

Dr. Carl S. Milsted, Jr
Asheville, NC
incrementalator@quiz2d.com

Really Natural Rights

Author's note: The following essay was written for a non-Libertarian audience. It is the basis for one of the chapters on my new web site, holisticpolitics.org.

I decided to run it here since I haven't been getting much feedback lately, so it is time to run something a bit controversial. Let's see if criticizing the Rothbard and Rand schools of ethics does the trick.

OK, this chapter is going to be a bit theoretical, so some of you might want to skip this and go on to the next chapter. However, the ideas herein have important implications. Much of the extremism of the libertarian movement is due to theoretical arguments, and many of the horrors of the Twentieth Century stem from the complete rejection of these same theories by others. So, what I am about to discuss has had a serious impact on human history despite its academic nature, and what I am going to propose can provide a basis for a "new" political coalition.

Who Governs the Governors?

What is a government? Is it simply the organization that has the might to control a geographical area? Does might make right? If so, is it moral to violently overthrow a government as long as you have sufficient might to do so? If not, is one obligated to obey a government even if it is made of up a bunch of ruthless thugs?

There have been times and places in history where the "might makes right" school of legitimacy has prevailed, but in most times and places governments have claimed a moral justification for their use of force. Such justifications do help avoid the ugliness of perpetual civil war, and sometimes such justifications have also provided some checks on what the governors could do to the people with their monopolies on might.

However, many of these justifications were based on questionable traditions, and even within these traditions, the kings of old often had to stretch truths to claim legitimacy. And for modern thinkers who found the traditions in question to be barbarous relics, it became difficult to justify the often brutal actions of governments – actions that would be considered criminal if carried out by private citizens.

But to simply overthrow brutal governments without a new moral framework would be to sink back into the barbarous state of feuding warlords. So during the Enlightenment, philosophers came up with theories of "natural rights." Such theories were enshrined in the U.S. Declaration of Independence and Constitution, and the resulting government has worked rather well, albeit imperfectly. Many other revolutions, such as the French and Russian Revolutions, which were not

grounded on these same principles, resulted in brutal regimes that were even more unpleasant than the autocratic regimes they replaced.

Despite the good record of governments grounded in natural rights theory, there are many people to this day who would deprecate such rights for reasons of security (the Bill of Rights is inconvenient to law enforcement) or the ability to have unlimited social programs (the strictly enumerated powers of Congress rule out well over half of what the federal government is currently doing) or central planning (the 5th Amendment gets in the way of unbridled takings).

Purist libertarians argue that the only legitimate reason for governments to tax or perform any other action prohibited to private citizens is to allow the protection of natural rights; otherwise taxation is simply theft writ large. Indeed, the more radical libertarians would argue that even the small amount of taxation needed for law enforcement and military defense is theft, that government should be funded on a purely voluntary basis. More “moderate” libertarians point out that without government running the military and courts, there would be more natural rights violations than the government has to commit to fund itself, so on the net such limited taxation is not theft. But neither brand of libertarian can find a natural rights rationale for state run welfare systems or parks, and thus the split between libertarians and those who would use the might of the state for “good causes.”

Many on the Left claim to espouse a different theory to determine whether a government is legitimate: whether a government follows the “will of the people.” Generally, this means more democracy. So, if The People vote to ban billboards or to nationalize the oil companies, it is morally correct to do so as long as a proper vote is taken.

However, there are serious theoretical problems to this approach. If two rapists are alone with a beautiful woman, is it moral for them to carry out their deed as long as they vote first? If a small town inhabited by white people vote that a (living) negro cannot be in town after sunset, is this morally acceptable? If the people of a state overwhelmingly vote to establish a state religion, do they have the right to tax non-members of said religion to build cathedrals? What is the difference between a democratic government and a lynch mob?

Indeed, many of these same Leftists who claim to espouse democracy drop back into natural rights arguments when their opposition gets into power and proceeds to violate certain portions of the Bill of Rights.

So, is freedom an all or nothing proposition? Are we left with the stark choice between unbridled “robber baron” capitalism and environmental devastation on the one hand, or a slippery slope towards dictatorship and labor camps on the other? Or, can we *modify* existing theories of natural rights to accommodate the main concerns of progressives and environmentalists?

