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The Decline of Natural Right

Jeremy Waldron

1. Introduction

In a preface he wrote in October 1894 to his book *Natural Rights: A Criticism of Some Political and Ethical Conceptions*, David G. Ritchie (sometime Professor of Logic and Metaphysics at the University of St. Andrews) made the following observation:

When I began, some three years ago, to write a paper on “Natural Rights,” ... I had a certain fear that in criticizing that famous theory I might be occupied in slaying the already slain. Recent experience has, however, convinced me that the theory is still, in a sense, alive, or at least capable of mischief. Though disclaimed by almost all our more careful writers on politics and ethics, it yet remains a commonplace of the newspaper and the platform, not only in the United States of America, where the theory may be said to form part of the national creed, but in this country, where it was assailed a century ago by both Burke and Bentham.¹

Is Ritchie correct in his claim that the theory of natural right never really died in the nineteenth century? It certainly suffered grievous injury at the end of the eighteenth century at the hands of thinkers like Edmund Burke and Jeremy Bentham. But how telling were their blows? In this article I shall consider what happened to the theory in the century following the attacks by Burke and Bentham.

Both of those critics—the traditional conservative and the utilitarian radical—were responding to natural right as it figured in the ideology of the French Revolution. In 1789 Edmund Burke wanted the world to know that Englishmen at least

are not the converts of Rousseau; we are not the disciples of Voltaire....
 Atheists are not our preachers; madmen are not our lawgivers. ..In England

¹ David G. Ritchie, *Natural Rights: A Criticism of Some Political and Ethical Conceptions* (Westport, Conn.: Hyperion Press, 1979), p. ix.

we have not yet been completely embowelled of our natural entrails.... We have not been drawn and trussed, in order that we may be filled, like stuffed birds in a museum, with chaff and rags and paltry blurred shreds of paper about the rights of man. ... We have real hearts of flesh and blood beating in our bosoms. We fear God; we look up with awe to kings; with affection to parliaments; with duty to magistrates; with reverence to priests; and with respect to nobility.²

Jeremy Bentham, writing a few years later, concentrated his ire on the Declaration of the Rights of Man and the Citizen. In his notorious condemnation of natural and imprescriptable rights as "nonsense upon stilts,"³ he observed that the force of any argument of natural right "is in proportion to the strength of lungs in those who use it. ... I mean in the first instance: for ultimately it depends upon the sharpness of the daggers which he ... has in his pocket."⁴ It was the language of political violence.

[W]hen I hear of natural rights ... I always see in the background a cluster of daggers or of pikes introduced in the National Assembly with the applause of the President Condorcet for the avowed purpose of exterminating the King's friends. Of late these pikes and these daggers have been exhibited in broad day, and pointed out to reasonable and reasoning men, as gibbets used to be to murderers and thieves.⁵

So was it events, rather than critique, that discredited natural right? One of the things I want to do in this article is to consider how far the decline of natural right in the nineteenth century can be attributed to the reaction against the revolution in France, and how far it was the effect of independent streams of thought, like positivism and historicism. I shall ask why radical thought was ambivalent about the doctrine throughout the century, and why socialist thought in particular was mostly inclined to turn its back on it. As a framework for thought, natural right suffered a radical decline in the social and political sciences. But things were not so clear in jurisprudence, and natural right lived on to a much riper old age in the writings of some prominent economists. So we have to ask: What is

² Edmund Burke, *Reflections on the Revolution in France* (Harmondsworth: Penguin Books, 1968), pp.181-2. See Jeremy Waldron, ed., *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen, London, 1987), pp. 114-5.

³ Jeremy Bentham, "Anarchical Fallacies," in Waldron, ed., *Nonsense Upon Stilts*, p. 53.

⁴ *Ibid.*, p. 74.

⁵ *Ibid.*

it about this theory that allowed it to survive in these environments, when so much of the rest of intellectual endeavor in the nineteenth century was toxic or inhospitable to it? Finally, with Professor Ritchie, we shall ask how far American thought represents an exception to all of this, and the extent to which and the reasons for which the doctrine survived as a way of thinking in the United States, long after it had lost its credibility in political thinking elsewhere.

2. What is natural right?

The idea of natural right, whose decline we are tracing in this article, is not (like the twentieth century notion of human rights) just a list of demands that any decent polity is supposed to satisfy. No doubt any serious demand for rights is predicated on a moral argument, but the idea of natural right takes in the premises and the method of argumentation as well. Also, the theory of natural right is not just an argument that people naturally have certain rights and that therefore they ought to be accorded legal and political rights that correspond with them. It represents a more general orientation towards politics and society erected on certain quite abstract foundations, composed of elements of natural law jurisprudence and social contract theory, and imbued with a fierce philosophical rationalism. It demands that custom and tradition justify themselves at the tribunal of reason and explain themselves in a system of thought that treats each human being as the equal of every other. As a political theory, its classic exposition may be found in the work of the late seventeenth century philosopher, John Locke; but diverse currents are also represented in the natural law jurisprudence of Hugo Grotius, in the rational egoism of Thomas Hobbes, in the essays and satires of Voltaire, in the political theory of Jean-Jacques Rousseau, and—in somewhat different form—in the political economy of thinkers like Adam Smith.

It is almost certainly a mistake to exaggerate the coherence or unity of natural right theory, particularly in this period of its disarray. Natural right brings together a number of distinct philosophical currents and, although in the second half of the eighteenth century its political tendency was unequivocal, by the middle of the nineteenth century—as we shall see—its shards and remnants could be adduced to support a bewildering variety of contradictory positions. Moreover the theory of natural right in the hands of an Enlightenment philosopher is not the same as the theory of natural right in the hands of an English Chartist, a Spanish *liberale*, a Kantian jurist, a Venezuelan *libertador*, and an American defender of free enterprise. Not only were different aspects of the heritage of natural right emphasized in its different applications, but different settings required different accommodations with other values that everyone would say lay outside the ambit

of natural right altogether. Still, even in this period and across all those who talked of natural right and acted on it in these different ways, certain common themes were evident.

The theory of natural right is rationalistic in its method, individualistic in its foundations, universal in its scope, and hyper-critical in its politics. It brings these elements together in its regard for reason as the touchstone of individual dignity, and in its refusal to countenance support for political arrangements that denigrate the rationality or insult the dignity of the ordinary person. It is, as this formulation suggests, a fundamentally egalitarian theory, refusing to accept that there are different ranks of person (king, noble, priest), refusing indeed to recognize anything other than general utility as a ground for empowering some at the expense of others. It may not be a theory that calls for equality in the sense of economic leveling—it imagines that ordinary people, left to their own devices may use their freedom in various ways with varying degrees of success—but it is committed to a fundamental leveling so far as politics is concerned. The popular sovereignty embodied in social contract theory, together with the universal suffrage which increasingly became the demand of political liberals in the nineteenth century, represent the natural tendency of this sort of egalitarianism. We are so familiar with this—at least as doctrine—that it is difficult for us to grasp how incendiary the natural equality idea seemed at the end of the eighteenth century as a premise on which to build a theory of government.

By the same token, natural right is an emancipatory theory: it regards freedom, choice and self-determination as the natural condition of human beings and the customs and structures that hobble individual liberty as aberrations (albeit long-established and often incorrigible ones). Again the implications are incendiary. The freedom embodied in the idea of natural rights is not just the freedom to move from village to village, the right to trade freely, and the right of individuals to speak and worship as they please—though these demands seemed radical enough in their first articulation. According to most natural rights theories, people also have a right to choose who they will be governed by and to be governed only by their own consent. Principalities and powers, hierarchies established since time immemorial, ranks of nobility and great chains of being, all suddenly have to answer at this tribunal of self-determination. When people rose against their government, it suddenly seemed as if natural rights theory had shifted the burden of proof from rebel to ruler: it was not for the rebel to justify his impudent transgression; it was for the ruler to explain for the first time why anyone would have consented to be governed under his imperious and insolent regime.

