

MIGHT VERSUS RIGHT

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Ludwig von Mises criticized the ‘old liberals’ for assuming the stance of a ‘perfect king’ whose only objective is to make his citizens happy.¹ Mises contended that the fiction of the ‘perfect king’ contributed to the modern notion of a godlike state. Unfortunately, pretense to the crown of philosopher-king seems to be an occupational hazard of political philosophy in general and not just the ‘old liberals.’ In this essay I shall argue that the evolution of natural law into a doctrine of natural rights was a result of the populist struggle against this inherent elitism of political philosophy. Furthermore, I shall argue that there are good reasons for abandoning the orthocratic or philosopher-king perspective, and that a libertarian theory of natural rights along the lines advocated by Murray Rothbard is the only viable alternative to might makes right.

I. The Basic Tenets of Natural Law

I shall begin by quoting what may seem like an odd source, Protagoras. Natural law is usually traced to Plato and Aristotle, whereas Protagoras is assumed to be an opponent of natural law since he was a Sophist, and the Sophists were the major skeptical opponents of Plato and Aristotle. Protagoras’s political philosophy, however, should not be confused with the nihilism of some of the later Sophists such as Callicles and Thrasymachus. It may be true that Protagoras’s epistemological assumptions were the basis for the nihilism of some of his followers, but this does not detract from his political philosophy any more than Locke’s empiricist epistemology invalidates his theory of natural rights.

In a debate with Socrates, Protagoras lays out his political philosophy in the form of a myth. According to this myth, through an oversight, man, unlike other creatures, was not given any special powers for taking care of or defending himself, e.g., claws or sharp teeth or legs for running at high speeds, leaving man “naked, unshod, unbedded, and unarmed.” This was partially corrected by Prometheus, who gave man skill in the arts.

Thus provided for, they lived first in scattered groups; there were no cities. Consequently they were devoured by wild beasts, since they were in every respect weaker, and their technical skill, though sufficient aid to their nurture, did not extend to making war on the beasts, for they had not the art of politics, of which the art of war is a part. They sought therefore to save themselves by coming together and founding

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¹ Ludwig von Mises, *Human Action: A Treatise on Economics* (Chicago: Henry Regnery, 1966), 691.

fortified cities, but when they gathered in communities they injured one another for want of political skill, and so scattered again and continued to be devoured. Zeus therefore, fearing the total destruction of the human race, sent Hermes to impart to man the qualities of respect for others and a sense of justice, so as to bring order to cities and create a bond of friendship and union.

Hermes asked Zeus in what manner he was to bestow these gifts on men. "Shall I distribute them as the arts are distributed — that is, on the principle that one trained doctor suffices for many laymen, and so with other experts? Shall I distribute justice and respect for their fellows in this way, or to all alike?"

"To all", said Zeus. "Let all have their share. There could never be cities if only a few shared in these virtues, as in the arts. Moreover, you must lay it down as my law that if anyone is incapable of acquiring his share of these two virtues he shall be put to death as a plague to the city."²

There are three features of Protagoras's conception of justice that constitute the essence of the natural law position. First, rational individuals are capable of living together in peace because they can comprehend the principles of justice. Second, justice is not something that is understood only by the elite and must be imposed on the masses. Instead, it can be understood by almost everyone. Finally, those who refuse to act justly or are incapable of so acting are to be treated like the wild beasts which they resemble. I'll refer to these as the social harmony, the populist, and the enforcement tenets of natural law. Almost every subsequent philosopher who held a natural law or natural rights position accepted the social harmony and enforcement tenets. No one questioned the view that justice is necessary for peace, or that it must be defended and enforced. Only the populist tenet was a source of contention. In fact, Protagoras presents the above myth in defense of the populist view of justice against the elitist view of Socrates.

I propose to use the above three tenets as a framework for examining the natural law. I shall first review how some of the major natural law philosophers interpreted these tenets, then I shall examine the major criticisms of natural law in light of these tenets. Finally, I shall show how natural law evolved into a theory of natural rights as the populist tenet came into prominence.

The major natural law theorists — e.g., Aristotle, Cicero, Aquinas, John of Paris, Vitoria, Molina, Mariana, and Grotius — presented stories about the origins of justice that were variations of Protagoras's account. For all natural law theorists, the function of natural law is to enable man to live in peace so that he can reap the benefits of cooperation. For example, Locke wrote that the law of nature "willeth the Peace and *Preservation of all Mankind*."³ Aquinas noted that "in order that man might have peace and virtue, it was necessary for laws to be framed. . . ."⁴ Even Augustine, a thinker not known for putting much emphasis on natural law, stressed social harmony: "[T]he

² Plato, "Protagoras", in *The Collected Dialogues of Plato*, Edith Hamilton and Huntington Cairns, eds. (New York: Pantheon Books, 1966), 319-320.

³ John Locke, *Two Treatises of Government*, Peter Laslett, Ed. (New York: Cambridge University Press, 1988), 271.

⁴ Locke, *Two Treatises*, 227.

laws of man's nature move him to hold fellowship and maintain peace with all men so far as in him lies."⁵ St. Paul's command was often cited in support of this view: "If it be possible, as much as lieth in you, live peaceably with all men."⁶

The central tenet of natural law is that rational individuals can peacefully coexist without dominion or coercion. Man's rationality, in this context, is illustrated by contrasting man with the beasts. Hugo Grotius's account is representative: "For no beings, except those that can form general maxims, are capable of possessing a right, which Hesiod has placed in a clear point of view, observing 'that the supreme Being has appointed laws for men; but permitted wild beasts, fishes, and birds to devour each other for food.' For they have nothing like justice, the best gift, bestowed upon men."⁷ It is important to note that, according to this account, what differentiates rational beings from irrational beasts is that the latter devour each other.

