

On the Naturalness of Rights

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THE POLITICAL APPEAL to rights is not merely familiar to us today, it is inescapable. Virtually every issue of importance in both foreign and domestic policy can be formulated as a question of the rights of individuals, minority groups, peoples, or nations. In spite of, or perhaps because of, this ubiquity of the language of rights, the notion of *natural* rights is not so common. Both public debate and academic discussion of rights shy away from, or draw short of, attributing naturalness to rights.¹ To speak about nature, and especially human nature is, or appears to be, an unacceptable return to a discredited tradition. Yet, if rights have no natural support their status is problematic.

Perhaps the failure to link rights to nature is one reason why current discussions of rights are so often charged with manufacturing assumptions to fit desirable conclusions instead of deducing conclusions from plausible assumptions. The charge that Rousseau levelled at earlier natural law theorists is true of many of our contemporary theorists of rights:

Writers begin by seeking the rules on which, for the common utility, it would be appropriate that men agree among themselves; and then they give the name *natural law* to the collections of these rules, without other proof than the good which they judge would result

from their universal application.

Rousseau is certainly right to conclude, "This is surely a very facile way to compose definitions and to explain the nature of things by almost arbitrary conveniences."²

In Rousseau's argument a natural law is a "rule of natural right." A right, in turn, is natural if it can be derived from "the first and simplest operations of the human soul." Natural laws deduced from natural right must "speak directly with nature's voice."³ In Rousseau's judgment Hobbes was the first who "saw very clearly the defect of all modern definitions of natural right" in their failure to examine these most primitive operations. While Rousseau judged Hobbes's final doctrine to be inadequate, he grants that his procedure was the correct one. To begin to understand the naturalness of rights, then, it will be useful to begin at the beginning with Hobbes.⁴

Natural Right and Natural Necessity

HOBBS'S DEFINITION of the Right of Nature in *Leviathan* is

... the liberty each man hath to use his own power as he will himself, for the preservation of his own nature, that is to say, of his own life, and consequent-

ly, of doing any thing which in his own judgment, and reason, he shall conceive to be the aptest means thereunto.⁵

While this definition states what natural right consists of with a clarity that could hardly be improved upon, it gives no explanation of its derivation. Natural right seems to be an arbitrary assumption like those Rousseau complained about. Why is this extensive liberty, which amounts to a claim to everything, a right? Perhaps a more important question is in what sense is it natural?

In the versions of the definition published earlier, Hobbes says that this liberty stems from "a certain impulsion of nature" by which "every man is desirous of what is good for him, and shuns what is evil." The "chiefest of natural evils" is death, "the terrible enemy of nature." This impulsion of nature which makes us desire preservation is no less an impulsion than that "whereby a stone moves downward." It is received from the "uncontrollable dictates of necessity."⁶ Whatever appearances to the contrary may exist, we can no more avoid the impulsion to shun death than we can avoid the impulsion to move downward.

This account of the naturalness of this impulsion makes it hard to see why the right of nature is described as a right. We do not speak of the right of a stone to move downward. We speak of the necessity a stone has to move downward. Hobbes has defined a right as a liberty. Now we find that it is a sort of necessity. Hobbes sees no contradiction here. We do speak of the liberty of a stone to move downward if something had been impeding its movement. Thus, a stone can be both free to move downward and compelled to do so. Humans are equally free and compelled to attempt to preserve themselves.

Hobbes argues that "all men account to be done justly and with right" whatever "is not contrary to right reason." It is not contrary to right reason to shun death. In fact, it would be contradictory or absurd to claim to avoid this natural necessity.

Further, a right is a "blameless liberty."⁷ The liberty to attempt to preserve life is blameless because it would be as absurd to blame a man for this attempt as it would be to blame a stone for its downward movement. Blame exists only where there is a choice. The Right of Nature is a right because it is blameless and according to right reason. It is natural because it is impelled by natural necessity.

Natural laws for Hobbes, as for Rousseau, are rules of natural right. They are theorems deduced from this initial necessity.⁸ Justice, the third law of nature, which consists only in law-abidingness or keeping contracts, is compatible with natural necessity because it is deduced from it. With this deduction Hobbes claims to be the first to have found rules which are so rooted in human nature that they, unlike other versions of natural law, can and will be obeyed.