With all this to its credit, the theory of natural rights was seen in the eighteenth century and continued to be seen in the nineteenth century as a profoundly disruptive way of thinking about politics and society. But natural right did not go into decline simply because it was politically subversive. It came to seem unsatisfactory from a philosophical point of view. It privileged the liberty and the equal rights of the individual in the most bracing way imaginable, but many thought that, both in its moral aspect and as a theory that sought to understand the world, it gave no adequate account of the main forms of human community. For community seemed to exist as something more than a voluntarily constituted service organization for the benefit of individuals and it seemed to call for an explanation—an historical and/or a sociological explanation using concepts that the theory of natural right could barely recognize.

The abstract universalism of natural right has always been a point of pride for proponents of the theory, a pride that continues in modern universalist doctrines of human rights. But the doctrinaire insistence that one size fits all was particularly vulnerable in an age that was beginning to become aware, not just of the different trajectories followed in the way of human socialization in different parts of the world, but of a sense that different principles arise out of and are apt for different social and historical circumstances. Universalists try to hold the line against this sort of view either by denying what they take to be its implicit relativism or by insisting that even if different circumstances evoke different principles, still the explanation of *why* certain intermediate principles are appropriate for certain types of circumstance is given by a few very fundamental principles whose moral force is invariant. Maybe that is a clever philosophical maneuver. But to many historicists and sociologists in the nineteenth century, it seemed obtuse and unhelpful; it certainly didn't seem to be the most fruitful heuristic for approaching social and historical diversity.

There are other problems too, both definitional and substantial, that made it harder for the theory of natural right to defend itself. The term "natural" posed a number of difficulties. In the mid-eighteenth century, David Hume noted that the term was "commonly taken in so many senses and is of so loose a signification," that it may not really pick out any distinctive approach to justice or political right.⁶ Theories of the natural fittingness of things—which reason can discern—are not necessarily theories of natural right. Nor are Catholic theories of natural law, which in the period under discussion was associated more with reaction than with

⁶ David Hume, *An Enquiry Concerning the Principles of Morals*, Appendix III, in *Hume's Enquiries*, ed. L.A. Selby-Bigge (Oxford: Clarendon Press, 1902), p. 307.

the emancipatory politics of natural rights. The theory of natural right certainly does not include every sort of “naturalism” or “naturalistic view.”⁷ The nineteenth century, which will be our focus, was the century in which natural science began to fulfill the promise of the Enlightenment, and this was as evident in the science of man as it was in the physical sciences. In itself natural science does not dictate a morality or a politics but the is/ought gap did not prevent a number of naturalist social and ethical theories from claiming scientific credentials. Of these, evolutionism was one of the best known in the second half of the nineteenth century. But evolutionism, though purportedly based on nature has at best a problematic relation to natural right, epitomized (as we shall see) in the complexities and contradictions of Herbert Spencer’s philosophy.

Much the same caution has to be entered in regard to the emphasis on rationality. Natural right theory was certainly uncompromising in its rationalism. Alexis de Tocqueville identified it with “[t]he belief that what was wanted was to replace the complex of traditional customs governing the social order of the day by simple, elementary rules deriving from the exercise of the human reason and natural law.”⁸ But not every form of self-confident moralizing from first principles is a form of natural right. The utilitarianism of Bentham and James Mill was as rationalist and as aprioristic in its premises as the theory of natural rights—in the principle of utility, for example, and in its dogmatic and unrelenting consequentialism—but it brought reason to policy in a different way. Indeed, while some critics of natural rights, like Edmund Burke, attacked it for its excessive rationalism, others, such as Bentham, saw natural right as an attack on reason. The discourse of natural rights, said Bentham, is just “so much flat assertion” for it “lays down as a fundamental and inviolable principle whatever is in dispute.”⁹ What was needed, he thought, was a more articulate political philosophy, one that did less of the crucial work in its premises and more by the movement from a very small set of principles through complex layers of argument to carefully reasoned conclusions for law and policy. That criticism developed throughout the nineteenth century, so that by 1894, when Ritchie was writing, natural rights, which had once seemed to represent the high-water mark of the

⁷ Not everything that G.E. Moore challenged with “the naturalistic fallacy” counts as natural right; as a matter of fact, Moore devoted very little attention to the theory of natural right in *Principia Ethica* (Cambridge: Cambridge University Press, 1993).

⁸ Alexis de Tocqueville, *The Old Regime and the French Revolution*, trans. Stuart Gilbert (New York: Doubleday, 1955), Part III, Ch. 1, p. 139.

⁹ Jeremy Bentham, “Supply Without Burthen” in Waldron, ed., *Nonsense Upon Stilts*, p. 74.

commitment to reason in human affairs, began to appear in the guise of a disreputable array of unargued intuitions.

In the same breath as the association with rationality, people from the mid-eighteenth century on, would connect natural rights with atheism or at least with a free-thinking assault on religion as it was traditionally conceived. From a longer historical perspective this is a little odd. The epitome of natural rights theory is John Locke's political philosophy in the second of his *Two Treatises of Government*. But a literal reading of that text reveals a philosophy which evidently rests its universal egalitarian and emancipatory principles on deep religious convictions.¹⁰ Even so, the theories that built on Locke's foundation quickly acquired a reputation for looseness in their religious commitments. In 1792, Tom Paine's name was a household word for his free-thinking.¹¹ And the Enlightenment *philosophes* were widely regarded as anti-theistic, if not atheistic in their metaphysics; certainly they believed that theories of natural human freedom and equality could be articulated in a way that had almost nothing to do with their own residual deism. They expected (and received) little support from the hierarchies of either Roman Catholic or established Protestant religion for their political thinking. That said, there was always an element of piety in the rhetoric of even the most anti-clerical of proponents of natural right: the rights of man were often referred to as sacred, and their violation treated as sacrilege. And this was not just a *façon de parler*: natural rights theory was not fundamentally opposed to Christian ethics, for example; on the contrary, it took some certain elements of basic Christian thought, concerning the dignity and fundamental equality of all God's human creatures, much more literally and pursued their implications much less equivocally than most bishops were comfortable with.

In what follows, I shall trace some of the causes and some of the characteristics of the decline of natural right in the nineteenth century, particularly after 1815. But even here we have to be careful, and two final preliminary caveats need to be mentioned. First, our focus on the decline of this body of thought in the nineteenth century might suggest that natural right had its heyday in the eighteenth. Politically this may have been the case. But Bentham's and Burke's critiques did not come out of nowhere, and it has been suggested that the doctrine was already in some disarray in the eighteenth century, a period (regarded by some as) of the

¹⁰ See e.g. John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), II, §6: p. 271 and Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in John Locke's Political Thought* (Cambridge: Cambridge University Press, 2002).

¹¹ See E.P. Thompson, *The Making of the English Working Class* (Harmondsworth: Penguin Books, 1968), p. 121.

“decadence of natural law.”¹² Secondly, it is inevitable that an article like this, tracing the decline of natural right will, by its design, tend to exaggerate that decline. But the decline was only partial, and the revival of a version of natural right in the mid-twentieth century was able to draw on its subterranean persistence throughout the nineteenth century and the years that followed. In tracing the causes and character of this relative decline, it will not always be possible to highlight the doctrine’s persistence in various quarters. But it should not be forgotten.

3. Revolution and reaction

I said at the beginning that Bentham and Burke were responding to what they regarded as the excesses of French revolutionary theory and practice. There can be no doubt about the impact of the French revolution and the subsequent terror in discrediting natural right at least in the first twenty or thirty years of the nineteenth century. Natural right was an inherently subversive doctrine—challenging as it did every tradition and institution to defend itself before a tribunal of reason that held each man to be each other’s equal. Its natural tendency was revolutionary and it tended to be discredited by the sanguinary reality of revolution. As George Sabine wrote: “Everywhere the Revolution produced, as revolutions are wont to do, a revulsion against its excesses, and it became the fashion to attribute these excesses to the philosophies and the rights of man.”¹³ Of course not every revolution results in terror, dictatorship, and war. But the French Revolution did and it flew the doctrine of natural right as its banner. Right or wrong, the theory of natural right was cursed with this as a part of its heritage at the beginning of the nineteenth century.

