within society – the legislature and court used an economic regulation to ban it. It seems that, if it could be shown that racial discrimination *did not* have a negative effect on interstate commerce, the court would be forced to allow it to continue. Racial discrimination is wrong because it violates people’s basic dignity, not because it “might have a substantial and harmful effect upon...commerce” (“*Heart of Atlanta Motel, Inc. v. United States*”).

In 1955 Rosa Parks famously refused to give up her bus seat to a white passenger, leading to the Montgomery Bus Boycott and the eventual court decision of *Browder v. Gayle*, which found the bus segregation to be unconstitutional. The court claimed that the laws violated the 14th amendment, but this only applied because the buses were state-run (“*Browder v. Gayle*”). If, however, the buses were privately owned and operated, it seems difficult for the courts to have justified their decision under the 14th amendment, and would most likely have had to appeal to the commerce clause.

We can imagine the principle of liberty being unable to effectively prevent this sort of discrimination. It could be argued that, when looking at the passengers, no aggregate freedom has been lost, as, while the black passengers would have lost the freedom to sit, the white passengers would have gained the freedom to sit. In fact, by creating a law that restricted these policies, the business’ right to structure itself would be lost. No one is being physically harmed, and blacks do not *need* to ride these buses, with the bus company owners not having any sort of obligation to serve them.

While some of these points may be true, this is why the principle of liberty must be supplemented by the principle of morality – the principle of morality prevents the state from transforming into a “procedural republic” and allows justice and rights to truly instantiate themselves. This sort of morally arbitrary discrimination would be prohibited by the first formulation of the principle of morality, as discrimination infringes upon persons basic dignity. Thus, whether, as in this case, we are dealing with bus companies, or as with the previous two, we are dealing with restaurants and hotels, the state would be justified in banning such practices, regardless of effect on interstate commerce.

We cannot view ourselves as atomized individuals, acting completely independently of one another within society, only needing laws to prevent us from directly harming each other. The social fabric must be maintained, and the principle of morality allows for us to affirm our equal right to citizenship and our basic social values. We are all interconnected, and our social relationships have moral import as they help to develop our life's narrative. Banning degrading activities like prostitution and discrimination, or regulating potentially destructive substances like alcohol, allow us to affirm to our children and ourselves our community's moral character.

The principles outlined in this chapter and the last demonstrate the importance of federalism when it comes to creating good public policy. Under a federalist system, different state and regions are able to experiment, increasing or decreasing positive and negative rights and liberties, as well as experimenting with different expressions of social values. By allowing for this sort of experimentation, we are able to maintain a dynamic system and avoid a dogmatic public moral framework. Because there states can engage in experimentation, it can become apparent as to what combination of rights and liberties is most effective. This competition allows for changes in the public moral paradigm, ensuring a dynamic competition of ideas and beliefs.

Conclusion

Discussions of rights and liberty are central to political philosophy. They form the basis for our justification of social institutions, and are the foundation for any debate related to public policy. And the modern theories of justice ultimately attain their ideal of justice through a proper ordering of rights and liberty. What makes these concepts so important in political philosophy is that they deal with the very core of what the discussion of politics is: how should human beings arrange political, economic, and social institutions?

But the perfect fulfillment of justice within society can never occur. The example I gave of an institution exemplifying the principles of justice, in which the criminal got what he was entitled to and what he deserved, is impossible to replicate in every instance. Thus, the purpose of politics is not to achieve justice; it is to construct institutions that best reflect justice based on the rights and liberties people naturally possess. Justice is an event horizon, and no matter how quickly we try to move towards it, we will never attain it. However, by seeking justice we move society forward, ensuring that the dignity and respect people are owed is reflected to a greater degree in our laws than they once were.

Natural law is a natural foundation for rights and liberties. It is the original foundation, and while its moral objectivism has been part of the reason for its derision, such a perspective is

necessary when engaging in philosophy. If there is no *physis* to the subject being discussed, then we will have moved back to ancestor worship, as with Patrick Devlin, or will replace ancestor worship with preference, as with John Stuart Mill. Neither is a proper foundation for politics, and neither can fully account for our intuitions and moral relations. There must be something objective in ethics and politics for us to reference, for without a common reference point debate, and thereby politics, cannot be had. Both myth and preference are wholly internal mechanisms, and cannot be the basis of an external mechanism like politics.

But natural law does not fall into the sort of dogmatism that can characterize other ethical theories which claim moral objectivity. Unlike divine command theory it is not rooted in mysticism, for there are rational, empirical facts that are used as bases for natural law's ethical claims. Natural law is similar to science in that it proclaims there to be an objective truth within its particular field and believes that truth to be intelligible. However, it does not claim that whatever particular moral imperatives it holds at any particular moment in history are *necessarily* true. They are simply the collection of moral imperatives that have the greatest amount of warrant based on our current understanding of human nature. Science goes through the same sort of process, acting as if a theory is true because there is greater justification for that theory than any other. However, both science and natural law must be willing to change their paradigms should new evidence come to light. This constantly evolving dialectic is emblematic of any field demonstrating a healthy quest for truth.

The political philosophy I have put forward is somewhat difficult to pin down. It contains some aspects of libertarianism, egalitarianism, and communitarianism, but can be considered as none of the above. If libertarianism is the "right-wing" and egalitarianism is the "left-wing" of liberalism, then perhaps this theory could be considered the "right-wing" to communitarian's

“left-wing.” It is heavily influenced by Leo Strauss, who himself was difficult to categorize and whose thought was predominantly influenced by classical philosophy. Communitarianism is a modern reinterpretation of classical Greek political philosophy, and so it seems somewhat appropriate to see this theory as an ideological partner to it. However, what makes it distinct from communitarianism is that while it affirms many communitarian criticisms of contemporary political philosophy, it also firmly rejects culture as the basis of morality, instead advocating a return to the belief in objective moral laws.

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