The distinctiveness of Hobbes's identification of natural right and natural necessity can be both illustrated and explained by comparing his doctrine with alternative views of the relation between right, justice, or law and necessity. A range of such views can be found in the history of Thucydides, whom Hobbes identified as "the most politic historiographer that ever writ." It is Thucydides who best performed the "principal and proper work of history," which is "to instruct and enable men, by the knowledge of actions past, to bear themselves prudently in the present and providently towards the future." Hobbes held that the reader of Thucydides learns from "contemplation of those human passions, which either dissembled or not commonly discoursed of, do yet carry the greatest sway with men in their public conversation." Thus, in Hobbes's judgment, Thucydides is unsurpassed in his presentation of the relation between men's passions and their public conversations or arguments about justice.⁹ As we shall see, it is precisely this relation which poses the problem of justice that Hobbes's derivation of natural law from natural necessity is meant to solve. The language

of Hobbes's own translation of Thucydides presents this problem as it manifested itself to Hobbes.

The Problem of Right

THE ISSUE INVOLVED in the relation between right and necessity is shown clearly in a charge brought against the Athenians by the Boeotians "that they had done unjustly to transgress the universal law of the Grecians" by seizing a temple and using sacred water. The Athenians respond that they had not harmed the temple and "for the water, they meddled with it upon necessity." They explain further that "whatsoever is forced by war or danger hath in reason a kind of pardon even with the god himself . . . and they are said to violate laws that are evil without constraint."¹⁰ The Athenian argument is Hobbes's argument. An act which is done out of constraint or necessity is blameless and self-preservation is forced upon men without a choice.

In the Melian Dialogue, which is their boldest and perhaps most consistent argument, the Athenians go so far as to appeal to a "necessity of nature" applying to men and (as far as they know) to the gods. This natural necessity makes the strong rule over the weak and consequently absolves them from blame and just retribution.¹¹ Nature, in the form of necessity, takes precedence over justice. Furthermore, the gods respect this precedence and do not blame those who are unjust out of compulsion.¹²

The Athenians' opponents, the Boeotians and Melians in the cases mentioned above and the Spartans elsewhere,¹³ cannot respond to the Athenians in their own terms. They look upon the Athenians simply as transgressors against divine law and a human justice which the gods support. The Spartans are outraged that the Athenians admit their transgressions and dismiss them so easily. The Melians, who face conquest by the Athenians, struggle against acknowledging that there could be compelled transgressions. Their position is that justice (such as their own) and in-

justice (that of the Athenians) deserve rewards and punishments because they are freely chosen. The Athenians, in return, point out that the Melians are too weak to be successfully unjust and accordingly that their justice comes from compulsion and deserves no reward, just as an Athenian conquest of Melos would deserve no punishment. While the Athenians do say that their conquests are blameless because compelled, they stop short of saying that they have a right to conquer others. Hobbes's definition of the Right of Nature grants all that the Athenians could want and more.¹⁴

We can generalize the problem of the normal view of justice from these examples. Justice, or right, as it is normally understood makes demands which are constantly undermined by natural necessity. This is as true of traditional natural law teachings as it is of the views of the opponents of the Athenians. In a tension between the demands of divine or natural justice and natural necessity it is clear which side will win. Recognition of mitigating circumstances caused by natural necessity requires making exceptions to any general rules. The necessity men feel to preserve themselves excuses them from obeying the divine law concerning the use of temple water and it would excuse them from obeying a natural law prohibition against theft. To allow necessity as an excuse, as seems only fair when meting out retribution, presents men like the Athenians with all they need to justify conquest of the world. The common view is that crimes are committed out of injustice and that people are accountable for their offenses. This view has no effect on the argument that claims that crimes are committed out of necessity. To respond to the Athenians of the world in their own terms, Hobbes seems to say, we need to base justice on the same necessity which they use to excuse injustice. Justice must be reconstructed in a way which is compatible with the position that men are not free except in the sense that stones are free.

At least two objections can be raised to

Hobbes's doctrine from traditional perspectives. First, it is by no means clear that the compulsion to shun death is a true compulsion. The Melians attempt to deny that the Athenians are compelled to conquer. In fact, we are regularly confronted with examples of people who, out of religious conviction or belief about justice, refrain from conquering others and even sacrifice their lives without hesitation. What is most important about traditional natural law teachings is that they both demand and explain such actions, by giving a rational account of human inclination to justice. It is possible to admit that the need to preserve one's life can mitigate some offenses against natural law without excusing these offenses entirely. In short, Hobbes compares the avoidance of death to the pull of gravity, but experience shows that this is an exaggeration.

Second, Hobbes's doctrine of necessity seems to imply that any real notion of responsibility for sin or crime is an impossibility and consequently is either incompatible with Christianity or makes a mockery of God's justice in punishing sin. Such an incompatibility, while proving nothing in itself, would make Hobbes's doctrine unacceptable to the audience he most wants to persuade. For rhetorical reasons alone it is desirable to show a connection between natural right and divine justice.