For those already inclined to conservatism, the events of 1789 to 1815 were sufficient to discredit the theory completely. Many took the opportunity to publish theories that not only rejected the doctrine of natural right but were explicit reactions against the basic humanism of its premises: I have in mind Gobineau’s racism and de Maistre’s repudiation of even the mildest Enlightenment optimism. But it wasn’t just reactionaries and conservatives who abjured the theory; most of them had never adhered to it in the first place. Those of a more liberal disposition, who might have welcomed the revolution when it first broke out—“Bliss was it in that dawn to be alive”¹⁴—also deserted it and the theory it was thought to embody

¹² George H. Sabine, *A History of Political Theory*, 3rd ed. (New York: Holt, Rinehart and Winston, 1961), p. 542.

¹³ *Ibid.*, p. 670.

¹⁴ William Wordsworth, *The Prelude*, Book XI.

after 1793.¹⁵ The reaction might be compared to that against communism once the reality of the Soviet Union became apparent. But it was a differently shaped reaction—quicker, less ambivalent, and in some ways more intense. Even though the terror lasted but a few years and the wars spurred by the revolution were over by 1815, the memory of Paris in 1793 and of Napoleon’s profoundly disruptive war-making in Europe continued to be something that could be invoked at any time to discredit natural right.

After 1815, conservatism was ascendant, but political conservatism was not the only form that threatened the natural rights idea. In the revival of traditional religion after 1815, the theory of natural right was condemned as destructively anti-clerical. As historian David Thomson notes,

Many of the greatest intellects in Europe, and some of the most biting pens, devoted themselves to affirming the dogmas of Christianity and old religious beliefs. ... The keynote of their thought was the demand for authority—authority both in state and in church, as the only bulwark against revolution and atheism. ... Before 1800 the most influential intellectuals had been on the side of rationalism, democratic ideals, and anti-clericalism. Now ... the greatest intellects supported traditionalism, conservatism and the church.¹⁶

It would be wrong to say that these conservative and reactionary currents in Europe discredited natural right altogether. As we will see, the theory continued to flourish in the United States. It was invoked also in on-going agitation for liberation in Latin America and in Europe as late as the uprisings of 1848.¹⁷ But it was plainly operating in a hostile environment, it was seldom invoked without serious qualification, and its invocation was almost always an occasion for hostility and for the expression of grave reservations about the soundness and sense of reality of those who invoked it. As the nineteenth century wore on, this political discrediting of the doctrine cleared the way for its intellectual critique and for its abandonment by many of the progressive forces to whom in other circumstances it might have continued to appeal.

¹⁵ See especially the chapter on Wordsworth in Alfred Cobban, *Edmund Burke and the Revolt against the Eighteenth Century* (London: G. Allen & Unwin, 1929).

¹⁶ David Thomson, *Europe since Napoleon*, 2nd ed. (New York: Alfred A. Knopf, 1966), p. 85.

¹⁷ The Constitution of the French Republic declared in 1848 talks, in Article 3 of natural rights: “*des droits et des devoirs anterieurs et superieurs aux lois positives.*”

4. Natural right in progressive politics

The triumph of counter-revolution was by no means comprehensive. After 1830, certainly by 1848, the nineteenth century was a century of protest and upheaval in Europe and in the Americas. Natural right was not absent from this turmoil. When the Chartists drew up their manifesto demanding universal suffrage and equal representation in London in 1837, they announced that “[t]he universal political right of every human being is superior and stands apart from all customs, forms, or ancient usage,”¹⁸ and when in 1848 a convention for women’s suffrage met at Seneca Falls, in New York, a Declaration was adopted explicitly in the mode of natural right, modeled on the 1776 Declaration of Independence, to explain why “one portion of the family of man [was now] to assume among the people of the earth a position different from that which they have hitherto occupied.”¹⁹ Despite the sharp jab of Bentham’s pen, the 1789 Declaration of Rights “remained a charter of liberalism throughout the nineteenth century.”²⁰

Still, there was reluctance among progressive writers to invest too heavily in what seemed a discredited vocabulary. Though specific claims of right continued to be made, in the years immediately following 1815 there tended to be a retreat to a more moderate discourse, less wide-ranging, less subversive in its implications. E.P. Thompson tells us that working class radicals preferred to use the Burkean language of “freeborn Englishmen” and the particular virtues of English constitutionalism rather than natural rights.²¹ Those who persisted with old-style natural rights theory found themselves having to apologize for its association with the Terror. One English radical wrote in 1796:

I adopt the term Jacobinism without hesitation ... [b]ecause, though I abhor the sanguinary ferocity of the late Jacobins in France, yet their principles .. are the most consonant with my ideas of reason, and the nature of man, of any I have met with ... I use the term Jacobinism simply to indicate a large and comprehensive system of reform, not professing to be built upon the authorities and principles of the Gothic customary.²²

¹⁸ Chartist Petition agreed to at the Crown and Anchor Tavern Meeting in London, February 28, 1837, as quoted in Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2004), p. 138.

¹⁹ <http://usinfo.state.gov/usa/infousa/facts/democrac/17.htm> (visited on November 3, 2006).

²⁰ Thomson, *Europe Since Napoleon*, op. cit., p. 11. See also note 16 above.

²¹ See Thompson, *Making of the English Working Class*, pp. 77-91.

²² *Ibid.*, p. 200

By the mid-nineteenth century, however, things had begun to reverse in a curious way. As memory of the Terror receded, more and more people remembered natural right theory less in its “sanguinary” Rousseauian version, more in its moderate Lockean manifestation.²³ In that guise, the theory was associated with the virtues of the settlement of 1688, with property, and with the negative and largely formal idea of freedom from absolutism and the rule of law.²⁴ It became Whig talk, almost Establishment talk. But for that very reason, many liberals and constitutionalists came to the opinion that even if it was not “terrorist language,”²⁵ Lockean natural right was no longer needed as a basis for opposition to absolutism. Other theories were available, other more straightforward ways of figuring things out. Sabine observes that “liberal political reform passed more and more out of the region of ideology and into that of institutional reconstruction,”²⁶ and for that, what was needed was not a myth about the state of nature, but a framework for clear thinking on public policy that would help shake the cobwebs from actual institutions.

In England, the utilitarians—Jeremy Bentham, James Mill, and his son John Stuart Mill—epitomized the new version of progressive political philosophy. Utilitarianism did not need the theory of natural right. It did not need to trace things back to a social contract signed at the dawn of time. Instead it proposed a systematic set of criteria for consequentialist evaluation of public and social arrangements. Natural right might have been hypercritical in its implications, but the principle of utility had its own critical logic, which “provided the sharpest of radical axes with which to chop down traditional institutions which could not answer the triumphant questions: Is it rational? Is it useful? Does it contribute to the greatest happiness of the greatest number?”²⁷ Bentham, for one, was convinced that asking and answering these questions was only obstructed by talk of natural right. To his mind, such talk was useless for criticizing English institutions, for it participated in the very blurring of institutional fact and critical value that the traditional defense of English institutions had always counted on. Radicals needed to stop talking about rights that had a ghostly existence and talk

²³ It was only in the late twentieth century that we got a sense of John Locke’s own involvement in revolutionary agitation in the 1680s. See Peter Laslett’s “Introduction” to Locke, *Two Treatises*.

²⁴ Thompson, *Making of the English Working Class*, p. 87.

²⁵ Bentham’s phrase from “Anarchical Fallacies,” in Waldron (ed.) *Nonsense Upon Stilts*, p. 53.

²⁶ Sabine, *History of Political Theory*, p. 671.

²⁷ Eric Hobsbawm, *The Age of Revolutions, 1789-1848* (New York: Vintage Books, 1996), p. 236.

instead about the systematic weighing of reasons for various legal and constitutional arrangements:

In proportion to the want of happiness resulting from the want of rights, a reason exists for wishing there were such things as rights. But reasons for wishing there were such things as rights, are not rights; ...want is not supply—hunger is not bread.²⁸

James Mill was equally merciless in puncturing the pretensions of natural right. There are persons, he said—“philosophers, pushing on their abstractions”—who say that the rights they call for already exist:

If asked, whence we derive a knowledge of this right and wrong in the abstract, which is the foundation of what they call right and wrong in the concrete, they speak dogmatically and convey no clear ideas. ...[W]riters of this stamp give us to understand, that we must take this standard, like many other things which they have occasion for, upon their word.²⁹

By simply assuming what is at issue and assuming it in abstraction from any distinctive sense of what a community owes by way of concern for its members, theorists of natural right blunt the spear of rational criticism, according to the utilitarians, and it is no wonder that the upshot of their critique is not careful evaluation followed by reform, but confusion, recrimination, and bloodshed.