A State of Nature

Let us consider a somewhat idealized state of nature, one that may have never existed except perhaps on deserted islands, but nonetheless a model that gives us a standard of “perfection” to act as a yardstick for societies not in such a state.

Suppose we have very few people scattered about a large amount of nature, such that the population is so sparse that any person or voluntary association of people can “get away from it all” in whatever environment they so choose. What rights would these individuals (or small voluntary groups) have, which frequently get lost in civilization? Imagine yourself and perhaps family and/or a few friends isolated in your favorite corner of Eden with no implements of modern civilization. What rights would you have?

For starters, you wouldn't have to pay taxes. No people means no government. It also means no slavers, vandals, or thieves to worry about. (If you are imagining a group, this right and the following rights apply to your group; if you have the wrong friends, there may be stealing within your group. “You” refers to your group if you are imagining a group.) All the products of your labor are yours. You don't have to help anyone unless you want to. All this sounds very Reaganesque, but we are not yet done.

There are also no guarantees of safety! There are dangerous animals about. The water supply may have parasites or dangerous bacteria. Many bugs consider you dinner. And you do not have the right to the products of anyone else's labor: no welfare, free health care, public schools or the like. Hmmm, we are getting to the right of Reagan now!

But, there are also no drug laws! You can take whatever herbs you can find or grow -- sounds rather libertarian. And there are no restrictions on the sexual preferences of your group, and even clothing is optional, weather permitting.

If we were to stop with our description here, we could have the basis for a libertarian society by simply preserving the rights you would have in this idealized state of nature. The rule would be: you can do anything you want as long as it doesn't violate someone else's natural rights. No one can take what you have built, eat what you have gathered, force you to work for them, or force you to obey someone else's code of morality.

When we let some reality seep in and we have to deal with someone who violated someone else's natural rights, we have some tougher questions to answer: How much force is justified in self defense? How much is justified in crime prevention? What is the most moral way to pay for protection from those who would violate these rights? Many books have been written on such questions, but instead of dwelling on them, I want to move on to the *other* natural rights and how many in the natural rights/libertarian tradition have had difficulty dealing with them.

The “Other” Natural Rights

Going back to our idealized state of nature, let us look at some other “rights” that people would have in such a state – rights that often get lost as population densities grow.

First, you would have the right to Pristine Wilderness: no smog other than from forest fires and volcanoes, no billboards, no clear cuts, no machine noises, and so on. All the interesting (and dangerous) animals and plants would still be around. Hmmm, now we are starting to sound Green.

Also, you would have the right of the Walkabout. You could go anywhere you like, and sleep anywhere you wanted to. Now, we are getting a bit of true communism to go along with our Green sentiments. Perhaps we are moving towards justification for lots of clothing-optional national forest.

You would also have the right to privacy. Not only can you be a naughty nudist in the woods, you can be such without an audience. On the other hand, if such things disgust you, you wouldn't have to be exposed to them because you can be isolated with your own group of upright people. Now, we are moving towards freedom of moral practice: the ability to either "do your own thing" or the ability to shun those whose "own thing" is offensive to you.

But we are not done yet. In such a state of nature, you would also have the right to hunt bountiful game, gather wild fruit and nuts from trees untouched by other humans, and to build tools and shelter from whatever sticks and rocks you find, and to build fire with whatever dry plant matter you can find. In a truly wild area in the more human friendly parts of the world, it is possible to "make a living" by hunting and gathering with much less effort than modern humans work to get by. In some ways the standards of living are much lower in such a state, but leisure time is valuable. We have come across something akin to an entitlement right! It is not on the level of what the average social democrat would call for, but it is more than is called for by those who advocate ideal free market societies.

The Inherent Conflicts

One reason that these additional natural rights get glossed over in the literature is that they are impossible to fully maintain as the population grows. Consider the right to hunt at will. If everyone were to do so today, mass extinction of game animals would be the result, and rather quickly at that. Similarly, wild plant foods were never abundant enough to support the current population of humans. The giant natural park model breaks down into environmental destruction and mass starvation.

Similarly, the right of the Walkabout interferes with the right to privacy. The right to exploit any natural resources interferes with the right to keep the products of your own work. Consider one group of people who decide to put their efforts into clearing land and planting crops and another group that herds animals. Either the labor of the farmers gets stolen when the herd animals eat the crops, or the walkabout and natural resource exploitation rights of the herdsmen get infringed.