This image of beasts, and especially fish, devouring each other can be found throughout the natural law literature. Aristotle, for example, compares lawless men to beasts: "But he who is unable to live in society, or who has no need to because he is sufficient for himself, must be either beast or god: he is no part of a state."⁸ This image has Biblical as well as classical roots. The book of Habakkuk speaks of "when the wicked devoureth the man that is more righteous than he," and compares such men to "fishes of the sea" and "creeping things."⁹ The early Christian apologist Irenaeus used this image when explaining the purpose of law: "Earthy rule has been appointed by God for the benefit of nations, so that, under the fear of human rule, men may not devour one another like fishes, but, by means of the establishment of laws, may restrain an excess of wickedness among the nations."¹⁰ For Christian thinkers, peaceful coexistence was possible because man was created in God's image and this was reflected in man's rationality. Augustine, for example, stated that God "did not intend His rational creature, who was made in His image, should have dominion over anything but the irrational creation — not man over man, but man over the beasts."¹¹

Implicit in this contrast between rational men and irrational beasts is what Rothbard referred to as a polar analysis of politico-economic systems: ultimately, our only choices are between reason and force (or right and might).¹² A prototypical example of such an analysis is provided by Locke: "There are two sorts of contests amongst men; the one managed by law, the other by force: and they are of that nature, that where the one ends, the other always begins."¹³ Grotius made a similar point by citing several ancient writers:

⁵ Augustine, *The Political Writings*, Henry Paloucci, ed. (Chicago: Gateway Editions, 1962), 13.

⁶ Romans 12:18.

⁷ Hugo Grotius, *The Rights of War and Peace* (Washington: W. Walter Dunne, 1901), 23.

⁸ Aristotle, *Politics*, Stephen Everson, ed. (New York: Cambridge University Press, 1988), 4.

⁹ Habakkuk 1:13-14.

¹⁰ Quoted by Elaine Pagels, *Adam, Eve and the Serpent* (New York: Vintage Books, 1989), 47.

¹¹ Augustine, *The Political Writings*, 148.

¹² Murray N. Rothbard, *Power and Market* (Kansas City: Sheed, Andrews and McMeel, 1977), 264.

¹³ John Locke, *A Letter Concerning Toleration*, John Horton and Susan Mendus, eds. (New York: Routledge, 1991), 45.

Cicero observes some where in his Epistles, that as there are two modes of contending, the one by argument, and the other by force, and as the former is peculiar to man, and the latter common to him with the brute creation, we must have recourse to the latter, when it is impossible to use the former. And again, what can be opposed to force, but force. Ulpian observes that Cassius says, it is lawful to repel force by force, and it is a right apparently provided by nature to repel arms with arms, with whom Ovid agrees, observing that the laws permit us to take up arms against those that bear them.¹⁴

The polar analysis of social harmony highlights the intimate relationship between the social harmony tenet and the enforcement tenet. The criminal, by acting like a beast, has forfeited his rights, and hence as Ulpian succinctly put it (quoted above by Grotius) “it is lawful to repel force by force.” Ulpian’s maxim was preserved in the *Digest* (of Roman Law), was incorporated into Gratium’s *Decretum* which was the basic text of Canon Law, and was quoted by a wide variety of natural law theorists, e.g., Ockham, Vitoria, and Plessis-Mornay (in the *Vindiciae Contra Tyrannos*).

Locke explained the connection between the social harmony tenet and the enforcement tenet along the same lines:

A Criminal, who having renounced Reason, the common Rule and Measure, God hath given to Mankind, hath by the unjust Violence and Slaughter he hath committed upon one, declared War against all Mankind, and therefore may be destroyed as a *Lyon* or a *Tyger*, one of those wild Savage Beasts, with whom Men can have no Society nor Security: And upon this is grounded the great Law of Nature, *Who so sheddeth Mans Blood, by Man shall his Blood be shed*.¹⁵

Let us now turn to the remaining tenet of natural law, what I have called the populist tenet. The classical statement was made by Cicero in the context of defending the right of self-defense:

And indeed, gentlemen, there exists a law, not written down anywhere but inborn in our hearts; a law which comes to us not by training or custom or reading but by derivation and absorption and adoption from nature itself; a law which has come to us not from theory but from practice, not by instruction but by natural intuition. I refer to the law which lays it down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right. When weapons reduce them to silence, the laws no longer expect one to await their pronouncements. For people who decide to wait for these will have to wait for justice, too — and meanwhile they must suffer injustice first.¹⁶

Plato and Aristotle, on the other hand, held elitist conceptions of the natural law. This is obvious in the case of Plato with his concept of a philosopher-king, but also is true of Aristotle, although to a lesser extent. Aristotle

¹⁴ Grotius, *Rights*, 34.

¹⁵ Locke, *Two Treatises*, 274.

¹⁶ Quoted by Stephen P. Hallbrook, *That Every Man Must Be Armed* (Albuquerque: University of New Mexico Press, 1984), 17.

presupposes that society must have a head, someone guiding it.¹⁷ Although his ideal society is not as elitist as Plato's, it is also not a natural order in the sense conceived of by Cicero. For Aristotle the only sense in which the natural law is written in man's hearts is that supposedly everyone knows his place. For example, the natural slave knows that he is a natural slave, and so willingly submits to his natural master. During the middle ages, beginning with Aquinas, the Aristotelian, elitist view of natural law dominated, but the Ciceroan, populist view was never totally eclipsed. This was due in large part to the very Ciceroan-like statement of St. Paul that there is a law written in our hearts: "For when the Gentiles, which have not the law, do by nature the things contained in the law, these having not the law, are a law unto themselves: Which shew the work of the law written in their hearts, their conscience bearing witness."¹⁸

No medieval natural law theorist, not even those who based their theory of natural law mainly upon Aristotle, could ignore such an important authority as St. Paul. Aquinas, for example, attempted to explain away the populist implications of this passage by arguing that "a law is in a person not only as in one that rules, but also by participation, as in one that is ruled. In the latter way each one is a law to himself, in so far as he shares the order that he receives from one who rules him."¹⁹

In summary, the fundamental thesis of natural law (what I have called the social harmony tenet) is that rational individuals are capable of living in social harmony. A rational individual is understood in this context to be one who can live peacefully with other rational individuals, in contrast to beasts who devour each other. As Cicero noted, for rational individuals the mode of contending is argumentation, not force, and in Hans-Hermann Hoppe's words, "argumentation is a conflict-free way of interacting."²⁰ The challenge of any natural law theory is to prove that this social harmony thesis is correct, that social harmony is a realizable possibility. This thesis is supported by two additional tenets: (a) rationality, in the sense necessary for social harmony, is not restricted to a few elite individuals, and (b) individuals who act like beasts may be treated like beasts. The former tenet, the populist tenet, was a source of controversy among natural law theorists. The latter, the enforcement tenet, was accepted by almost everyone as being obvious. Reason was deemed to be an appropriate mode of interaction with only those who are reasonable. Just as it would be absurd to try to reason with wolves, it was considered absurd to try to reason with men who acted like wolves.