This hostility to what was seen as the question-begging and obscurantist discourse of natural right continued unabated throughout the century. John Stuart Mill was a critic of some of the drier calculative aspects of Bentham’s utilitarian arithmetic, but he was never tempted by the formulas of Locke and his tradition. Seventy years after Bentham wrote his *Anarchical Fallacies*, Mill wrote in *On Liberty* that he preferred to bypass natural right and deal directly:

It is proper to state that I forego any advantage which could be derived to my argument from the idea of abstract right as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being.³⁰

²⁸ Bentham, “Anarchical Fallacies,” in Waldron (ed.) *Nonsense Upon Stilts*, p. 53.

²⁹ James Mill, “Jurisprudence,” in *James Mill: Political Writings*, ed. Terence Ball (Cambridge: Cambridge University Press, 1992), p. 46.

³⁰ John Stuart Mill, *On Liberty*, ed. Currin V. Shields (Indianapolis: Bobbs Merrill, 1956), p. 14

One could phrase the conclusions of an argument like that of *On Liberty* in the language of rights, but as I said at the beginning of section two of this article, the theory of natural right was about premises not just conclusions.³¹ Mill wanted to make it clear that he did not need natural right premises even for what appeared to be an argument for individual rights.

The very considerable success of the utilitarians in pursuing a sometimes quite radical agenda in this form helped reinforce the impression among progressive thinkers that natural right was not only a dangerous associate, but an unnecessary one.

European socialists were also reluctant to invest in the theory. It is easy enough to explain this for certain circles, by the growth of anti-individualist versions of socialism—for example, in the work of Karl Marx. For Marx, the only thing salvageable from the 1789 *Declaration of the Rights of Man and the Citizen* was the rights of the citizen, precisely the part of the manifesto that was *not* tainted by natural right: as for the rest, “none of the so-called rights of man goes beyond egoistic man, man as he is in civil society, namely an individual withdrawn behind his private interests and whims and separated from the community.”³² Natural right could not conceive of man as Marx conceived of him, as a species-being, engaged in the communal organization of socially productive forces.

But actually, Marx’s philosophically collectivist version of socialism was far from the only version on offer. Eric Hobsbawm points out that at least in the early decades of the nineteenth century the new society that socialist agitators envisaged did not necessarily abandon liberal ideals:

A world in which all were happy, and every individual fully and freely realized his or her potentialities, in which freedom reigned and government that was coercion had disappeared, was the ultimate aim of both liberals and socialists.³³

Still, like Mill, even the socialists who shared liberal ideals had little time for natural right as a starting point. For them, the reason was not the sanguinary provocations of Rousseau, though that was always a strategic disadvantage. It was an almost opposite danger: in matters economic, the theory of natural right in its moderate Lockean version tended to be associated with the protection of property

³¹ See also the excellent discussion of H.L.A. Hart, “Natural Rights: Bentham and John Stuart Mill,” in his collection *Essays on Bentham: Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), p.79, at p. 90.

³² Karl Marx, “On the Jewish Question,” in Waldron, ed., *Nonsense upon Stilts*, p. 147.

³³ Hobsbawm, *Age of Revolutions*, p. 243.

and with the formal characteristics of the rule of law. Socialists wanted to expose the reality of inequality and exploitation that formal right tended to mask and that substantial natural right in its proprietorial version tried to legitimize. If pressed, they may have accepted that these proprietorial conclusions distorted the truth of natural right. They even may have accepted that someone could phrase their position in the idiom of natural right, and do so without making a mockery of that idiom. But they felt no necessity to do this. Like the utilitarians, they believed that their affirmative claims should be made directly, without having to be phrased in the idiom of a less disingenuous understanding of natural right.

Something similar was true of radical democrats. In principle, the demand for democracy could be phrased in terms of natural right. Democracy is a credible expression of fundamental equality and of respect for individual thought and liberty in the circumstances of collective decision. Even the principle of majoritarianism can be unpacked in terms of natural right: each has a right that his own voice count as strongly as possible in the public policy direction that it argues for, but only as much as anyone else's, and he has a right that no policy position be favored collectively on any basis other than this equal respect.³⁴ And sometimes the case for universal suffrage was made in these terms in the nineteenth century: I have already mentioned the Chartists.³⁵ But the case was also made more directly by the utilitarians, eschewing the premises of natural right.³⁶ And as the century wore on, natural right switched sides. It started being associated with the *anti*-democratic position—with the new talk of “tyranny of the majority” and the democratic threat to individual rights (particularly property rights).³⁷ Now it was natural rights against Rousseau, rather than a rights-based argument for democracy.

Democracy was often associated with nationalist demands, but there too the doctrine of natural right was pushed to one side. I have already noted the universalism of natural right: not only did it attribute the same rights to everyone, but it seemed an inherently cosmopolitan and internationalist idea. Some of the

³⁴ For a modern argument to the effect that the principle of majority decision uniquely satisfies these constraints of neutrality, equality, and positive valence, see Kenneth May, “A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision,” *Econometrica*, 20 (1952): p. 680.

³⁵ See quote accompanying fn. 18 above.

³⁶ See, e.g., James Mill, “Government,” in *Political Writings*, esp. pp. 21-42

³⁷ It is interesting to note John Stuart Mill's observation in 1840 that popularization of the phrase “the tyranny of the majority” was one of the few deplorable effects of Alexis de Tocqueville's work, *Democracy in America*. See John Stuart Mill, “M. de Tocqueville on Democracy in America” (1840), in Mill, *Dissertations and Discussions: Political, Philosophical, and Historical* (New York: Henry Holt, 1882), Vol. II, p. 81.

more hopeful features of the outbreak of the French Revolution had that internationalist character.³⁸ But though the revolution was universalist in tone, the actions of France became more nationalistic and aggressive in the 1790s. This was partly because of France's strategic situation. But it also reflected an ambiguity that was present certainly in Rousseau's thought and arguably in all versions of natural right that emphasized popular sovereignty.³⁹ As we have seen, the emancipatory rhetoric of natural right aimed not just at liberating the individual, but at liberating communities of individuals to govern themselves by their own collective will. Looked at from a strictly individual point of view, the principle of self-determination might privilege personal freedom and government by consent. But in terms of practical politics, self-determination was always going to be seen as a collective matter—as a matter of what peoples, not persons, were entitled to. On this logic, it was not the individual who was entitled to rule himself; instead the will and destiny of the people were held to be something in whose name the individual could rightly be subjected. For many nineteenth century patriots, *the people* was a real entity—as real as the individuals who composed it—with a history and an interest of its own. The Jacobins regarded the sovereign will of the French people as sacred, and in their progress through Europe the French taught other peoples—the Italians, the Spaniards, and so on—by example (if not necessarily by intent) to accord sanctity also to their own *volontés generales*.

Now, nationalistic versions of popular sovereignty were not seen in the same anti-liberal light in the nineteenth century as they were in the twentieth. Some of them were versions of liberalism: to read Mazzini, for example, is to read a focused application of liberal principles about self-determination to the specific circumstances of Italy. But they were not versions of liberalism to which traditional natural right theory had any distinctive contribution to make. As I have said, the main difficulty emerged with the idea of “the people.” From the point of view of natural right, “the people” was just the plural of the individual person; it was not analyzed as a collective and barely understood as a sovereign. Rousseau came closer than most theorist of natural right to a collective sense of “the people,” but it was just at this point that his own theory began to exhibit the antinomies

³⁸ David Thomson points out in *Europe Since Napoleon* (p. 29) that the heroes of 1789 in France felt that “they were conducting a revolution on behalf of all mankind” and they “welcomed into their ranks men of any other nation whom they regarded as sharing their aspiration.” In the first flush of revolutionary enthusiasm, Tom Paine and Jeremy Bentham were made citizens of France, and when Lafayette gave the key of the Bastille to Paine to deliver to George Washington, the gesture in its identification of the French and American revolutions was “a symbolic gesture of the solidarity of the democratic international.”

