

WHAT ARE NATURAL RIGHTS? A NEW ACCOUNT

WHAT EXACTLY ARE “NATURAL RIGHTS”? In a recent exchange, Loren Lomasky has argued that natural rights and Gilbert Harman’s moral relativism are not compatible—indeed, that the latter cannot serve as a foundation for the former.¹ The discussion between Harman and Lomasky suggests that there may be different ways of understanding natural rights, some possibly more promising than others.

Harman is the well-known defender of “moral relativism,” the view that “morality is the result of implicit bargaining and adjustments among people of varying powers and resources.”² Such a “relativism” holds that morality is the outcome of mutually advantageous convention, and I shall refer to any such theory as “moral conventionalism.” Harman argues that this conception of morality offers the only plausible foundation for natural rights. This is an extraordinary thesis, one that had never occurred to me prior to reading Harman’s reply to Lomasky’s first article. Conventionalist accounts of morality are undergoing a revival these days,³ and it would be of great interest to know whether such theories do offer a way of defending appeals to natural rights.⁴

Harman defines natural rights as “rights people have simply by virtue of being people.”⁵ He then seeks to show how his conventionalist theory can provide a foundation for such rights. I do not find his case very persuasive, nor does Lomasky.⁶ In any case, Harman’s characterization of natural rights is at best incomplete. Lomasky contends that “natural rights, by definition, are not conventional.”⁷ And surely this is part of our traditional understanding of such rights. Harman’s idea of founding natural rights on moral conventionalism may not offer much hope after all.

In my “Human Autonomy and the Natural Right to Be Free,” I

contrasted natural and “conventional” rights and characterized the former as follows:

- (1) Natural rights are those rights (if any) a person has in the state of nature;
- (2) they are held prior to and independently of institutional arrangements (e.g., legal systems), conventions, or agreements;
- (3) they derive from or have their basis in human nature or activity, they flow from some attribute(s) of the person rather than of the situation;
- (4) they are basic and infeasible, and they provide the framework within which teleological moral considerations (if any) may operate;
- (5) they are self-evident; and
- (6) they include rights against coercion.⁸

I think that this characterization fits most of the eighteenth-century natural rights tradition, as well as most of the contemporary theories in this line of thought, but I cannot defend this claim here. The main difference between contemporary and “classical” natural rights theories concerns (5). We tend to be skeptical of appeals to self-evidence, so perhaps we should drop (5) from our list of characterizing attributes.

Reflecting on Harman’s thesis, and rereading some of David Hume’s writings on justice, property, and government, it occurred to me that it may be useful to develop another characterization of natural rights. It seems clear that the view I have just outlined—let us call it the classical conception of natural rights—is incompatible with moral conventionalism. Here Lomasky is right. However, by clarifying (1) and amending (2), we may develop a second conception of natural rights, one that may be compatible with moral conventionalism.

Natural rights are those rights, if any, that persons have in a state of nature. Such states are in part hypothetical states that illustrate what a particular theorist believes characterizes human nature. If in a state of nature we find that humans are asocial and lack government (Hobbes), then implicit in such a notion is the view that society and government are of instrumental value to (such) humans and to be justified accordingly. If in a state of nature we find that humans are social and are obligated by a natural moral law (Locke), then implicit in such a state is the view that government is to be justified in terms of that sociality and that moral law. On the first view, there are no natural rights in the state of nature, while on the second there are.⁹ These two positions have always seemed to me, and to others, to be the basic alternatives.¹⁰ Thus, skepticism about natural law leaves us only with the view that there are no natural rights.

Consider, however, a third possibility, that offered by Hume. On his view, society is possible prior to government, and so are moral laws or rules of justice and property (*contra* Hobbes), but these laws and rules are conventional (*contra* Locke).¹¹ Reflecting about Hume’s

alternative suggests to me that condition (1) should be altered to read as follows:

- (1') Natural rights are those rights (if any) a person has
 (a) in a state of nature that is prior to society,
 (b) in a state of nature that is prior to government.

Hume can argue that humans have rights in sense (1')(b), although not in sense (1')(a). Why call such rights "natural," though? We may refer to Hume's thoughts about the "naturalness" of the "artificial" virtue of justice:

Mankind is an inventive species; and where an invention is obvious and absolutely necessary, it may as properly be said to be natural as any thing that proceeds immediately from original principles, without the intervention of thought or reflexion. Tho' the rules of justice be *artificial*, they are not *arbitrary*. Nor is the expression improper to call them *Laws of Nature*; if by natural we understand what is common to any species, or even if we confine it to mean what is inseparable from the species.¹²

Now it seems to me that Harman's conventionalism, as that of Baier, Gauthier, and Mackie, can generate natural rights in sense (1')(b). It is our thinking of Hobbes and Locke that blinds us to this possibility.