The Misunderstanding of Gravity and the Misunderstanding of Man

IF THE FEAR of death that serves as the foundation of the Right of Nature were as certain a force as gravity, we would expect it to operate as universally as gravity and draw men automatically into the Leviathan-style state that Hobbes deduces from the right of nature. The book *Leviathan* is unnecessary if what it says is true. Even if men fail to understand the natural necessity properly, it should act upon them just as gravity acts upon those who have not read Newton.¹⁵ Interestingly, Hobbes argues both that those human actions of self-sacrifice which appear to

defy natural necessity in fact follow it and that men's understanding of gravity does affect the way it acts upon them.

On the first point, that men in fact always do act in accordance with natural necessity in spite of appearances to the contrary, Hobbes asserts that before philosophic discussion of justice entered the public realm "princes did not sue for, but already exercised the supreme power. They kept their empire entire, not by argument, but by punishing the wicked and protecting the good." The "simplicity of those times" meant that natural necessity did its work unimpeded. Men felt the fear of death, felt the necessity of entering society to relieve this fear, and felt the necessity of obeying their sovereign once in society. Argument was unnecessary because those simple ages did not suffer from error.¹⁶

The success of these regimes at acting in accord with necessity obscured the nature of the necessity which brought them into being. Because they were so well protected against each other the citizens lost sight of their fear. In attempting to understand justice, they embraced "a false empty shadow instead of it." Error replaced salutary ignorance and "contention and bloodshed" replaced peace. This does not mean, however, that natural necessity had ceased to act or that men ceased to feel it. They merely ceased to understand it properly. Hobbes freely admits, and even insists, that there are men who deny his account of the necessity which forces men to attempt to preserve themselves. Those who do, "however, confess and deny the same thing . . . out of a desire they have to contradict others, they gainsay themselves."¹⁷ Their actions confess that they feel the necessity even as their speech denies that they feel it. This self-contradiction holds true even of those actions which do not preserve life.

Hobbes's discussions of gravity show how this can be. Gravity pulls people down whether they understand it or not. Humans and stones are equally subject to this pull. Those who do not think about gravity, those who understand it, and

those who misunderstand it are all equally subject to the uncontrollable dictates of necessity. However, although all feel gravity equally, some misunderstand what they feel. In fact, university professors in particular misunderstand what they feel, and they pass on this misunderstanding to all who will listen to them. This is true both in the discussion of right and in the discussion of gravity. When the Schools do not engage in circular reasoning or insignificant speech,¹⁸ they misunderstand gravity by anthropomorphizing things. They

... measure, not only other men, but all other things, by themselves; and because they find themselves subject after motion to pain, and lassitude, think every thing grows weary of motion and seeks repose of its own accord, little considering, whether it be not some other motion, wherein that desire of rest they find in themselves, consisteth.¹⁹

Not least among the consequences of this misunderstanding is that it stands in the way of a successful science of physics.

More important for the discussion here is Hobbes's insistence that this anthropomorphizing is based on a prior misunderstanding of what humans feel after growing weary of motion. As Hobbes says, the desire for rest consists in "some other motion." It is not a sign of a tendency to rest or peace. In neither external nature nor the internal working of the human soul is there a tendency to rest or peace. What men interpret as a tendency to rest in themselves is only a variant of motion. They misinterpret their own feelings because they are ignorant of motion. Thus, the misunderstanding of gravity is a misunderstanding of nature based on a misunderstanding of oneself. This prior misunderstanding, in turn, is based on a misunderstanding of nature, or the physics of internal motion. Men would not err in measuring all things by themselves if they began by measuring themselves properly. If they understood themselves, they would not misunderstand gravity. If

they understood gravity they would be less likely to misunderstand themselves.

Just as it is possible to misinterpret an internal motion as a tendency to rest, it is possible to misinterpret the similar internal motion that makes us shun death. We do shun death, but we think that we seek rest, peace, or a *summum bonum*.²⁰ We are all the more willing to accept the view that the universe itself supports peace if, like Thucydides' Melians, we believe that the universe supports our well-being.