³⁹ *Ibid.*, pp. 30-1.

most associated with the abuses of the 1790s. Rousseau stated the collectivist position too starkly: “[W]hoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free.”⁴⁰ By itself the language of positive freedom was too austere. European nationalists like Herder, Fichte and Schelling preferred to associate it with the richer discourse of a people’s cultural and linguistic heritage; and their immemorial history as brothers, as inhabitants of the same villages and tillers of the same soil. That would be a “people” worth subordinating the individual to; but it was not a sense of “the people” that natural right could comprehend. What happened, then, as the nineteenth century wore on, was that the theory of natural right was simply marginalized in nationalist discourse or superseded by thicker theories of popular emancipation. Natural right seemed thin, quaint and irrelevant by comparison, and it remained so until the twentieth century, when people understood the need to revive it as a basis of the moral and legal claims that an individual might make against the people whose communal existence allegedly enveloped him.

5. New intellectual currents

The nineteenth century was an age of great intellectual innovation as well as political upheaval. But few of the new currents of thought were congenial to natural rights theory. There is not enough space to consider all of these: some we have touched on already; some we shall postpone to our later discussions of natural right in economics, natural right in jurisprudence, and the distinctive career of natural right in the United States. But it is clear that natural right was never going to sit comfortably in an intellectual environment polarized by romanticism, on the one hand, and materialist positivism, on the other. Both these developments responded in different ways—poetically or technically—to the emergence of a new social and material environment: the rise of mass society, industrial society, and the need for a political science oriented to technical issues of administration as much as to the traditional forms and problems of governance. Natural right seemed as irrelevant to the enthusiasm with which positivists, like Auguste Comte, conceived a new science of society and administration as to the fury and despair with which romantic and idealist literature reacted to the soullessness of modern industry. Even those critics of modernity, like Thomas Carlyle, who were

⁴⁰ Jean-Jacques Rousseau, *The Social Contract*, trans. Maurice Cranston (Harmondsworth: Penguin Books, 1968), Bk. I, Ch. 7: p. 64.

explicitly reactionary in their nostalgia, looked back wistfully to ancient visions of community and heroism, not to the modest premises of Lockean individualism.

I have said several times that the theory of natural right was universalistic in its basic principles. It invited its adherents to think about the development of political institutions in terms of a single trajectory of state of nature, social contract, and civil society. Of course, it was always understood that this trajectory was simplistic in relation to the actual history of particular societies; but it was thought nevertheless to supply a useful template that could be placed over an account of the historical or anthropological detail of actual history as an aid to interpreting its moral significance.⁴¹ But this balancing act could be taken only so far. Montesquieu's *Esprit de Lois* gave the eighteenth century a taste of how productive a political science could be if it abandoned this assumption that, ultimately, one size fits all, and the success of his geographical and cultural relativism sounded an ominous note for the future of natural right.⁴² The growth of more sophisticated historicist philosophies in the nineteenth century meant that the unsatisfactory character of the natural rights view became patent.

By the beginning of the nineteenth century, many intellectuals were venturing the opinion that the purpose of rational analysis

is not to criticize the institutions, laws, and traditions of society, but to understand how they arose, to grasp them as the product of their unique historical circumstances. To criticize society according to some general normative ideals was now regarded as pointless, because it abstracts from the factors that make a society what it is *of necessity*.⁴³

Worse still, the historicist approach was able to reflect on the provenance of the ideals of natural right themselves: "The apparently universal, natural or eternal standards of reason of the *Aufklärung* are ultimately only the product of their own era and culture."⁴⁴ At a stretch, the rights of the individual might still be regarded as important, but only as an emanation of local conditions. Here the themes of nationalism and historicism came together in a sort of vindication of Edmund Burke: "The historic method which grew in favor in history and in politics

⁴¹ For a discussion of this in relation to Locke's political theory, see Jeremy Waldron, "John Locke: Social Contract versus Political Anthropology," *The Review of Politics*, 51 (1989): p. 3.

⁴² Montesquieu, *The Spirit of the Laws* (1748), eds. Anne Cohler, Basia Miller and Harold Stone (Cambridge: Cambridge University Press, 1989).

⁴³ Frederick C. Beiser, *Enlightenment, Revolution and Romanticism: The Genesis of Modern German Political Thought, 1790-1800* (Cambridge: Harvard University Press, 1992), p. 6.

⁴⁴ Beiser, *Enlightenment, Revolution and Romanticism*, p.6.

admitted that rights were founded in nature but identified nature with history and affirmed that the institutions of any nation were properly but an expression of the life of the people.”⁴⁵

When critics attacked the timeless verities of natural right, some (as we have seen) emphasized relativity to place, climate and circumstance. Others speculated about a process of organic growth that might manifest itself at different stages in different climes, but which had a consistent overall trajectory. The philosophy of Hegel was of this character. The world went through its various stages and the idea of abstract freedom entered history and took hold, no doubt initially at one particular place and time but in a way that was relevant for all times. But abstract freedom was not immune from dialectics; it too was destined to supersession by more authentic modes of human life, involving the identity of strong particularized ethical communities. In the course of outlining his dialectic, Hegel took the opportunity to say some very harsh things about natural right—its empty abstraction, its betrayal of all that is generous in human nature and enriched by community, its contradictions, and again the bloodshed which its fanatic pursuit made inevitable. This was the familiar conservative critique of the Revolution and Terror, now rendered as idealist philosophy.⁴⁶ Equally important was Hegel’s explicit relativization of natural right to a particular set of historical circumstances, and that of course was fatal to its pretensions: natural right itself extolled reason but it could not afford too much in the way of reflection on its own character and emergence. Hegel’s theory provided a self-conscious philosophy of the decline of natural right: it was a way, not just to condemn it to irrelevance, but to comprehend its eventual (and inevitable) decline.

Having said all that, we should be careful about how much direct influence we attribute to Hegel, particularly as the nineteenth century wore on. The celebrity of his work was largely a matter of fashion and Hegel was unfashionable in Germany by mid-century. Still, his philosophy exercised considerable influence, first on the more materialistic dialectic of Karl Marx and Friedrich Engels, and later also on a generation of “new” liberals, including liberals in England, like T.H.

⁴⁵ Charles Grove Haines, *The Revival of Natural Law Concepts: A Study of the Establishment and of the Interpretation of Limits on Legislatures with Special Reference to the Development of Certain Phases of American Constitutional Law* (Cambridge: Harvard University Press, 1930), p. 69.

⁴⁶ G.W.F. Hegel, *Phenomenology of Spirit*, trans. A. V. Miller (Oxford: Oxford University Press, 1977), §§541-595; *Philosophy of Right*, ed. Allen Wood (Cambridge: Cambridge University Press, 1991); *Lectures on Natural Right and Political Science*, Heidelberg 1817-1818, trans. J. M. Stewart and P. C. Hodgson (California: University of California Press, 1995); and *Natural Law: The Scientific Ways of Treating Natural Law, Its Place in Moral Philosophy, and its Relation to the Positive Sciences of Law*, trans. T.M. Knox (Pennsylvania: University of Pennsylvania Press, 1975).

Green and Bernard Bosanquet. Their Hegelianism may have been weak and tempered with some rather down-to-earth British ideas of urban politics and ordinary social and political responsibility. But they agreed with Hegel that theories of natural right could no longer be regarded as a starting point. Natural right represented a discredited intellectual tendency to be diagnosed and understood, not a set of premises to begin from. Even if it is important to preserve certain individualist values and to say—as Green said—that the state presupposes the rights of individuals, it was equally important to emphasize that “a right against society, as such, is an impossibility,” for rights are features of our organic relationship in community.⁴⁷ A proper approach to politics and society needs to establish organic interdependence on the ground floor so to speak, rather than seeing it as an option which free and equal individuals, proud and independent of one another, might or might not choose to exercise.

6. Law

I have talked thus far about the decline of natural right as a theory of society and as an inspiration for political action. However, the doctrine of natural right was always legalistic. It used the language of the law—rights, duties, and contract—and it licensed a sort of litigious stance of the individual towards the community. So it makes sense to look particularly at the influence of natural right in the field of jurisprudence. And here we begin to hear the other side of the story, that what the nineteenth century witnessed was by no means a comprehensive decline of natural right on every front.