The history of the American West provides many examples of such conflicts. The rights of hunter-gathers (Indians) collided with the rights of herdsmen (cowboys) which collided with the rights of farmers (the guys with the barbed wire). And within each group there were wars over hunting rights, water rights, grazing rights and mineral rights – wars over the things of value not created by human hands.

Private property provides a powerful tool to make the most efficient use of the land. People who own land can hunt at the optimal amount to get meat without driving the game extinct, or they let the optimal number of animal graze without destroying the grass, or they can clear the land and prepare it for farming. And the

farmers who *own* farmland have incentive preserve the soil, rotate crops and possibly set up irrigation systems; this is in contrast with the slash and burn agriculture of semi-nomadic societies. Private property allows people to keep the fruits of their labor when their labor gets mixed with the land, thus preserving one of the classical natural rights.

However, private property interferes with the right of the Walkabout, and the right to Forage. And neither private property nor completely public property preserve the right of Pristine Wilderness. This requires a government or other powerful institution to maintain large tracts of wilderness while restricting exploitation rights. As for the right to privacy in the wilderness, this requires limiting the number of people in the wilderness at the same time.

The natural rights described in this section cannot all be inalienable. I think it is for this reason that many philosophers have glossed over them. But these are still important rights. There are hundreds of millions, if not billions of people who are more poor than those who live in a state of nature – even though most of these remaining state of nature people are living in the nastiest places on Earth, such as the Arctic Circle and the Kalahari Desert.

And the right of private property in land and other natural resources presents some serious theoretical problems in regard to who gets the original title to land.

We will explore some possible solutions in the next section.

Which Rights to Alienate?

“WE hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness”. So reads the Declaration of Independence, one of the most forceful and consequential enunciations of natural rights theory. Note the word “unalienable”; it means that these rights cannot be given up. No one can sell or give away these rights on their own behalf or on their children’s behalf, according to the Declaration. And to this day, we outlaw gladiatorial combat and indentured servitude in deference to this principle. It is also why we have bankruptcy laws instead of debtor’s prisons, and that children do not have to inherit the debts of their parents (accept as a lien against the value of their inheritance).

I repeat: the term unalienable implies that these rights cannot even be given away *voluntarily*. We have a restriction on the right of contract. Voluntary contract does not make all things morally right – especially if such contractual obligations are extended to children and unborn generations.

The Founders declared Life, Liberty and the Pursuit of Happiness to be unalienable rights because they could. If no one murders, all have the right to Life. If no one enslaves, all have Liberty. If everyone minds their own business (drug warriors, take note), all have the right to Pursue Happiness.

The “other” natural rights *have* to be alienable to some degree. As I have already shown, these rights get in each other’s way as the population rises. The question arises as to which rights to alienate and who loses what?

Consider the thorny problem of private ownership of land and other natural resources. Private property allows for efficient use of land and, to some degree, environmental preservation; however, it also takes away the pre-existing rights of Foraging and the Walkabout. Those who own land have more rights than those who do not. In modern times, this is reflected by having a price on land. If you want more land, you have to pay for it in exchange for the property rights lost by the seller. This is all well and good, but what about the right of first ownership? Is it first come, first serve? Is it right of conquest?

Many in the natural rights tradition ascribe to an idea that goes back at least to John Locke: that the first person to mix his labor with the land gets to keep it. That is, a pioneer gets to keep the land he clears. This is because he owns his body and the fruits of his labor until he should choose to sell or give it away. If we are only concerned with the “classical” natural rights of the second section of this chapter, we are on a strong footing. To take away the value added to the land of someone who cleared it for farming is to commit theft.

The real difficulty with this approach to original land ownership is that there is more value to land than that added by the person whose labor “improves” the land. In the case of a lumber company, the labor may well subtract value from the land as old growth timber is harvested. And in the case of a farmer who sets up a farm on a plot of land that later turns out to be on top of an oil field, the descendent of the farmer gets a very unfair share of the world’s natural resources.

Another approach to this problem is to make the original owners of land pay a price to society in general by buying land at auction from the government (which at least in theory provides services to society). This was tried at times during American history, but in practice the auctions were rigged in favor of those who came in on the first to mix labor basis. Those who had the land on the first come, first served basis (the Native Americans) had their land rights heavily reduced with little compensation – to put it mildly.

