THE DANGERS OF NATURAL RIGHTS

RICHARD TUCK*

One of the first things that students learning about political theory or jurisprudence are taught is the distinction between political theories based on rights and those based on consequentialist ethics. Such ethics are of various kinds, of which Utilitarianism is the most obvious and familiar. Utilitarianism, students are instructed, is always liable to result in a range of startling and repulsive consequences visited upon innocent members of the community, such as medical snatch-squads sent to seize passers-by and use their organs in transplants to save the lives of more people than are butchered to provide the spare parts.[1] Rights theories, on the other hand, are held to entrench a range of protections for the citizens such that even if substantial utilitarian gains are to made from overriding them, governments are prevented from doing so. On most accounts, these rights are related to fundamental features of human life without which the life would not be worth living and which should be guaranteed to all members of the society.[2]

On the other hand, one of the first things that students learning about the history of ideas are taught is that the great Utilitarian philosophers were also notable fighters for a range of civil rights in their societies. Extension of the franchise, transparent government, press freedom, and the rule of law

* Professor, Departments of Government, Harvard University and Jesus College, Cambridge University.

1. *See, e.g.*, ROSS HARRISON, BENTHAM 238-39 (1983). This is a modern example of what John Rawls termed "telishment," the infliction of arbitrary harm by a body of utilitarian officials. *See* John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 3-32 (1955). But it is not clear that it suffers from the features that led Rawls to argue that telishment would be opposed even by Utilitarians, such as an increase in insecurity among the population. On the face of it, it *decreases* insecurity, since it renders us *more* secure against death by natural causes. It could be simply seen as a parallel to conscription in wartime—our acceptance of a risk of death to ourselves as part of the war against disease. *Cf.* H.J. McCloskey, *An Examination of Restricted Utilitarianism*, 66 PHIL. REV. 466, 466-485 (1957).

2. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

were all energetically championed by Jeremy Bentham[3] and early Benthamites such as James Mill[4] and John Austin.[5] These students are taught that rights theories were what these liberals *attacked*, and not unreasonably, given that the first generation of rights theorists, including Grotius, Hobbes, and Pufendorf, explicitly defended slavery and absolutism.[6]

Is the actual history of these theories irrelevant to understanding how to characterize them? I do not think so. I think that history tells us something extremely important, and almost always overlooked, about rights theories and their rivals: unless certain special and unusual conditions are in place, a theory of natural or human rights is more likely to lead to a *weakening* of the civil liberties embedded in the legal system of a society. Utilitarian modes of thinking, surprisingly enough, can often *strengthen* them.

Examination of the arguments advanced by the early rights theorists makes clear the distinction between natural law and natural rights, which is a constant refrain of Thomas Hobbes (and Grotius, as well).[7] Although the great seventeenth-century writers who pioneered the theory of rights used freely the terminology of natural law, in fact they were consistent critics of the principal natural-law tradition—that of medieval Aristotelianism. Aristotle himself was a repeated target. As even Pufendorf (the most sympathetic to Aristotelianism of all these writers) observed, Aristotle taught nothing more than the ethics of an Athenian gentleman.[8] To early rights theorists, all the codes of natural law developed by Aristotle's medieval commentators seemed ridiculously local and over-specific; these included such principles as magnanimity, which few societies

3. *See* HARRISON, *supra* note 1, at 130-31 (open government), 211-15 (universal franchise), 239-40 (rule of law).

4. *See* JAMES MILL, ESSAYS ON GOVERNMENT, JURISPRUDENCE, LIBERTY OF THE PRESS, AND LAW OF NATIONS 20-34 (Reprints of Economic Classics 1967) (1825) (discussing freedom of the press and universal franchise).

5. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 41-44 (Wilfrid E. Rumble ed., Cambridge University Press 1995) (1832).

6. *See generally* RICHARD TUCK, NATURAL RIGHTS THEORIES; THEIR ORIGINS AND DEVELOPMENT 58-81, 119-42, 156-57 (1979).

7. *See id.* at 74-75, 90-92, 111, 120-21.