Natural right is not the same as natural law, but it grew out of the natural law heritage in the seventeenth century. To a certain extent, then, its fate was tied to the career of natural law. It has been said that natural law was “in hibernation” in the nineteenth century except within the Catholic church.⁴⁸ This is an exaggeration. It is true that in England and in the places where English jurisprudence was influential, natural law was discredited. Bentham rejected even the muddled compromise with natural law that Blackstone sought to salvage.⁴⁹ And Austinian positivism, following in Bentham’s footsteps, built an influential jurisprudence—completely serviceable for the purposes of the working lawyer and more than adequate from the perspective of the law-maker—that had no need whatever of

⁴⁷ T.H. Green, *Lectures on the Principles of Political Obligation* (London: Longmans Green, 1941), pp. 144-6

⁴⁸ J.M. Kelly, *A Short History of Western Legal Theory* (Oxford: Clarendon Press, 1992), p. 333.

⁴⁹ See Jeremy Bentham, *A Comment on the Commentaries* (Oxford: Clarendon Press, 1928), pp. 60-73,

that concept.⁵⁰ But the same was not necessarily true in the rest of Europe, and the continuing influence of natural law in nineteenth century continental jurisprudence, long after it had become marginalized to the point of non-existence in philosophy and sociology, meant there was at least a modicum of space for the sort of thinking that the doctrine of natural right presupposed.⁵¹

In its more abstract reaches, German jurisprudence and German constitutionalism was heavily influenced by the philosophy of Immanuel Kant. Kant himself cannot really be regarded as a theorist of natural law: his derivation of duty from the formal structure of practical reason differs markedly from the more substantive natural law arguments of the likes of Locke and Grotius. But Kant's vocabulary of duty and right, and his distinction between hypothetical and categorical imperatives, is not uncongenial to the tradition of natural right, nor is the shape and spirit of his jurisprudence. "The kingdom of ends," whether posited as a heuristic for moral thinking or as an ideal of political philosophy, gave an attractive rendering of traditional liberal ideals, combining them with a Rousseauian reverence for at least the idea of legislative participation. The whole of Kantian legal and political philosophy was built on principles of respect for freedom, dignity and equality, which could serve as an uncompromising touchstone for the legitimacy of any system of law:

The Universal Principle of Right: Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.⁵²

[I]f a public law is so constituted that a whole people could not possibly give its consent to it (as, e.g., that a certain class of subjects should have the hereditary privilege of ruling rank), it is unjust.⁵³

Though these principles are redolent of the social contract tradition, Kant found a basis for them that did not depend on the myth-making of natural right. (His use of

⁵⁰ See John Austin, *Lectures on Jurisprudence*, 5th ed., ed. R. Campbell (Edinburgh: John Murray, 1885); see also A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. of 1915 (Indianapolis: Liberty Classics, 1982).

⁵¹ Haines, *Revival of Natural Law Concepts*, p. 65: "Various schools of legal philosophy continued to be protagonists of natural law theories when in political circles these theories were regarded as exploded vagaries."

⁵² Immanuel Kant, "Introduction to the Doctrine of Right," §C, from *The Metaphysics of Morals*, in *Practical Philosophy*, ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), p. 387.

⁵³ Kant, "On the Common Saying: 'That may be Correct in Theory, but it is of no Use in Practice,'" in Kant, *Practical Philosophy*, p. 297.

the social contract ideal was always hypothetical, deploying it explicitly as an ideal of reason). He argued that the principles I have cited were disclosed by rigorous reflection on the very possibility of practical reason in the realm of the governance of men's external actions. What's more he did not just propose them as external criteria of legitimacy; he saw them as the key to legal science. The Universal Principle of Right, in particular, opened up the possibility of something like an algebraic science of right that could be used, *within* jurisprudence, to build up a rational code of laws in the Romanist spirit and sort out and analyze some of the conundrums of property law or the law of obligations with which lawyers had to grapple every day.⁵⁴

The same was true of constitutional jurisprudence. Kant's legal and political theory seemed to offer a systematic way of understanding the idea of a *Rechtsstaat*, a society whose political structure was thoroughly imbued with the rule of law. His achievement was not so much the redemption of natural right in this area, as the provision of a rigorous intellectual framework in which some of the most important insights of natural right—limited government, legal equality, the primacy of individual autonomy, and the symmetry of right and duty—could continue to be pursued.⁵⁵ In Germany, then, it was legal much more than political philosophy that kept old-fashioned liberal ideals alive.⁵⁶ This was partly a matter of resisting the reaction against natural right by singling out elements of the tradition that had distorted it. The French revolutionaries, it was said, had gone wrong by preferring the general will of Rousseau to the classic premises of individual liberty. “The French, wrote Heinrich von Treitschke, “despite all their enthusiasm for liberty, have only experienced equality,” and what's more they tended to associate their equality, in Rousseauian fashion, with statism, whereas von Treitschke accompanied his doctrine of liberty with a fairly thorough-going suspicion of the state.⁵⁷

Having said all that, these ways of pursuing the jurisprudence of natural right were never unopposed. The same currents of thought that set up nationalist conceptions against old-fashioned liberal ones affected legal theory too. Friedrich

⁵⁴ In this as in much else, Kant was bearing the mantle of Leibniz: see Roger Berkowitz, *The Gift of Science: Leibniz and the Modern Legal Tradition* (Cambridge: Harvard University Press, 2005).

⁵⁵ Cf. Michael Stolleis, *Public Law in Germany, 1800-1914* (New York: Bergahn Books, 2001), p. 9: “[T]he numerous Kantian systems of natural law, which grew up between 1790 and 1810, had already imported parts of the modern vocabulary of constitutional thought into the older natural law systems.” E. K. Bramstead and K. J. Melhuish, eds., *Western Liberalism: A History in Documents from Locke to Croce* (London: Longman, 1978).

⁵⁶ Sabine, *History of Political Theory*, p. 672

⁵⁷ Heinrich von Trietschke, “Political Freedom and its Limitation,” p.449.

Carl von Savigny insisted that law was not to be regarded as the working out of an abstract calculus of liberty, but as an historical emanation of the spirit of a people, as much a part of a nation's particular heritage as its language or its culture.⁵⁸ There had long been a current of jurisprudence that associated law with custom rather than with reason, and the nationalist mood of the 1800s gave this view more force. As Benjamin Cardozo remarked, "The nineteenth century put its faith in unconscious and undirected growth; and Nature dethroned as an exemplar, was made to yield place to History."⁵⁹

On the other hand, as the century wore on, both the rationalism of Kantian *Recht* and the immanent nationalism of Savigny's historical jurisprudence came under attack from a vigorous new positivism. In the 1870s, Rudolf von Jhering and others tried to develop a more realistic legal theory, understanding law as founded on will and purpose, not on either natural right or cultural ideals. Law for Jhering was an instrument for the explicit pursuit of social interests.⁶⁰ As such it was amenable to evaluation in the light of social utility, not natural right. Jhering is famous for having attacked a jurisprudence of concepts—what we would call "legal formalism"—and there is a tremendous amount in common between his legal philosophy and that of the American realists, on the one hand, and modern sociological jurisprudence, on the other.⁶¹ But what matters most for our purposes is that Jhering's work represented a decisive turn in German jurisprudence away from any lingering preoccupation with abstract formulas of right.

7. Economics

The other arena in which natural right seemed more robust in the nineteenth century was in the sphere of economic thought. There are several possible reasons for this. One is the style of economic thought, which is almost as abstract in its foundations as natural right. It is certainly as individualistic. Eric Hobsbawm points out that "the classical assumptions about the nature and natural state of man undoubtedly fitted the special situation of the market much better than the situation

⁵⁸ Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (Birmingham, Alabama: Legal Classics Library, 1986), pp. 24-31. See also the excellent discussion in Donald R. Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Cambridge: Harvard University Press, 1990), pp. 229-51.

⁵⁹ Benjamin Cardozo's review of Roscoe Pound, *Interpretations of Legal History*, *Harvard Law Review*, 37 (1924): p. 279, at p. 280.