Regardless of how first ownership is determined, the result is that some natural rights are alienated, and these alienations are passed on to future generations. If your grandfather sold the family farm for a song to the coal company, you are out of luck.

Is this right? Or should each generation separately receive compensation for rights given up? If so, we have a natural rights basis for a limited “welfare right”(!) Those who own property and/or exploit natural resources beyond a median share can be morally taxed at the rate of the rent on this extra share, the value of which could go to an equal dividend to all. This provides something of a non-zero poverty floor *without anyone having to prove poverty*. (The importance of this last phrase will be explored in a later chapter.) However, this tax should not extend to the value added to the land by human labor, since people own the right of the fruits of their labor because they own themselves.

If I understand the secondary sources correctly, this is the idea put forth by Henry George in his “Progress and Poverty.” However, I cannot say for certain as I have not read this book, yet.

Another place where these ideas can be found is in the Bible(!) The right of the poor (or anyone, for that matter) to glean the fields is a rather elegant substitute for the right of Foraging. The law of the Jubilee Year makes explicit the difference between human generated wealth and wealth implicit in nature. I intend to cover these ideas in detail in a later chapter. Stay tuned.

Consequences

If we were to apply this expanded theory of natural rights given in this chapter, we would end up with a somewhat modified libertarian society. We would have most of the classical freedoms that libertarians defend, along with some land set aside for preserving some of the right of Pristine Nature and the Walkabout, some government action to preserve those species not protected by private property rights, and a small dividend to all (which is of the most benefit to the poor) to compensate for the inequalities in the distribution of natural resource ownership.

Some libertarian implications would be:

1. Victimless crime laws would be repealed.
2. Where possible, criminal punishment would be based on victim compensation. When not possible, punishment would be somehow proportional to the damages done.
3. Taxes on labor (including the income taxes) would be eliminated. People own the products of their labor. The same would go for consumption taxes on items whose primary values is on their labor content. Taxation would be based on fee for essential services such as national defense and a justice system, and for paying the aforementioned dividend.

Some egalitarian implications would be:

1. The dividend that would go to those who own less than their fair share of the Earth’s inherent resources due to their choice of parents.
2. The end to labor taxation.
3. The end to subsidies, grandfathering, most occupational licenses, and other legal practices that directly favor old money.
4. The end of certain indirect subsidies to the established interests which are not obvious. I will write about these in detail in later chapters.

Some green implications would be:

1. The practice of setting aside part of the land to be used in a primitive fashion would continue.
2. Protection of endangered species would continue to be justified.

3. Polluters would have to pay full damages, either directly to the victims for concentrated pollution or into the general dividend fund for dispersed pollutants. No grandfathering!

Note that I have *not* proven that we *ought* to do these things. I have only proven that such things would be consistent with an expanded theory of natural rights. I have not proven that any theory of natural rights *ought* to be followed in any definitive philosophical sense. However, it is useful to have such a theory that does not depend purely on tradition or prevailing religion; it provides a moral foundation for a useful government that does not grow out of control. (And as I have already touched upon, such a natural rights theory is largely backed up by the Bible, which is at least supposedly the foundation for the prevailing religions of the U.S.)

Conclusion

Members of the radical Left have some embarrassing history to answer for. When Marxists got into power, the result was generally dictatorship, labor camps and a bout or two of mass starvation. But the advocates of limited government have some embarrassing moments in history to answer for, also. The paragons of laissez-faire capitalism, Britain and the United States during the Nineteenth Century, were not exactly utopias that we want to go back to.

The major ugly aspects of both systems can be traced to the violation of the natural rights as described in this chapter. The appropriation and labor camps of the Marxist governments are obvious examples of classical natural rights violations. Slavery and lack of women's rights in Nineteenth Century Britain and the U.S. are also obvious violations classical natural rights.

But we can go further and lay much of the blame for worker exploitation during the Industrial Revolution on the violation of the expanded set of natural rights. Great Britain (and feudal societies in general) had a legal system that *amplified* the inequalities between the owners of natural resources and those who lived by their labor. Primogeniture was designed to keep the land in a few hands, and the enclosure movement took away land rights from the peasants without compensation. And the Corn Laws subsidized landowners while making food more expensive for landless laborers. (Laissez-faire politicians of the time get credit for fighting against the Corn Laws and for the poor. Once upon a time, limited government was part of a Leftist agenda; it can be so again.)