II. Challenges to Natural Law

Most of the critics of natural law either misunderstand or misconstrue one or more of these three tenets. I shall divide the challenges to natural law into three categories according to which of the three tenets is the major source of contention. I shall refer to these attacks on natural law as the utilitarian, pre-

¹⁷ Aristotle, *Politics*, 3.

¹⁸ Romans 2:14-15.

¹⁹ St. Thomas Aquinas, *Summa Theologica* (Chicago: William Benton, 1952), 207.

²⁰ Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism* (Norwell, MA: Kluwer, 1989), 132.

scriptive, and cognitive challenges. The utilitarian challenge dismisses natural law as being mystical, not realizing that it has a functional basis in social harmony. The prescriptive challenge dismisses natural law as violating the widely accepted thesis that an ought statement cannot be logically derived from descriptive facts. I shall argue that this attack is based on a misunderstanding of the enforcement tenet. The cognitive challenge dismisses natural law on the grounds that there is no agreement as to the content of the natural law, and so it cannot be the basis of social harmony. I believe that this is the most serious criticism, but that it can be met by clarifying the populist tenet and its relationship to the enforcement tenet.

Utilitarian critics of natural law assume that in so far as natural law is distinguishable from utilitarianism, it must be without any functional value to society, and thus based on intuition or revelation, and not reason. But as we have already seen, most classical natural law theorists understood natural law as providing the basis for social harmony. They believed that rational individuals were capable of understanding and abiding by the conditions which make peace and cooperation possible. What distinguishes a utilitarian from a natural law theorist is the former's belief that utility is something that can be summed and ought to be maximized. The utilitarian substitutes for the polar analysis of the natural law theorist a form of analysis which involves comparing alternatives and choosing the best according to some measure of utility. Furthermore, since it is unlikely that the average person is capable of making these comparisons, most forms of utilitarianism are elitist.

The prescriptive challenge comes in two forms. First, there are those who believe that advocates of natural law should be able to convince those who do not value living in peace that they ought to value living in peace. There is no question that there exist individuals who, in Zeus's words, "are incapable of acquiring his share of these two virtues" of justice and respect for their fellows. The critic demands that a viable natural law theory be able to come up with some argument that will convince any and every thug who either cannot grasp the benefits of cooperation or does not value such benefits that he ought to value peace and cooperation. This, however, is to misconstrue the function of natural law.

Natural law theory only directs its arguments to those committed to living in social harmony. The ultimate response to a thug or social nihilist is not a syllogism, but Zeus's response: "he shall be put to death as a plague to the city." The rationale behind this response, and the basis for the enforcement tenet, is that social nihilists who favor might over right can hardly object when might is used against them. One of the most explicit statements of this principle was made by Richard Hooker in a well known passage quoted by Locke in his *Second Treatise*: "if I do harm, I must look to suffer, there being no reason that others should show greater measure of love to me, than they have by me, showed unto them."²¹

The polar analysis underlying the social harmony tenet and providing the basis for the enforcement tenet is not directed at proving that one should choose peace over war. Rather, it tries to prove that right (peace) and might (war) are the only two choices, and that if you choose might, then you can expect to do battle. This is not to say that no natural law theorist has ever at-

²¹ Locke, *Two Treatises*, 270.

tempted to prove that one ought to choose peace. Nor is it to suggest that argument in this regard is always worthless. If, for example, a person does not understand the relationship between justice and peace, then argument may help him understand. But if the person is, in Aristotle's words, either a beast or (thinks of himself as) a god, then he is likely beyond all reason in this regard.

The second form of the prescriptive challenge comes from those who agree that peace is a good thing, but ask why it isn't rational for individuals to cheat if they believe they can get away with it. Of course, if everyone cheats then social peace will be undermined, but this does not make it irrational to cheat since whether everyone else cheats or not is independent of whether or not any particular individual cheats. The question of whether it is rational or not to cheat (or defect) has received a lot of coverage in the Prisoners' Dilemma literature.²² But is it really very important to show that the defector is acting irrationally? Suppose it can be proven that it is irrational to cheat. Does anyone suppose that this is going to stop those who are inclined to cheat? More likely the reply will be "So what — I'd rather have the extra money I can reap from cheating and be considered irrational by the game-theorists, than be that much poorer and entitled to describe myself as rational." On the other hand, suppose that it cannot be shown that there is anything irrational about cheating if one believes that one can get away with it. It does not follow that we are not justified in treating the cheat as a social outcast or an outlaw. Since this person by hypothesis favors a peaceful society and thus favors punishing those who violate the peace, the person can hardly complain if he is caught and punished.

Both of these prescriptivist objections are faulting natural law for failing to do what its defenders never proposed it could do. No syllogism is going to turn the thug into a nice person. L. A. Rollins, who dismisses natural rights as a myth, is correct in claiming that natural law won't protect you from thugs, only walls and guns will protect you.²³ Rollins's mistake is to assume that natural law theorists necessarily suppose otherwise.²⁴ If a person isn't motivated to care about peace, then there is no sure-fire argument that will make him become so motivated. And if a person isn't motivated to obey the natural law when he believes he can get away with violating it, there is again no sure-fire argument that is going to reform him. The answer to both these challenges is that natural law theorists have, for the most part, never supposed that they could bridge the is-ought divide separating those who are committed to social harmony from those who are not. Natural law theorists only address their arguments to individuals committed to social harmony, not thugs and nihilists.

Let us now turn to the cognitive challenge to natural law. Unlike the other two challenges, this one cannot be dismissed so easily, for it exploits an issue upon which natural law theorists are divided — an elitist versus a populist in-

²² Jan Narveson, *The Libertarian idea* (Philadelphia: Temple University Press, 1988), 140-144.

²³ L.A. Rollins, *The Myth of Natural Rights* (Port Townsend, WA: Loompanics Unlimited, 1983), 9, 41.