8. *See* Richard Tuck, *The 'Modern' Theory of Natural Law*, *in* THE LANGUAGES OF POLITICAL THEORY IN EARLY-MODERN EUROPE 99, 104 (Anthony Pagden ed., 1987) [hereinafter Tuck, *'Modern' Theory*].

had ever honored in the form in which it was admired by the Greeks.[9]

Instead, these seventeenth-century writers developed a "minimalist" moral theory, in which the principles that were to be described as "natural" or universal were those that all societies had genuinely acknowledged.[10] Grotius pioneered this approach, both in his astonishing early and unpublished essay on the problem of the Indies[11] and in his famous and influential *De Iure Belli ac Pacis* of 1625.[12] In each work, he argued that the conventional accounts of moral virtue were too vulnerable to the skeptical relativism of his contemporaries and that the principles of "sociability" (an effective moral community) were extremely basic, consisting only of two elements. The first was a general moral requirement on us not unnecessarily to injure another person, and the second was a general right to preserve our own lives.[13] In another work, Grotius explained these two principles as functionally necessary for social life; any society that denied either of them was doomed to self-destruct.[14] Any other moral principles embodied in the ethics or law of a society would then simply be local agreements arrived at by the members of the society, and thus the whole apparatus of conventional natural law could be dismissed as a rationalization of an essentially eurocentric view.

Civil society itself, in the Grotian view, was simply a means of effectively implementing these principles, and in particular ensuring that members of society were properly secured from injury. His readiness to explain civil society in these pragmatic terms met with a great deal of hostility from contemporary Aristotelians, who accused him of being an Epicurean—that is,

9. *See* SAMUEL PUFENDORF, SPECIMEN CONTROVERSIARUM CIRCA JUS NATURALE IPSI NUPER MONTARUM 9 (1678).

10. *See generally* Tuck, *'Modern' Theory*, *supra* note 8; RICHARD TUCK, PHILOSOPHY AND GOVERNMENT 1572-1651 (1993) [hereinafter TUCK, PHILOSOPHY AND GOVERNMENT].

11. *See* HUGO GROTIUS, DE IURE PRAEDAE COMMENTARIUS (Gwladys L. Williams & Walter H. Zeydel trans., Oxford University Press 1950) [hereinafter GROTIUS, PRAEDAE COMMENTARIUS].

12. *See* HUGO GROTIUS, DE IURE BELLI AC PACIS LIBRI TRES, CUM . . . COMMENTARIIS HENR. L.B. DE COCCEII . . . INSERTIS QUOQUE OBSERVATIONIBUS SAMUELIS L.B. DE COCCEII HENRICI FILII (1751) [hereinafter GROTIUS, BELLI AC PACIS].

13. *See generally id.*

14. *See* Tuck, *'Modern' Theory*, *supra* note 8, at 112.

of basing social life on utility alone.[15] There is certainly praise for Epicureanism to be found in Grotius's works, especially the early *De Indis*,[16] though Grotius consistently drew a distinction between civil society or political association, which was largely governed by the self-interest of the members, and natural society, which was based on the fundamental respect of one human being for another, whatever their political relationship. But the idea that civil society is a mechanism to secure its members a set of benefits defined in terms of their rights was a key development, because it gave rise to the concept of rights as *guarantees.*

If the point of a civil society was to secure its members in the exercise of their rights, then if the society failed to deliver that security, the members were relieved of their obligations and could return to the state of nature. It followed that the first duty of any government, understood as the agent of its citizens, was to safeguard their natural rights. The idea of rights as guarantees remains absolutely central to the discourse of rights, and is what makes rights problematic from the point of view of civil liberties. It is captured in Dworkin's view that our rights "trump" other considerations: the first duty of the government is to secure them, and other duties come into play only when it has secured to the best of its ability the fundamental rights of its citizens.[17]

This Grotian theory is the theory traditionally referred to as the idea of the social contract, in which individuals can require things from their fellow citizens with the recourse of seceding from any formal association with them. Earlier natural-law theory had not given rise to the notion of a *social* contract, because it had supposed (on Aristotelian grounds) that men are naturally and inextricably linked together in societies; instead, it had generated the idea of a *governmental* contract, in which a pre-existing community could reject its government as an inadequate or dangerous agent of the community's will.[18] But a

15. *See* KASPAR ZIEGLER, IN HUGONIS GROTII DE IURE BELLI AC PACIS LIBROS QUIBUS NATURAE & GENTIUM JUS, EXPLICAVIT NOTAE ET ANIMADVERSIONES 71-72 (1676); JOHANNES ADAM OSIANDER, OBSERVATIONES MAXIMAM PARTEM THEOLOGICAE IN LIBROS TRES DE JURE BELLI ET PACIS HUGONIS GROTII 57-58 (1671); GROTIUS, BELLI AC PACIS, *supra* note 12, at 43, 45.

16. *See* GROTIUS, PRAEDAE COMMENTARIUS, *supra* note 11, at 9.

17. *See* DWORKIN, *supra* note 2, at xi.