⁶⁰ See Rudolf von Jhering, *Law as a Means to an End*, trans. Isaak Husik (Boston: Boston Book Company, 1913).

⁶¹ See H.L.A. Hart, "Jhering's Heaven of Concepts and Modern Analytical Jurisprudence," *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), p. 265.

of humanity in general.”⁶² Another reason is that, just like natural right, economic theory does not assume that there is a state and that its familiar institutions or the traditional areas of its operation are justified: it calls all that in question or at any rate refuses to take it for granted. Neither economic theory nor the theory of natural right need be “anarchist” in their implications or even what we would now call “libertarian”; but both bodies of thought proceed with a strong presumption in favor of individual liberty and they insist that legal and political restraints need to be argued for, not assumed.

Thirdly, in economics perhaps more than anywhere else, the theory of natural right was able to display its chameleon-like character.⁶³ It could be used to defend economic liberty against government attempts to redress inequality, or it could be used to condemn existing inequalities of social conditions and to argue for a natural right to subsistence for the poor.⁶⁴ Historically, natural right had been associated with private ownership and the protection of property against social claims. But its tendency was never unequivocal: in the nineteenth century, Locke’s labor theory was cited often to defend the rights of workers against the farmers or industrialists who employed them.⁶⁵ Ritchie noted that Henry George made his case against the private ownership of land on grounds of natural right, though “he works out this vague and treacherous conception in his own way.”⁶⁶ In other words, natural right had no settled tendency one way or another, and the fact that economics as a discipline also tended to argue from first principles meant that there was a genuine inclination on both sides to explore and debate what various premises of natural right might actually entail so far as property and markets were concerned.⁶⁷

On the other hand, there were economists who did not share their colleagues’ predilection for argument from first principles, in the style of natural rights. Some emphasized the difference between arguing in the style of Hume and

⁶² Hobsbawm, *Age of Revolutions*, p. 237. Hobsbawm also suggests that since there was greater confidence in the triumph of capitalism than in the stability of political arrangements, it was not thought particularly dangerous or incendiary to license natural law speculation about the economy.

⁶³ Ritchie, *Natural Rights*, p. 14.

⁶⁴ See, e.g., Henry W. Farnam, “The State and the Poor,” *Political Science Quarterly*, 3 (1888): p. 282.

⁶⁵ See John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the ‘Two Treatises of Government’* (Cambridge: Cambridge University Press, 1969), p. 6.

⁶⁶ D. G. Ritchie, reviewing Henry George *The Condition of Labor: An Open Letter to Pope Leo XIII in the International Journal of Ethics*, 2 (1892): p. 522.

⁶⁷ We see this continuing through the late twentieth century in the debate about the economic implications of Lockean premises in the work of Robert Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974).

Smith and arguing in the style of Locke and Rousseau. Certainly, the economic liberalism that derived from Smith's work is quite different from anything one can find in Locke, both in its foundations and in what it implied for free trade and other aspects of national economic policy. It is actually quite hard to put one's finger on this. The premises of Smith's and Hume's political economy are still very abstract; but it is as though their abstraction is more pragmatic in character than Locke's theology of individual rights.

Beyond all this, many economists took the view that natural rights talk in economics was not only inconclusive but fundamentally confused, and they ridiculed "the natural-rights dogma that property rests on production."⁶⁸ Their arguments instead were pragmatic through-and-through. One American economist dismissed arguments for free trade based on natural rights along the following lines:

A few years ago, my esteemed friend Professor Sumner, of Yale University, announced that he had talked enough ... about protectionism as a matter of policy; hereafter he purposed to attack it as immoral,—as an unjustifiable invasion of natural rights.... I do not deem myself qualified to say much about natural rights, having never lived in a state of nature, but having resided all my life in communities, more or less civilized, whose citizens were required to render numerous and onerous services, to refrain from many courses agreeable to themselves, to make heavy contributions, to submit to severe sacrifices, to walk in paths instead of roaming at will over the fields,—all for the general good. It seems to me that the denunciation of protectionism as immoral should be preceded by a demonstration that it is socially inexpedient.... If the denial of the right to buy in the cheapest market and sell in the dearest market would yield to the community any considerable part of the blessings which the protectionists, unquestionably in good faith, promise, I imagine there are few Americans so transcendental in their political philosophy as to question the right or the propriety of the establishment of that system.⁶⁹

The antinomies of natural right in matters of economy were supposed to be particularly evident in the work of Herbert Spencer.⁷⁰ His *Social Statics*, first

⁶⁸ Thorstein Veblen, "Mr. Cummings's Strictures on *The Theory of the Leisure Class*," *Journal of Political Economy*, 8 (1899): p. 106, at p. 111.

⁶⁹ Francis A. Walker, "Protection and Protectionists," *Quarterly Journal of Economics*, 4 (1890): p. 245, at p. 264.

⁷⁰ Spencer was probably the primary target of the critique of natural right in the book by D.G. Ritchie quoted at the beginning of this article.

published in 1851, proceeded on unambiguous principles of natural right—principles of natural liberty and an equal God-given entitlement to exercise liberty for the sake of self-preservation and the pursuit of happiness that (but for their prolixity) might have been formulated by John Locke.⁷¹ Much of *Social Statics* pursued the economic and political implications of these principles in a familiar spirit of *laissez faire*. But Spencer also associated this Lockean position with a different sort of naturalism, with something closer to Darwinism—the idea of a struggle for life, the evolution of society, and “the survival of the fittest.” And it was simply not clear how the two strands of thought could be reconciled. A Lockean principle of liberty does not license the sort of life-or-death struggle in which one could talk comfortably about the survival of the fittest, and (as George Sabine observes) Spencer was bound to have difficulty maintaining the idea of a minimal *laissez-faire* state on the assumption of an evolutionism that one would think would make the state, like society, grow into something more complex and more highly integrated.”⁷² These antinomies only intensified as Spencer’s career developed. The evolutionism played a larger and larger role in his theory, and it contributed to the impression—pretty strongly established in any case—that appeals to the natural or to natural rights could not really settle anything in political economy.

8. Natural Right in United States

I have reserved the final section of this article for some comments on America, for the picture of a largely unmitigated decline of natural right, which seems to be the upshot of any general study of nineteenth century philosophy and politics, is in need of even greater qualification, when we turn our attention to United States.

The United States could claim to be the child of natural right. The 1776 Declaration of Independence opened with the resounding proclamation—

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. —That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, —That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its

⁷¹ See Herbert Spencer, *Social Statics* (London: Williams and Norgate, 1868), pp. 93-4.

⁷² Sabine, *History of Political Thought*, p. 724.

foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

This can be read as a paradigm of natural right rhetoric (Lockean in character, uncontaminated by Rousseau). Maybe it is a little naïve to say that the U.S. Constitution, with its republican structure, its separation of powers, and its Bill of Rights, is the realization of Locke in Philadelphia. There are aspects of the Federalists' jealous preservation of central authority that are based on pragmatic political realism rather than the first principles of natural right theory. And there are other aspects of American constitutionalism that are simply homegrown and owe no debt to the natural right tradition. Civic republicans may want to point to the influence of a heritage of political theory thought that is distinct from natural right.⁷³ And there are aspects of the Framers' version of natural rights theory—such as the Ninth Amendment to the Constitution—that quickly became a dead letter in the U.S. law and governance.⁷⁴ Even so, a case can be made that natural right had more to do with this constitutional design and with the spirit in which it began to be administered than any other body of contemporary theory.

It is tempting to add to this that the growth of the practice of judicial review of legislation based on individual rights also represented the continuing influence of natural right in the life of the American constitution. But that would be misleading. Though judicial review was inaugurated in the decision in *Marbury v. Madison* (1803), its use for most of the nineteenth century was structural rather than rights-based. Only towards the very end of the century was there any attempt on the part of the judiciary to uphold principles of natural right enshrined in the constitution. That involved invoking principles of freedom of contract, *laissez-faire*, and the protection of property to strike down economic and social legislation, and it was intensely controversial for many of the reasons that natural right itself was controversial.⁷⁵

⁷³ See the discussion in Frank Michelman, "Traces of Self-Government," *Harvard Law Review*, v. 100 (1986): p.4, at pp. 17-19.