²⁴ David Gordon, "In Defense of Rights", in *Man, Economy and Liberty: Essays in Honor of Murray N. Rothbard*, Walter Block and Llewellyn H. Rockwell, Jr., eds. (Auburn, AL: The Ludwig von Mises Institute, 1988), 232.

terpretation of natural law. The populist argues that the social harmony tenet is empty if all that is being claimed is that a handful of like-minded philosopher-kings can live in peace with each other, but who must impose order on everyone else. The elitist counters that given widespread disagreement over what constitutes justice, it is hard to see how social harmony is possible unless society is guided and order imposed by the few who properly understand justice.

The skeptic's position is that both sides of the elitist-populist debate are right in their criticism of the other side, but concludes that this proves that the social harmony tenet is false: there is no reason to believe that rational individuals can live together in peace and harmony. There will be conflict, even among rational individuals, and ultimately, those who are stronger will impose their wills on those who are weaker. The skeptic may agree that peace is better than war, and may even wish that society could be based on natural law, but he argues that because people disagree as to what constitutes the natural law, social harmony is not possible.

It is at this point that the argument often becomes sidetracked, for many skeptics rashly conclude that this proves that there is no right or wrong involved, and that natural law and, more generally, justice and morality are subjective matters. The proper rejoinder is that disagreement does not prove that the issue of contention is subjective.²⁵ For example, very few people would conclude from the fact that there is disagreement over the truth of the Darwinian theory of evolution that it is therefore a subjective matter whether man evolved from lower life forms.

The sophisticated skeptic, however, doesn't conclude from the fact that there is disagreement over the natural law that natural law must be subjective. Instead, he concludes that this means that natural law can't be the basis for social harmony. The sophisticated skeptic's main premise is simply the fact that people disagree. He is willing to grant, for the sake of argument, that some social arrangements are objectively better than others. The skeptic attacks natural law by turning the elitist-populist debate into a dilemma for the natural law advocate. According to the skeptic, there are two ways of dealing with the fact that people disagree, but neither can provide the basis for social harmony. One alternative is to assume that the truth is obvious to rational beings, and those who fail to admit the truth are either irrational or obstinate and must have the truth imposed on them. Because this alternative assumes that the correct-thinking (and acting) should rule everyone else, I shall refer to it as the orthocratic option.²⁶ Alternatively, we can assume that everyone is capable of arriving at the truth and sincerely wishes to do so. But in the meantime, everyone needs to suspend all action until an agreement is reached. Since this alternative depends upon reaching an unanimous agreement from a neutral, disengaged, even disembodied perspective, I shall refer to it as the disengaged contractarian option.

Neither alternative can be the basis for social peace. The second alternative, the disengaged contractarian option, is totally incoherent. First, suspending all action until we reach an agreement is incoherent since the process of

²⁵ Gordon, "In Defense", 233.

²⁶ This term is inspired by the observation of John Locke that "everyone is orthodox to himself." Locke, *A Letter*, 14.

reaching an agreement itself requires action and the use of scarce resources. We must use our bodies in the process of reaching an agreement, and we need a place to stand.²⁷ Even if we set aside this objection, there is no reason to assume that the parties will be able to reach an agreement in any reasonable length of time. Since it requires that we suspend all action until unanimous agreement is reached, there is the very real possibility that everyone will starve to death in the meantime. Note that these objections arise even if we grant the dubious assumption that all parties to the dispute are rational and sincere. On the other hand, if we allow the contractarian to suspend debate after a reasonable length of time, on the grounds that anyone who has not consented must be either insincere or irrational, then the contractarian option becomes a version of the orthocratic option — force is justified against those who are not being reasonable.

If the disengaged contractarian horn of the dilemma is incoherent and can only be made sense of by assimilating it to the orthocratic horn, the orthocratic option is vacuous, and in practice is no different from might makes right. The orthocrat, in effect, says that correct-thinking people ought to force their will on everyone else. The objection to this position isn't the relativist assertion that there is no right nor wrong, but rather that wrong-thinking people don't think of themselves as wrong-thinking but as among the correct-thinking. So in practice this rule is not, "correct-thinking people have the right to rule wrong-thinking people," but rather, "people who believe they are among the correct-thinking have the right to rule others whom they categorize as wrong-thinking." But since almost everyone thinks of himself as among the correct-thinking, this reduces to everyone trying to force his will on everyone else — i.e., might makes right.

Interestingly, these two alternatives in the dilemma proposed by the skeptic correspond very closely to the two theories of ownership that Rothbard presents as the only two logical alternatives to the libertarian theory of self-ownership. Rothbard's first alternative is the "'communist' one of Universal and Equal Other-ownership." He rejects this alternative for reasons that parallel the reasons for rejecting disengaged contractarianism. Theorists who ignore the fact that man is necessarily engaged in the world treat individuals as if they were "floating wraiths."²⁸ Rothbard concludes that any practical version of this alternative reduces to his second alternative — "Partial Ownership of One Group by Another — a system of rule by one class over another."²⁹ Rothbard rejects this second alternative on the grounds that it is not a "universal . . . ethic for the human race" but rather a "partial and arbitrary ethics, similar to the view that Hohenzollerns are by nature entitled to rule non-Hohenzollerns." The view that the Hohenzollerns are by nature entitled to rule non-Hohenzollerns is an instance of the orthocratic viewpoint that we set out above. There is nothing to stop the Hohenzollerns from believing this, but there is also nothing to stop the non-Hohenzollerns from believing just the opposite. And as long as both groups believe they have the right to dominate the other, social harmony is not possible.

Where the skeptic and Rothbard differ is over whether there is a unique,

²⁷ Hoppe, *Socialism and Capitalism*, 132.

²⁸ Murray N. Rothbard, *The Ethics of Liberty* (Atlantic Highlands, NJ: Humanities Press, 1982), 46.