18. *See* OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE 87-90 (F.W. Maitland trans., Cambridge University Press 1900) (1881).

theory of a governmental contract is clearly not going to imply much about individual rights as guarantees, unless the pre-governmental community is thought of as an agency responsive to the demands of its members and in turn enforcing those demands upon its government. It was precisely such a vision of society that natural-law theory rejected.

A theory of this kind—that is, one with a set of minimal natural rights (centrally, the right of self-preservation) whose exercise a government must guarantee—is found, with variations, in all the seventeenth-century rights theorists. The most interesting twist to it was provided by Hobbes, who in many ways accepted Grotius's argument. In a sense, all he did was call into question Grotius's confidence that we could know what were the appropriate circumstances in which we were justified in acting on the basis of our right to preserve ourselves.[19] According to Hobbes, there is in many cases a significant uncertainty about whether our lives are genuinely at risk, and the differing judgments of agents about the circumstances lead to instability and conflict. It is to eliminate this epistemic uncertainty, above all, that a sovereign is needed.[20] As Hobbes said in one of the most striking passages in his entire *oeuvre*,

> In the state of nature, where every man is his own judge, and differeth from other concerning the names and appellations of things, and from those differences arise quarrels, and breach of peace; it was necessary there should be a common measure of all things that might fall in controversy; as for example: of what is to be called right, what good, what virtue, what much, what little, what *meum* and *tuum*, what a pound, what a quart, &c. For in these things private judgments may differ, and beget controversy. This common measure, some say, is right reason: with whom I should consent, if there were any such thing to be found or known *in rerum natura*. But commonly they that call for right reason to decide any controversy, do mean their own. But this is certain, seeing right reason is not existent, the reason of some man, or men, must supply the place thereof; and that man, or men, is he or they, that have the sovereign . . . and consequently the civil laws are to all subjects the measures of their actions, whereby to determine, whether they be right or wrong, profitable or unprofitable, virtuous or vicious; and by them the use and

19. *See* TUCK, PHILOSOPHY AND GOVERNMENT, *supra* note 10, at 304-07.

20. *See* THOMAS HOBBES, ELEMENTS OF LAW, NATURAL AND POLITIC 188-89 (F. Toennies ed., 2d ed. 1969) (1650).

> definition of all names not agreed upon, and tending to controversy, shall be established. As for example, upon the occasion of some strange and deformed birth, it shall not be decided by Aristotle, or the philosophers, whether the same be a man or no, but by the laws.[21]

Even the definition of a man, the most fundamental proposition of any natural-law system, was for Hobbes a matter of debate to be settled by the local sovereign. The only thing that was not a matter of debate was the general proposition that men are entitled to preserve themselves. Even if two people could not agree on what counted as an act of self-preservation, they would agree that no one in principle could be blamed for preserving himself.

For Hobbes, our rights are guarantees, because if the sovereign fails to protect us, the social contract is voided and we are entitled to protect ourselves. It is sometimes supposed that there is an inconsistency in Hobbes's argument at this point: if the sovereign is necessary because we cannot be confident about the correct circumstances in which we can exercise our right of self-preservation, how can we know that the sovereign is failing to protect us? Is that not a matter of judgment and therefore transferred with other matters of judgment to the sovereign to decide? A fair reconstruction of Hobbes's response to this would be that there are certain cases where there is as a matter of fact no disagreement (for example, a direct assault on our persons). Because it was judgment in *disputed* cases that was transferred to the sovereign, judgment in undisputed cases remains with the citizen.[22] Put another way, one could say that in undisputed cases, the sovereign's judgment must by definition be the same as the citizen's, and so it could not matter that all citizens had transferred their judgment to the sovereign.[23]

A particularly vivid analogy that all the early writers employed was between the bearers of natural rights and sovereign states. (This analogy has been employed ever since; H.L.A. Hart in a famous article of 1955, *Are There Any Natural Rights?*, also talked about natural rights as constituting a kind of sovereignty for

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21. *Id.*

22. *See* TUCK, PHILOSOPHY AND GOVERNMENT, *supra* note 10, at 309.

23. *See* Richard Tuck, *Hobbes's Moral Philosophy*, *in* THE CAMBRIDGE COMPANION TO HOBBES 193-95 (Tom Sorell ed., 1996) [hereinafter Tuck, *Hobbes*].

individuals over parts of their lives.)[24] Civil relationships, on this analogy, are like the treaties entered into by independent states: though they may constrain in various ways the exercise of the state's freedom, the essential capacity to make decisions about what relationships to enter remains in the hands of the sovereign state. I suspect that this pervasive analogy is more than merely a convenient heuristic device: the only agents whom we have ever witnessed who are autonomous beings constructing their own moral and juridical environment *are* sovereign states. The creators of modern rights theories, in particular Grotius, were theorists of international relations as well as general political theorists, because they took various pre-existing ideas about the moral principles governing the interactions of states and applied them to the interactions of autonomous individuals of all kinds, including the hypothetical individuals of the "state of nature."