The view that things tend toward rest is to the true understanding of gravity as the traditional natural and divine law teachings are to Hobbes's teaching of the natural necessity men feel to preserve themselves. The consequences of this misinterpretation of natural necessity are potentially as severe as the consequences of a misunderstanding of gravity for someone who steps off a cliff. Men falsely believe that nature or God supports them in their sacrifice of life much in the way that a madman might believe that a cloud can support him in his step off a cliff. Hobbes argues, then, that the traditional understandings of right and law lead to political madness and destruction if they are followed consistently. More likely, they will not be followed consistently and men will follow natural necessity and act against what they believe justice to be. They will be neither entirely good nor entirely bad.²¹ Others, like the Athenians, will ignore beliefs about justice and take advantage of those who attempt to be just. By building his doctrine of natural law, or justice, on necessity, Hobbes claims to explain to men their most deeply felt need and to do away with any conflict between this need and justice. He replaces madness, bad faith, and the triumph of the wicked with a solid basis for justice.

Natural Necessity and Divine Punishment

HOBBS'S REINTERPRETATION of natural law requires the abandonment of much of the content of traditional natural law. This abandonment was made easier by the

variations within the natural law tradition "whereof we see so many volumes published, and in them so many contradictions of one another and of themselves."²² The abandonment of divinely posited law could not be accomplished so easily. Therefore, Hobbes undertook to reconcile his doctrine as much as possible with Christian notions of divinity. Because it will not be possible here to examine this attempted reconciliation fully, a few words about the relation between natural necessity and divine punishment will have to suffice.²³

If men are compelled to act as they do when they injure others, how can a just God punish them for their actions? Hobbes could maintain his position by holding that any actions done for the preservation of life are not sins, the position the Athenians took against the Boeotians. He comes close to doing this when he discusses taking pleasure in the prospect of injury to an enemy, "a passion so adherent to the nature both of man, and every other living creature, as to make it a sin, were to make a sin of being a man." To assert that natural necessity, or merely being a man, compels sin would be to assert that men are wicked by nature, which Hobbes emphatically denies because it "cannot be granted without impiety." He admits that men "derive desire, fear, anger, and other passions from nature," but does "not impute the evil effects of those unto nature." The passions have their source in nature, but sins come from circumstances which direct the passions in different ways. The passions can be channelled, like a river, in directions which are either good or evil. Moreover, also like a river, they do not channel themselves.²⁴

God's punishment of sin, then, should not be understood as punishment of actions that were committed out of free will. If we understood God's punishment as retribution, it would be impossible not to blame Him for punishing actions committed from natural compulsion. Because there is no free will there is nothing intrinsic to human actions which make them blameworthy or praiseworthy. For

Hobbes, "the right of afflicting, is not always derived from men's sins but from God's power." Sins do not deserve punishment, but God does have the right to punish them. In fact, God's punishments are not examples of retribution against sin, but deterrents against future sins. Hobbes says that "to say that God can so order the world, as a sin may be necessarily caused thereby in a man, I do not see how it is any dishonour to him." Divine punishment itself helps to order the world so that sin will be committed less often. God uses punishment as a wise sovereign does, to "frame and make [men's] wills to justice."²⁵

Of course, because men fear both the visible power of other men and the invisible power of God,²⁶ it is desirable to show that God's will is in accord with the right and law of nature. The only divinely posited addition to the law of nature that Hobbes concedes to be necessary to salvation is the requirement of believing that Jesus is the Christ. This belief need have no effect on speeches or actions.²⁷ Hobbes, unlike the Athenians, insists that God can and does punish actions which are performed out of compulsion. He reconciles natural compulsion and divine will to such a degree, however, that God's will is seen to support self-preservation through obedience to a sovereign.

Once divinely ordained commands opposed to natural necessity are disposed of in the argument, the sovereign's place is easy to see. He, like God, makes laws and punishments to channel wills to justice. The purpose of punishments is not retribution for freely chosen injustice, but deterrence, or (in Hobbes's terms) terror. Laws don't improve citizens, they merely direct actions. They are like dikes and dams channeling rivers which will be most effective if they do not ignore or misinterpret the force of gravity. The sovereign, like God, may with right punish men for following their compulsions; but if he orders his state in conformity with the force of natural right, punishment will rarely be necessary. Just as Hobbes reconciles the obligations of divine and natural

law with the necessity of natural right, the wise sovereign will reconcile the obliga-

tions of positive law with the necessity of natural right.