²⁹ Rothbard, *Ethics*, 45.

third alternative. The skeptic's attack on natural law is, at bottom, an attack on the polar analysis framework adopted by natural law thinkers. For the skeptic, opposed concepts of the natural law show that the contest is not one between might and right, but between might and right-1 and right-2 and right-3 and so on. Every distinct school of natural law is at war not only with the social nihilists who only recognize might, but with everyone else who has a different concept of right. The only way to avoid this implication, according to the skeptic, is to drop the enforcement tenet. This, in effect, is what the disengaged contractarians have done. For the skeptic, all attempts to avoid the conclusion that might makes right reduce to these two sorry alternatives — either the incoherent dreams of disengaged contractarians or the righteous nihilism of orthocratic moralists. Rothbard's theory of natural rights is viewed as just one more candidate in an endless series of incompatible natural rights and natural law theories — one more instance of the orthocratic delusion.³⁰

It is the skeptic, however, who is deluded. To understand the source of the skeptic's error, we need to re-examine the social harmony tenet of natural law: rational individuals are capable of living together in peace. The skeptic, as well as the orthocrat and contractarian, assumes that if an issue is amenable to reason, then rational disputants can come to an agreement. The contractarian emphasizes the resulting 'agreement'; the orthocrat emphasizes the qualifier 'rational'. Both assume that a rational order implies unanimity (on important issues). Since we don't have unanimity, the contractarian treats it as something to be achieved, whereas the orthocrat assumes that we have unanimity among all those who are truly rational. The skeptic, finding these alternatives to be infeasible, rejects the possibility of a rational order.

Rothbard, in proposing his third alternative, is implicitly attacking the unanimity (or uniformity) assumption. The skeptic has read too much into the 'rational' qualifier of the social harmony tenet. The social harmony tenet simply hypothesizes that individuals committed to social harmony can live together in peace. The qualifier that these individuals be rational does not require that they be intellectuals. An irrational individual, in this context, is not someone who makes mistakes in logic or is not very good at solving problems. Instead, an irrational individual is someone who chooses to live, or is only capable of living, like the "fishes of the sea", by "devouring" other individuals.

The populist tenet that the natural law is written in our hearts should not be interpreted as meaning that there is some deep uniformity of opinion. Rather it should be interpreted as meaning that we ought to presume that other people are committed to social harmony until they prove otherwise by their violent actions. Implicit in the social harmony tenet is a presumption against violence — any use of violence must be justified. It is instructive to contrast the underlying presumptions of the orthocrat and contractarian. For the orthocrat there is a presumption against violence except when someone disagrees with him. But in practice this means that there is no presumption against violence. For the disengaged contractarian, on the other hand, there is a presumption against not only violence but all action, and as we have seen this presumption is totally incoherent.

³⁰ See, for example, George I. Mavrodes, "A Challenge to Self-Ownership", *Reason* (March 1978).

In summary, in a society composed of rational individuals, i.e., individuals committed to social harmony, violence would never be necessary, and so would not be justified among these individuals. It follows that if an individual A uses unjustified violence against an individual B who is committed to social harmony, A shows by his actions that he is not committed to social harmony. Given a presumption against the use of violence, the important question is what would constitute a justified use of violence. According to the enforcement tenet, B, or his agent, is justified in using force in defending himself against A. Thus, we have identified one type of situation where violence is justified. The orthocrat believes that there are other situations where violence is justified — when a person does not meet the orthocrats standards of reason. But as we have seen above, taking an orthocratic stance undermines the social harmony tenet, and reduces, in practice, to might makes right. Thus, when the populist tenet is properly understood, there is only one viable alternative to might makes right, Rothbard's nonaggression axiom: "no man or group of men may aggress against the person or property of anyone else."³¹

III. Liberty's Parable

Although the populist tenet of the natural law has classical roots, and the shift in emphasis from the elitist to populist interpretation of natural law began in the middle ages, the debate over liberty of conscience in the 16th and 17th centuries played an important role in tipping the balance in favor of the populist tenet. Central to this debate was a parable told by Jesus, the parable of the tares. This parable was interpreted as directly challenging the uniformitarian assumptions of elitist political theories, and it inspired sophisticated attacks on both the orthocratic and contractarian doctrines. Given the pivotal role this parable played in the history of liberty, it is surprising that contemporary historians and partisans of liberty have paid so little attention to it.

The parable of the tares likens the world to a field in which both wheat and weeds are growing:

The kingdom of heaven is likened unto a man which sowed good seed in his field: But while men slept, his enemy came and sowed tares among the wheat, and went his way. But when the blade was sprung up, and brought forth fruit, then appeared the tares also. So the servants of the house holder came and said unto him, Sir, didst not thou sow good seed in thy field? from whence then hath it tares? He said unto them, An enemy hath done this. The servants said unto him, Wilt thou then that we go and gather them up? But he said, Nay: lest while ye gather up the tares, ye root up also the wheat with them. Let both grow together until the harvest: and in the time of harvest I will say to the reapers, Gather ye together first the tares, and bind them up in bundles to burn them: but gather the wheat into my barn.³²

When His Disciples express bafflement at this parable, Jesus provides the following interpretation:

³¹ Murray N. Rothbard, *For A New Liberty* (San Francisco: Fox and Wilkes, 1978), 23.

³² Matthew 13:24-30.

He that soweth the good seed is the Son of Man; The field is the world; the good seed are the children of the kingdom; but the tares are the children of the wicked one; The enemy that sowed them is the devil; the harvest is the end of the world; and the reapers are the angels. As therefore the tares are gathered and burned in the fire; so shall it be in the end of this world.³³

The key passage for the defenders of liberty of conscience was “Let both [wheat and tares] grow together until the harvest.” This was interpreted as meaning that uniformity is not to be imposed. Furthermore, the stated reason, “Lest you root out the wheat,” implied that imposed uniformity undermined social harmony. The parable does not explain why this is so, but defenders of liberty of conscience came up with three explanations: (1) You might mistake wheat for a tare, i.e., a true Christian for a heretic. (2) Persecution causes civil strife, uprooting the wheat as well as the tares. (3) Someone who is a tare today might become wheat tomorrow.

The first commentator to interpret the parable along these lines was John of Chrysostom, a contemporary of Augustine. Chrysostom, however, argued against only the killing of heretics, not the use of other means of coercion. But later commentators who interpreted the parable as supporting toleration extended the argument to rule out all coercion against heretics. For example, Theodore Studita (b. 759 A.D.), commenting on Chrysostom, asserted: “The rules of bodies may punish those who are convicted in the body, but not those who have offended in the soul, for this belongs to the rulers of souls, and the penalties which they inflict are excommunication and the like.”³⁴ Wazo, prince bishop of Luik writing in 1048, also stressed that excommunication was the ultimate weapon that could be used against heretics.³⁵ Unfortunately, for the next five centuries most commentators gave a much more circumscribed interpretation of the parable, limiting its scope so that it did not apply to heretics. During the 16th and 17th centuries, however, the parable of the tares became the scaffolding upon which was constructed a rational defense of liberty of conscience and a populist conception of natural law. Defenders of liberty developed the three standard explanations for Jesus’s command to let both the wheat and tares grow together, “Lest you root out the wheat,” into sophisticated attacks on the orthocratic and contractarian viewpoints as well as the uniformitarian assumption that underlies them.