The idea of natural rights as guarantees that the state must honor, or the picture of liberal agents as autonomous and sovereign beings negotiating among themselves from a posture of fundamental independence (a kind of moral United Nations), appears to be an appealing vision of politics in which we are not at all prey to the uncertainty that is the inevitable result of the shifting calculus of a consequentialist ethics. There is no doubt that certainty, of various kinds, was the prime goal of all the seventeenth-century writers.[25] Epistemically, we could be confident that our natural rights, defined in some minimal fashion, were secure from skeptical interrogation. Socially, we could be confident that we could not find ourselves legally or morally obliged to submit our own person or liberty to the vagaries of the social process. More subtly, we would not have to possess any particular account of the human psychology or mental life that might turn out to be vulnerable to scientific investigation.

This is a little-considered aspect of rights theories. But one of the striking differences between a rights theory and Utilitarianism is that the ascription of a right to someone does not require us to make any estimate about that person's inner condition. If he has a right to stand in Trafalgar Square, it does

24. *See* H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 184 (1955).

25. *See* TUCK, PHILOSOPHY AND GOVERNMENT, *supra* note 10, at 154.

not matter whether he gets pleasure from the act or a kind of Dostoyevskyan sense of tragedy; it does not even matter whether he chooses to perform the act on any particular occasion or not (compare Hobbes, for whom it does not matter, strictly, whether people do always seek to preserve themselves).[26] This person's inner life could be entirely inscrutable, but we have decided that in this particular area he is sovereign. Our recognition of the sovereignty of this person can be compared to the situation of international relations, where—in the classic theory—we do not need to know what goes on politically in a country in order to accord it sovereignty vis-a-vis other countries.

Utilitarianism, on the other hand, requires the most detailed and confident account of the inner states of the individuals with which it is concerned. It is unlikely to be a coincidence that Hobbes was both the greatest rights theorist and a complete skeptic about the possibility of determining with any accuracy what is going on in someone else's mind. (Indeed, he was also a skeptic about whether other people, and the entire physical world, actually exist in the form in which they present themselves.)[27] Similarly, it may well not be a coincidence that rights theories have enjoyed a tremendous revival in the second half of the Twentieth Century, as both philosophy[28] and social science[29] came to write off knowledge of other minds as a valid basis for their disciplines.

It is, however, the need for certainty that constitutes the danger to civil liberties inherent in accounts of natural rights. To explain this, I should first emphasize that we are *not* dealing here with the bodies of rights written in some form into the civil laws of some countries (although many commentators assume that rights theories will surface in such documents). From the perspective of a natural-rights theory, such documents are merely another bit of civil legislation, each to be judged for its moral legitimacy by the criterion of natural rights. Rather, we

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26. *See* Tuck, *Hobbes*, *supra* note 23, at 188.

27. *See* TUCK, PHILOSOPHY AND GOVERNMENT, *supra* note 10, at 300-01.

28. *See, e.g.*, SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE: AN ELEMENTARY EXPOSITION 114-46 (1982).

29. Walras and Pareto explicitly turned on the impossibility of making interpersonal comparisons or saying anything worthwhile about the mental processes that might underlie manifest preferences. *See, e.g.*, W. STANLEY JEVONS, THE THEORY OF POLITICAL ECONOMY 14 (3d ed. 1888). The notion of "revealed preference" simply systematized this basic thought.

are dealing with an argument about how to justify or attack a particular piece of legislation or governmental act. Natural rights are obviously by definition *meta*-political, though they may be adduced in discussion by legislators or interpreters of legislation (if those two categories of person can, *contra* Hobbes, be distinguished).[30]

In order to see how a notion of natural rights can undermine civil liberties in this context, consider the decision by the British government after a few years of the Troubles in Northern Ireland to suspend trial by jury in terrorism cases.[31] The argument that was widely advanced was that the prime duty of a government is to secure the lives of its innocent citizens. This is a guarantee that it has to honor. Trial by jury had become an ineffective means of condemning terrorists, who were being released and were killing innocent people; there was therefore an obligation on the government to find a different means of protecting its citizens. This argument is identical to Hobbes's: a society may choose to abandon its civil liberty in order to secure the protection of its citizens.