¹For example, it is only in a footnote that John Rawls says that his interpretation of "justice as fairness has the characteristic marks of a natural rights theory." See John Rawls, *A Theory of Justice* (Cambridge, Mass., 1971), p. 506n. Rawls does not make it clear whether having the characteristic marks of a theory is the same as being an example of such a theory. ²Jean-Jacques Rousseau, *Second Discourse* in *The First and Second Discourses*, ed. Roger D. Masters (New York, 1964), p. 95. ³*Ibid.*, pp. 95-96. ⁴*Ibid.*, p. 129. Rawls recognizes the "greatness" of Hobbes's work, but regards it as raising "special problems." These special problems prevent Rawls from including *Leviathan* in his list of works "definitive of the contract tradition." (See Rawls, p. 11n.) Rousseau's remark suggests that Hobbes's insight was decisive for the founding of this tradition. ⁵Thomas Hobbes, *Leviathan* (New York, 1962), p. 103, henceforth cited as *L*. ⁶Thomas Hobbes, *De Cive*, in *Man and Citizen*, ed. Bernard Gert (Garden City, N.Y., 1972), pp. 90 and 115, henceforth cited as *DC*, and *De Corpore Politico* in *Body, Man and Citizen*, ed. Richard S. Peters (New York, 1962), p. 278, henceforth cited as *BMC*. ⁷*DC*, p. 115 and *BMC*, p. 278. ⁸*L*, p. 124. ⁹*Hobbes's Thucydides*, ed. Richard Schlatter (New Brunswick,

N.J., 1975), pp. 6, 7, and 25. ¹⁰*Ibid.*, p. 301. ¹¹*Ibid.*, p. 381. ¹²The Athenians give no clear account of how the necessity of nature applies to the gods. If the gods are constrained by nature to rule over the weak they can blamelessly injure those who deserve no punishment, including the Athenians. The pious Nicias comes closest to acknowledging this in his last speech (*Ibid.*, p. 500). As will be shown below, Hobbes's account of divine justice attempts to remedy the defects of the Athenian position. ¹³On the Spartans and the Athenians see in particular *ibid.*, pp. 68-76. ¹⁴For a thorough examination of the variations in the Athenian position see Christopher Bruell, "Thucydides' View of Athenian Imperialism," *American Political Science Review*, vol. 68, 11-17. My understanding of Thucydides also owes much to Clifford Orwin. ¹⁵On this point see Leo Strauss, *Natural Right and History* (Chicago, Ill., 1953), p. 200. ¹⁶*DC*, p. 97. ¹⁷*DC*, pp. 98-99. ¹⁸*L*, p. 487. ¹⁹*Ibid.*, p. 23. ²⁰*Ibid.*, p. 80. ²¹See Machiavelli, *Discourses*. ²²*L*, p. 206. ²³For an excellent treatment of a major aspect of this important issue see Clifford Orwin, "On the Sovereign Authorization," *Political Theory*, vol. 3, no. 1. ²⁴*L*, p. 216, *DC*, pp. 100-101. ²⁵*L*, p. 262-263 and "Of Liberty and Necessity," in *BMC*, pp. 253 and 255. ²⁶*L*, p. 111. ²⁷See op. cit., Orwin.

Radical Historicism and the Meaning of Natural Right

Mark Blitz

TO UNDERSTAND FULLY the problem of natural right we must consider both its classical and modern varieties, and the arguments that challenge its existence altogether. In modern times these arguments develop in terms of the discovery of historical changeability. This discovery is evident in Rousseau and Kant, who still defend a form of natural right in politics; and a teaching about history animates Hegel and Marx. But we find in the so-called radical historicists—thinkers such as Nietzsche and Heidegger—the most uncompromising of the historical arguments that question natural right. In what follows, I will delineate briefly the ways in which historicism challenges natural right. By doing this I hope to deepen our understanding of natural right's intelligibility and possibility—its meaning.

I

"NATURAL" RIGHT or natural justice is the justice that is everywhere and always. For "historicism," however, no justice is everywhere and always: legal codes, and opinions about right and wrong, vary with time and place; no action is correct in every circumstance; and no one can prove conclusively to a recalcitrant man or mob that anything is always just.

One replies: even if these facts are true,

they do not demonstrate that natural justice is impossible, but only that it is hard to recognize.

In reply to this, an historicist may then attempt to show that there can never be natural justice because justice must be relative to time and place. Justice appears to be "comprehensive" only because it orders activities that history shows to be in fact incomplete; it appears to be "absolute" only by ignoring the true unfolding of the dialectic of equality and inequality; it seems to be intelligible only by being concerned with necessarily transient matters.¹

The historicist's foe then points out that these arguments presume after all to tell us what must be true about justice in every circumstance. It may be conceivable that the only permanent truths about justice are its necessary incompleteness, relativity, and transient intelligibility. But it is always unclear in concrete descriptions and analyses how justice can indeed offer itself in precisely this set of permanent limitations, but in these alone. The result is perplexing: to disprove the possibility of a justice that is everywhere and always one must say quite a few things about justice's unchanging characteristics.

The argument often remains in this perplexity. But one asks: why should the question of everywhere and always be so