The first explanation for Jesus’s command was that one might mistake wheat for a tare. Sebastian Castellio, a mid-16th century defender of liberty of conscience, developed this simple idea into an attack on the orthocratic point of view: “After a careful investigation into the meaning of the term heretic, I can discover no more than this, that we regard as heretics with whom we disagree. This is evident from the fact that today there is scarcely one of our innumerable sects which does not look upon the rest as heretics, so that if you are orthodox in one city or region, you are held for a heretic in the next.”³⁶

³³ Matthew 13:37-40.

³⁴ Quoted by H. Roland Bainton, “Religious Liberty and the Parable of the Tares”, in *Early and Medieval Christianity* (Boston: Boston Press, 1962), 102.

³⁵ Quoted by Bainton, “Religious Liberty”, 104.

³⁶ Sebastian Castellio, *Concerning Heretics* (1554), Roland H. Bainton, Ed. (New York: Octagon Books, Inc., 1965), 129.

Castellio elsewhere wrote, “If we say that we cannot make a mistake, we are saying only what those who killed the godly have always said. . . . Are we better than they? Who ever thought that he held a false religion?”³⁷

A century later, during the English Civil War, the defenders of liberty of conscience against the Church of England and the Puritans repeated this argument. Richard Overton, a leader of the Levellers, observed, “For no man knoweth but in part, and what we know we receive it by degrees, now a little and then a little. He that knows the most was once as ignorant as he that knows the least. Nay, is it not frequent among us, that the thing that we judged heresy we now believe is orthodox?”³⁸ Roger Williams in his tract defending liberty of conscience succinctly made the same point: “Error is confident as well as Truth.”³⁹

When John Locke wrote his defense of liberty of conscience a half century later, he did not appeal to the parable of the tares, but he used the same arguments in attacking the orthocratic position. In discussing the question of a state-sanctioned church, Locke asks which church are we to choose? He notes that it “will be answered, undoubtedly, that it is the orthodox church which has the right of authority over the erroneous or heretical.” To which he scornfully replies, “This is, in great and specious words, to say just nothing at all. For every church is orthodox to itself; to others, erroneous or heretical. Whatsoever any church believes, it believes to be true; and the contrary thereupon it pronounces to be error.”⁴⁰ Nor can we allow the prince to choose, for “the religion of every prince is orthodox to himself. . . . If it be once permitted to introduce anything into religion, by the means of laws and penalties, there can be no bounds put to it; but it will, in the same manner, be lawful to alter everything, according to that rule of truth which the magistrate has framed unto himself.”⁴¹

The second explanation for Jesus’s command was that suppressing heresy led to civil strife. Most supporters of liberty of conscience emphasized this explanation, but Henry Robinson’s account is among the most insightful. Robinson was a mid-17th century English merchant, who wrote a number of tracts defending liberty of conscience during the English Civil War. In Robinson’s most sophisticated treatment of this theme, he makes it clear that the argument for liberty of conscience is not based on the assumption that the truth is unknowable. Robinson begins by supposing that we grant, for the sake of argument, that his opponent has infallibly grasped the truth and that he is able to present the Gospel “in a powerfull and all-sufficient way of convincing all such as were not perverse”. Furthermore, he supposes that we grant that his opponent can “distinguish who were thus malignantly obstinate, sinning against their own consciences.” Likewise he supposes that God doesn’t object to the killing of malefactors before their appointed time. Yet, even if we grant all this, it can be still be shown why “it is *Gods* will and

³⁷ Castellio, *Concerning Heretics*, 278.

³⁸ Richard Overton, “An Arraignment of Mr. Persecution”, in *Liberty in the Puritan Revolution, 1638-1647*, William Haller, ed. (New York: Columbia University Press, 1934), 234.

³⁹ Roger Williams, *The Complete Writings of Roger Williams*, v.3 (New York, Russell & Russell, Inc., 1963), 272.

⁴⁰ Locke, “A Letter”, 24.

⁴¹ Locke, “A Letter”, 37.

pleasure [that] they [willful heretics] should be permitted to live out the dayes which he has given them to repent in, or aggravate their sin.”⁴² He notes that in the Parable of the Tares “the difficulty lyes not so much is distinguishing betwixt the *children of the Kingdom*, the *good seed*, *good Christians*; and the *tares*, *Anitichristians*. . . .” For “either of them knows how opposite each is to the other, each of them *loves their owne*, and *hates the other!*”⁴³

But the difficulty lyes, in that the *tares* take themselves to be the *wheat*; and therefore if pulling up of *tares* were not prohibited unto all in generall, but made lawfull unto any, even unto those that could infallibly distinguish them, our *Saviour* knew the *tares* would have assumed this liberty to themselves, and so have pulled up the *wheat* instead of *tares*, which I humbly conceive to be the reason of the *Householders* prohibition not to have them rooted up at all. . . .⁴⁴

[T]he use of the *Parable* lyes not so much in applying the prohibition unto the *true* Church for not rooting up the tares; but rather unto a *false* erroneous Church . . . for if God had given leave unto the *true* Church to pull up the *tares*, each *false* Church pretending to be the only true one, would have appropriated the commission to herselfe, and so have gone to worke pulling up more *wheat* than *tares*.⁴⁵

In brief, the argument for liberty of conscience does not presuppose that the truth is unknowable. Some men may discover the truth and even infallibly know that they know the truth. Rather the problem is that not all men know the truth — given the diverse opinions in the world, there can be little doubt about this. And among those who are mistaken, many do not consider it a viable possibility that they are mistaken. If we grant a rule that those who hold the truth infallibly can coerce others, then those who are in error but are mistakenly certain that they hold the truth will be likewise licensed to coerce those who disagree with them, thus undermining social harmony. Castello summarized the argument as follows:

In a word, Christianity is today divided into many sects and they cannot be counted. Each sect regards itself as Christian and the rest as heretical. If, then, we are to apply the law for the persecution of heretics we shall let loose a Midianite war of extermination . . .⁴⁶

The third explanation given for leaving the tares alone is that someone who is a tare today may become wheat later (St. Paul being a prime example). This argument turns on the fact that no one can say how long it will take to convince someone of an important truth. This point is relevant to the viability of the contractarian option. Although no major opponent of liberty of conscience was naive enough to advocate that everyone should suspend all action until a consensus was reached, some advocated an orthocratic version of contractarianism, arguing that those who were not convinced of the truth after several “admonitions” were guilty of sinning against conscience. The defenders of liberty of conscience attacked this argument by pointing out that in

⁴² Henry Robinson, “John the Baptist”, 1644, Henry E. Huntington Library collection, San Marino, CA, 87.