What about condition (2)? This must be altered as well. Distinguish "background moral conventions" and "agreements." The latter should be understood as normal agreements, promises, contracts, and the like, tacit or explicit. The former are those mutual expectations and tacit conventions or norms that make possible agreements, promises, and contracts. More precisely, let us define "background moral conventions" as those regularities R in the behavior of persons P in situations S, such that part of the reason that most of these persons conform to R in S is that it is common knowledge among P that most persons conform to R in S and that most persons expect most other persons to conform to R in S, where R are those regularities which are a necessary condition for normal agreements, promises, contracts, and the like.¹³ Background moral conventions, then, are precisely the result of the "implicit bargaining and adjustments" that Harman (and Hume et al.) describe.

Suitably modifying (2) and replacing (1) with (1')(b) (and dropping (5)), we have a new characterization of natural rights:

- (1') natural rights are those rights (if any) a person has in a state of nature prior to government;
 (2') they are held prior to and independently of institutional arrangements (e.g., legal systems), and of agreements, promises, and the like (although they are not prior to and independent of "background moral conventions");
 (3) they derive from or have their basis in human nature or activity, they flow from some attribute(s) of the person rather than of the situation;

- (4) they are basic and indefeasible, and they provide the framework within which teleological moral considerations (if any) may operate; and
 (5) they include rights against coercion.

While it seems to me that there is no way of generating classical natural rights from a conventionalist moral theory, it may very well be possible to generate these "new" natural rights from such a foundation. Indeed, I would claim that Hume does precisely this. For those of us who are skeptical of the rationalism necessary for classical natural rights, this new characterization of these rights may be more promising.

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1. Loren E. Lomasky, "Harman's Moral Relativism," *Journal of Libertarian Studies* 3 (1979): pp. 279-91, and "Relativism and Rights: A Reply to Harman," *ibid.*, 4 (1980): pp. 373-77; and Gilbert Harman, "Moral Relativism as a Foundation for Natural Rights," *ibid.*, pp. 367-71.
2. Harman, "Foundation for Natural Rights," p. 367. Harman continues "...and, although it is in everyone's interest that there should be a strong duty not to harm others, it is not in everyone's interest that there should be an equally strong symmetrical duty to help others avoid harm." For Harman's "moral relativism," see his "Moral Relativism Defended," *Philosophical Review* 84 (1975): pp. 3-22; "Relativistic Ethics: Morality as Politics," *Midwest Studies in Philosophy* 3 (1978): pp. 109-21; and "What Is Moral Relativism?" in *Values and Morals*, ed. A. I. Goldman and J. Kim (Dordrecht, Holl.: D. Reidel, 1979), pp. 143-61.
3. See Kurt Baier, *The Moral Point of View* (New York: Random House, 1965); J. L. Mackie, *Ethics: Inventing Right and Wrong* (Harmondsworth, Eng.: Penguin, 1977), and David P. Gauthier, "Bargaining Our Way into Morality: A Do-It-Ourselves Primer," *Philosophical Exchange* 2 (1978): pp. 15-27. The notion of convention is clarified in David Lewis, *Convention* (Cambridge, Mass.: Harvard University Press, 1969).
4. Natural rights theories are also undergoing a revival. See Murray Rothbard, *For a New Liberty*, rev. ed. (New York: Macmillan, 1978); Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974); and various articles in *The Libertarian Alternative*, ed. Tibor Machan (Chicago: Nelson Hall, 1974).
5. Harman, "Foundation for Natural Rights," p. 367.
6. Lomasky, "Relativism and Rights," p. 376.
7. *Ibid.*
8. *Journal of Libertarian Studies* 4 (1980): p. 391n. In terms of this characterization, Harman focuses on (3), Lomasky on (2).
9. Hobbes's "right of nature" is, of course, a mere liberty. See his *Leviathan*, chaps. 14-15.
10. See David P. Gauthier, "Why Ought One Obey God? Reflections on Hobbes and Locke," *Canadian Journal of Philosophy* 7 (1977): pp. 425-46.
11. For Locke, see his *Second Treatise of Government*, chap. 2, as well as the excerpts from the *Essay* and the *Essays on the Law of Nature*, in *British Moralists 1650-1800*, vol. 1, ed. D. D. Raphael (Oxford: Clarendon, 1969), pp. 154-90. For Hume, see *A Treatise of Human Nature*, bk. 3, sec. 2.
12. Hume, *Treatise of Human Nature*, ed. L. A. Selby-Bigge, 2d ed. (Oxford: Oxford University Press, 1978), bk. 3, sec. 1, last para.
13. This account is adapted from Gauthier, "David Hume: Contractarian," *Philosophical Review* 88 (1979): p. 6, and from Lewis, *Convention*, chaps. 1-3.