Contrast a utilitarian argument in the same situation. Again, it can be accepted that trial by jury is an inefficient means of securing convictions, and that therefore some innocent people are going to be killed. But the essence of Utilitarianism is that this is not the end of the matter. Some deaths are to be put in a scale and weighed not just against other deaths (for the rights theorists would ponder that too), but also against a wide range of other disbenefits. The abolition of trial by jury, though not risking anyone's life, undermines many things that are very important to people, such as a feeling of popular control over the judicial system. It might well be argued from a utilitarian perspective that the long-run harm of abolishing trial by jury significantly outweighs the short-run benefit of preventing the deaths of some innocent people. This is an argument that is very difficult to make in the language of rights, as the harm caused to the public by the abandonment of trial by jury may be quite hard to express in the bold terms that rights discourse seems to require. But it is precisely the kind of argument that the classical

30. *See* THOMAS HOBBES, LEVIATHAN 190-92 (Richard Tuck ed., Cambridge University Press 1996) (1651).

31. *See* Conor Gearrty, *Political Violence and Civil Liberty, in* INDIVIDUAL RIGHTS AND THE LAW IN BRITAIN 145-78 (Christopher McCrudden & Gerald Chambers eds., 1994).

Utilitarians themselves often made about the institutions of their society.

We can put these arguments in another interesting form by seeing social principles on Rawlsian lines as decision-theoretic principles by individuals in a situation of uncertainty about their own prospective social position. The Rawlsian always "maximins"—that is, he wants to make sure that whatever happens, he will be guaranteed a minimum level of welfare (the most minimal is his life).[32] The appropriate social structure is therefore the Rawlsian commonwealth, in which certain basic goods are secured to every citizen; a structure which, as Professor Dworkin observed, though not described by Rawls himself in a full language of rights, is markedly suitable as a philosophy for a modern rights discourse.[33] The Utilitarian, on the other hand, maximizes expected utility; he is willing to take risks.[34] In a Rawlsian original position, where the Utilitarian is ignorant of his own future state, maximizing his own expected utility is the same as maximizing the average utility of the society. What this way of looking at the issues elegantly captures is that an attitude to *risk* is critical to the two philosophical positions: a rights theorist wants to minimize risk, whereas a Utilitarian is prepared to gamble. In the case of trial by jury, a Utilitarian may be willing to risk his own death at the hands of the unconvicted terrorist in return for the wider benefits to himself of the jury system; the rights theorist will not want to take such a risk.

The jury example turns on the question of physical preservation, the central issue for the seventeenth-century writers, and it might be argued that this is why it leads to similar absolutist conclusions. But this is not an adequate response, as the same kind of reasoning is possible whenever there is a *hierarchy* of rights. Among the seventeenth-century authors, there was not much of a hierarchy, because they were concentrating single-mindedly on the most basic case, for the most part (Locke may be an exception).[35] But even if one admits

32. *See* JOHN RAWLS, A THEORY OF JUSTICE 152-57 (1972).

33. *See* DWORKIN, *supra* note 2, at 168-83.

34. *See, e.g.*, AMARTYA KUMAR SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 136-46 (1970).

35. I am thinking of the implications of Locke's idea that we have duties to improve the world as well as preserve ourselves, and rights corresponding to those duties. *See*

other rights of various kinds into one's philosophical scheme, it is hard to see how to avoid giving priority to some over others; and in particular, it is hard to see how to avoid giving priority to the ancient right to life. Once we accept a hierarchy, then the more fundamental will trump the less fundamental, and the subversion of civil liberties in the interests of natural rights will once more be possible.

Again, we should emphasize the difference between the civil code of rights and the philosophy of rights. Precisely because the code is a *civil* code, all of its articles may be regarded as possessing equal validity (however strange the mental gymnastics then required of its interpreters). But if my argument is correct, then we should be very wary of defending these codes as expressions of an underlying philosophy that can be used to interpret them, and by extension can be called on to underpin other civil legislation. This is a habit of mind which, once it moves away from the particular civil document in question, may begin to justify the same kinds of inroads into liberty that the original theorists of natural rights sought to defend. It is hard to accept Hobbes's premises and deny the cogency of his conclusions. This conclusion is equally valid for my own country, which has no single and systematic written constitution, yet, as a paradoxical consequence, has also made only too apparent in recent decades the dangers of a rights-based or security-based moral philosophy.

JOHN LOCKE, TWO TREATISES OF GOVERNMENT 285-302 (Peter Laslett ed., Cambridge University Press 1988) (1689).