⁴³ Robinson, “John the Baptist”, 87-88.

⁴⁴ Robinson, “John the Baptist”, 88.

⁴⁵ Robinson, “John the Baptist”, 89.

⁴⁶ Castello, *Concerning Heretics*, 264.

Robinson's words, "we know not Gods secret times and seasons for bringing men unto the truth; 'tis a dangerous thing to anticipate Gods judgements, even on those which afterwards were to be condemned; some are not called untill the 11 hour in Gods account."⁴⁷ Robinson's assertion that one may not be called "until the 11[th] hour" is an allusion to another parable that is often cited in this context, the parable of the early laborers.⁴⁸ In this parable laborers are hired at different times during the day to work in a field. At the end of the day (the eleventh hour) all the laborers are paid the same. This causes complaints from those who came earlier. The moral of the parable, however, is that some are not called (to Christ) until the eleventh hour; yet, they receive the same reward.

Although the argument was originally made with reference to "God's calling," William Walwyn, a friend of Robinson and one of the leaders of the Levellers, saw its more general implications. In arguing against a bill that would make atheism punishable by death, Walwyn proceeds as follows:

Men are not borne with the knowledge of this [belief in God] more then of any other thing; it must therefore either be infused by God, or begoten in us by discourse and examination as other things are; if it be infused, we must waite Gods time; his season is not the same for all, though happily one mans understanding may be opened at the first or second houre, another may not till the eleventh or last houre.

If by discourse and examination; then every man must have liberty to discourse thereupon; to propose doubts, to give and take satisfaction, to scruple, argue, or doe any thing that may firmly establish our minds in this prime and fundamentall truth.⁴⁹

Not only did Walwyn understand that reaching any rational consensus requires time, and that time is a scarce resource, he also realized that rational discourse requires liberty.

It should be noted that many of the arguments used by Protestants to defend liberty of conscience were similar to arguments developed by Catholic thinkers in defense of the rights of infidels, even though they were unwilling to extend these arguments to heretics. Two 16th century Dominican priests, Francisco De Vitoria and Bartolome de Las Casas, for example, are justly famous for their defense of the rights of the American Indians against the conquistadors. Vitoria argued along the lines of the 11th hour argument discussed above that "the barbarians are not bound to believe from the first moment that the Christian faith is announced to them",⁵⁰ concluding that "however probably and sufficiently the faith may have been announced to the barbarians and then rejected by them this is still no reason to declare war on them and despoil them of their goods."⁵¹ Las Casas appealed to the parable of the tares, and launched an attack on the orthocratic view of justice

⁴⁷ Henry Robinson, "An Answer to Mr. William Prynne's Twelve Questions", 1644, Henry E. Huntington Library collection, San Marino, CA, 18.

⁴⁸ Matthew 20: 1-16.

⁴⁹ William Walwyn, *The Writings of William Walwyn*, Jack R. McMichael and Barbara Taft, eds. (Athens, GA: University of Georgia Press, 1989), 239.

⁵⁰ Francisco de Vitoria, *Political Writings*, Anthony Pagden, ed. (New York: Cambridge University Press, 1991), 269.

⁵¹ Vitoria, *Political Writings*, 271.

that is as forceful as that presented by later Protestant thinkers:

And because of this newness [of the teaching of Christianity] they [the American Indians] can reasonably doubt this teaching and be suspicious of it, and refuse to hear it or admit its preachers, considering them to be deceivers rather than heralds of the true religion. Otherwise they would be extremely inconstant. 'Being too ready to trust shows shallowness of mind.'⁵²

Moreover, as is evident from what has been said, it is difficult, indeed impossible, to detect or distinguish those who cannot excuse themselves by reason of invincible ignorance from those who are rendered guiltless by it. Therefore the determination of this matter does not belong to human but to divine justice, because it is God who knows and judges what is hidden.⁵³

Also, since they rejoice in holding that blasphemous notion that in worshipping their idols they worship the true God, or that these are God, and despite the supposition that they have an erroneous conscience, even if the true God is being preached to them by better and more credible as well as more convincing arguments, together with the good example of Christians, they are bound, without doubt, to defend the worship of their gods and their religion by going forth with their armies against all who attempt to take those things from them or injure them or prevent their sacrifices — to fight, kill, capture, and exercise all the rights consequent on a just war according to the law of nations.⁵⁴

Later natural rights theorists pointed out that the arguments for liberty of conscience could be generalized to apply to all opinions and practices. Herbert Spencer, for example, argued that just as "[t]he advocate of religious freedom does not acknowledge the right of any council, or bishop, to choose for him what he shall believe or what he shall reject[,] [s]o the opponent of a poor law, does not acknowledge the right of any government, or commissioner, to choose for him who are worthy of his charity, and who are not."⁵⁵ Auberon Herbert applied this same argument against public education⁵⁶ and compulsory taxes.⁵⁷

IV. Natural Rights

So far I have not distinguished natural rights from natural law, but have used the same framework for both. Let us now turn our attention to why natural law evolved into a doctrine of natural rights. My thesis is that the increased emphasis on the populist tenet was largely responsible for this transition. Before defending this thesis, however, we need to examine how the doctrine of natural rights differs from natural law.

⁵² Bartolome de Las Casas, *In Defence of the Indians* (Dekalb, IL: Northern Illinois University Press, 1992), 134.

⁵³ Las Casas, *In Defense of the Indians*, 139.

⁵⁴ Las Casas, *In Defense of the Indians*, 244.

⁵⁵ Herbert Spencer, *The Man versus the State* (Indianapolis: LibertyClassics, 1981), 197.

⁵⁶ Auberon Herbert, *The Right and Wrong of Compulsion by the State and Other Essays* (Indianapolis: LibertyClassics, 1978), 73.