⁷⁴ The 9th Amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

⁷⁵ Consider the well-known dissent by Justice Holmes in *Lochner v. New York* 198 U.S. 45 (1905): p. 75: "This case is decided upon an economic theory which a large part of the country does not entertain. ... It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. ... The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The 14th Amendment does not enact Mr. Herbert Spencer's *Social Statics*."

True, even in the United States, there was a conservative reaction against natural rights ideas after 1815, though it was less comprehensive there than elsewhere.⁷⁶ And American theorists of natural right could certainly be embarrassed intellectually in the same ways as their European counterparts. In certain jurisprudential circles in the US, towards end of the nineteenth century, it was regarded as an absurd mistake in a legal treatise to talk of natural right.⁷⁷ And much the same was true among American sociologists and political scientists, certainly by the 1860s.⁷⁸ It was also true of progressives. The growth of pragmatism as a self-conscious body of philosophical writing was an American phenomenon, and in the latter part of the nineteenth century pragmatists excoriated the apriorisms of natural rights theory along with every other metaphysics. Like the philosophic radicals in England, they wanted their progressive ideas stated in a direct and transparent form, without any metaphysical claptrap.

Even so, the tenor of the Constitution, a strong individualist sense of “We, the People...,” the spirit of the frontier, and the innate American suspicion of government conspired to provide a more hospitable environment for natural right for much longer than Europe provided. For example, there was a greater influence of contractarian ideals in the United States, and not just among political philosophers.⁷⁹ As one observer has remarked, “[i]n America men put the social-contract theory into practice and actually made their government. ... They identified with it and felt that they should share, as of right, in the advantages that it could bring them...”⁸⁰ Participants in constitutional conventions in Virginia in 1829 and in Massachusetts in 1820 and 1853 spoke the language of inalienable rights and argued about property and representation in language worthy of Locke,

⁷⁶ Haines, *Revival of Natural Law Concepts*, p. 65: “[W]hen the reaction from the practices and the political philosophy of the American and the French Revolutions gained ascendancy in the United States one of the chief objectives was to discredit Thomas Jefferson and the tenets of the Declaration of Independence.”

⁷⁷ See, e.g., the review (by “F.J.G.”) of Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States* in *Political Science Quarterly*, 2 (1887): p.174, at p. 175.

⁷⁸ See Benjamin Fletcher Right, *American Interpretations of Natural Law: A Study in the History of Political Thought* (Cambridge: Harvard University Press, 1931), p. 276.

⁷⁹ See Alan Ryan, “The British, the Americans and Rights,” in Michael J. Lacey and Knud Haakonssen (eds.), *A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law 1791 and 1991* (Cambridge: Cambridge University Press, 1991), p. 366 at p. 380.

⁸⁰ Leonard W. Levy, “The Law of the Commonwealth and Chief Justice Shaw,” in Lawrence M. Friedman and Harry N. Scheiber (eds.), *American Law and the Constitutional Order: Historical Perspectives*, Enlarged edition (Cambridge: Harvard University Press, 1988), p.151, at p. 152.

with no particular sense that this needed to be filtered through the lens of Kant, Comte, Bentham, or any other respectable oracle of nineteenth century thought.⁸¹

In mid-century, the doctrine of natural right took on new salience in two regards. I have already mentioned the Seneca Falls Declaration of 1848, in which women's demands for social equality and political suffrage were put forward with an explicit invocation of natural right. The other regard is of course the politics of slavery.⁸² In the very nature of the problem, discussion of the justifiability of slavery is impossible without going back to first premises about human freedom and equality. There were natural law defenses of slavery in the sixteenth century and one sees the residue of them even in Locke.⁸³ Most observers would have said, however, that the issue was settled as a matter of natural law by the middle of the eighteenth century, at the latest: slavery was repugnant to natural law and utterly incompatible with the rights of man.⁸⁴ But in the period between 1831 and 1865, the issue was revisited in a number of tracts published in the American south that took on the issue of the natural justifiability of slavery directly. Now, it would be a mistake to say that the outpouring of books and essays that denounced slavery as a violation of natural right was a direct response to these racist tracts. Most abolitionists saw no need to dignify these arguments with a response. Instead, anti-slavery arguments based on natural right were intended to demonstrate the intolerability, as well as the wrongness of slavery: the case that American theorists of natural right sought to answer was the case that said that even if slavery was a violation of the law of nature it must be tolerated as positive law for the time being and, through the Fugitive Slave Laws, accepted as a social and political expedient. To answer this case, the abolitionists needed to invoke, not just natural law premises, but the whole natural right theory of government.⁸⁵ Readers do not need to be told that this was not a purely academic debate. Though the huge convulsion that we call the American Civil War was fought ostensibly just on the issue of

⁸¹ Wright, *American Interpretations of Natural Law*, pp. 194-210.

⁸² We think of this as an issue particularly for the United States, and mostly it was. But we should not forget the hemispheric politics of slavery. Action against slavery in the nineteenth century was not confined to North America. The prohibition of the Slave Trade in the British Empire earlier in the century reflected the continued force of natural rights arguments among the liberal intelligentsia of Britain. And in different ways, the slave revolt in Haiti, and the emancipatory policies pursued by Simón Bolívar and other *libertadores* in Latin America—all this kept the issue of the fundamental rights of man on the front burner.

⁸³ See Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University press, 1979), pp. 49, 53-4; and Locke, *Two Treatises*, II, §§22-4, 172: pp. 283-5, 382-3.

⁸⁴ See Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975), pp. 8-30.

⁸⁵ There is a fine discussion of all this in Wright, *American Interpretations of Natural Law*, pp. 210-42.

union and secession, the underlying issue of slavery emancipation was inescapable and the compatibility of slavery with the contract underlying a free republic was the issue for which men fought: hundreds of thousands of lives were sacrificed to determine a most basic issue in the natural rights of man.

9. Conclusion

The period roughly between 1789-1945 is a most interesting one from the point of view of natural right. We know that the doctrine flourished in the seventeenth and eighteenth centuries and that people gave their lives for it, and demolished their traditional forms of government. We know that something like it—the doctrine of human rights and new forms of social contract theory—flourished again in the second half of the twentieth century and continues to flourish in the twenty-first.⁸⁶ In between there was a period of decline and hibernation—uneven, to be sure, and never complete—but a period in which to invoke natural right was always to invite intellectual ridicule and accusations of political irresponsibility. As late as 1951, Hannah Arendt could write disparagingly of the various societies formed for the protection of the rights of man in the first part of the twentieth century:

all attempts to arrive at a new bill of human rights were sponsored by marginal figures—by a few international jurists without political experience or professional philanthropists supported by the uncertain sentiments of professional idealists. The groups they formed, the declarations they issued, showed an uncanny similarity in language and composition to that of societies for the prevention of cruelty to animals. No statesman, no political figure of any importance could possibly take them seriously.⁸⁷

The decline and hibernation that we have traced can be read as a story of fading panics and passing intellectual fashions or as a story of historic contingency, with the subsequent revival understood as a reflection of the growing power in the world of American ideas. I like to read it, though, as a tribute to the immense complexity of the body of thought we call natural right. It was never just one thing, it never operated at just one level or in one political or intellectual domain, it was vulnerable but never vulnerable as a whole. It sank below ground in some

⁸⁶ See the *Universal Declaration of Human Rights* (1948) and such prominent works of contractarian political philosophy as John Rawls, *A Theory of Justice*, (Cambridge: Harvard University Press, 1971) and Nozick, *Anarchy, State and Utopia*.

⁸⁷ Hannah Arendt, *The Origins of Totalitarianism*, New edition n (New York: Harcourt, Brace, Jovanovich, 1973), p. 292.

forms and in some places, not others. Some of it died and rotted; but some lay fallow and sprang up again when the rains came. And when various versions of natural right did spring up again in the twentieth century, they were revived in a way that transformed the doctrine. It was no longer an integrated theory of society and government, but it emerged as a set of uncompromising moral and legal constraints that any form of social and political practice must come to terms with. The modern law of human rights and the modern revival of liberal political theory cannot be equated with the theory that drove men to the barricades in 1789, but it is still and undeniably a manifestation of the philosophy of natural right that flourished in Europe a hundred years before.