⁵⁷ Herbert, *Right and Wrong*, 393-394.

It is generally agreed that for natural law the stress is upon duty whereas for natural rights the stress is upon liberty. It is also generally agreed that there is a logical connection between statements about rights and statements about duties.⁵⁸ The point of contention is whether there is a difference between natural rights and natural law other than one of emphasis. The thesis that rights and duties are logically connected is known as the correlativity of rights and duties: for someone A to have a right implies that others have duties with respect to A's right. For example, if A has a right to do X, then others have a duty to refrain from interfering. And if A has a right to receive Y, there must be at least one other individual who has a duty to provide A with Y. If statements about rights can be translated into statements about duties, then debating the merits of natural rights over natural law would seem akin to debating whether a glass is half full or half empty.⁵⁹

Another candidate for distinguishing rights from duties is the role played by enforcement: rights are usually understood as being enforceable but duties need not be.⁶⁰ Thus, if A has a duty to help B, this does not entail that A may be legitimately forced to help B. On the other hand, if B has a right to be helped by A, this implies that A may be forced to help B. In other words, rights are part of the language of justice, which is a subset of the language of morality, the part that is enforceable. But since much of natural law is considered to be enforceable, this does not explain how the evolution of natural law into natural rights was a revolutionary development. If every right can be translated into an enforceable duty, then how can it be maintained that an important shift took place in political thinking when the language of natural rights replaced the language of natural law?

The answer to this question will become clearer if we first address another question: given a right (and hence a corresponding enforceable duty), who can legitimately enforce this right? In particular, may the holder of a right enforce the right? I'll refer to a right as a primary right if it is enforceable by the holder of the right, whereas a right is a secondary right if it is enforceable only by someone other than the rights-holder, such as the state. (This is not to say that the holder of a primary right must enforce it himself, but only that he may.) It is my contention that what is significant about the evolution of natural law into a doctrine of natural rights is that it was accompanied by viewing individual rights as primary rights, as rights that the individual may enforce. What was revolutionary was the populist interpretation of the enforcement tenet. Natural rights are primary rights. The rights that are logically implied by the classical natural law theories are, for the most part, secondary rights. In comparison to primary rights, secondary rights are second class rights.

An example will serve to illustrate the insubstantial nature of secondary rights. Suppose, for instance, we treat the right to life as a secondary right. This would mean that an individual does not have the right to defend himself from attack (unless he receives permission from the proper authority) but

⁵⁸ Narveson, *The Libertarian Ideal*, 41.

⁵⁹ The relationship between rights and duties is not reciprocal: although all rights have corresponding duties, not all duties have corresponding rights. For example, if A promises B to give X to C, then A has a duty to give X to C, but C does not have a right to X. However, it is hard to see how this difference could have revolutionary implications.

⁶⁰ Narveson, *The Libertarian Ideal*, 48.

must depend upon someone else, usually the state, for his defense. What if the state fails to defend the individual, either because it lacks the resources, or because it would not mind if this individual were eliminated? In the latter case one might argue that the state is derelict in its duties. But unless one also maintains that citizens have the right to force the government to defend their rights (thus, treating these rights as primary rights), then this duty of the state is not enforceable and the citizens' rights can appropriately be described as rights in name only. In the former case where the state lacks the resources to protect its citizens, they don't even have grounds for complaining that the state is derelict in its duty. In such a society all the primary rights lie with those who can legitimately defend and enforce them. If the state is the only legitimate enforcer of the citizens' 'rights', then these 'rights' are only secondary rights. They are grants given by the government, which it can always withdraw, either *de jure* by changing the law granting the 'right', or *de facto* by not enforcing the 'right'. All the primary rights lie with the state. It does not matter if the state is said to have the duty to grant the citizens all kinds of so-called rights. If the citizen cannot licitly use force to guarantee these state-granted 'rights', then they are not primary rights.

Many defenders of primary natural rights have gone so far as to assert that secondary rights are not really rights. For example, William Wollaston (1722) asserted, "If a man has no right to defend himself and what is his, he can have no right to anything . . . since that cannot be his right which he may not *maintain* to be his right."⁶¹ Secondary rights are a lot like the rights that skeptics like Rollins enjoy making fun of as mythical rights: An unenforceable right "never stopped a single slug" or "saved a single person from being gassed to death."⁶² In a nutshell, no guns, no rights.

It is important not to get bogged down debating whether secondary rights are 'really' rights. The important point to recognize is that secondary rights are the rights of the non-elite (Aristotle's natural slaves), whereas primary rights are the rights of the elite. If one takes a populist view, then everyone who hasn't forfeited his rights is part of the 'elite'. To say that secondary rights are not really rights is to attack the elitist view of natural law. In fact, I would contend that much of modern rights talk is concerned with secondary rights and is a way of taking an elitist (orthocratic) view of justice and yet sounding like a populist. Modern rights talk is just an euphemistic way of talking about the duties that the elite want to force upon everyone else. It is much easier getting a law passed whereby A has to provide X to B by asserting the right of B to X than by asserting that A has a duty to provide B with X. In the former case, it is easier to rally those who belong to class B in support of the law without provoking those in class A to oppose it.

V. Property Rights

Most rights theorists partition rights somewhat differently, distinguishing between liberty rights and welfare rights (or active and passive rights). Liberty rights are rights to act in certain ways, where everyone else has a duty not to

⁶¹ George H. Smith, "William Wallaston on Property Rights", *Journal of Libertarian Studies* 2, no. 3 (Fall, 1978): 222.

⁶² Rollins, *Myth*, 41.

interfere. Welfare rights are rights to certain things or services, where certain other people have a duty to provide these things or services. Libertarians maintain that there are only liberty rights.

Although logically distinct, in practice these two ways of categorizing rights divide rights along similar lines. The advantage of the primary-secondary distinction is that it exposes the orthocratic foundations of most welfare rights theorizing. To see why, consider a commonly proposed welfare right — the right of the poor to the surplus of the rich. In principle, such a right could be treated as a primary right, but this would mean that the poor have the right to take this surplus at gun point if necessary. It is obvious to even the most doctrinaire advocate of welfare rights that this would be a formula for a Hobbesian state of nature. Social harmony is not possible if welfare rights are primary rights.

As soon as one focuses on primary rights — rights that are defensible by the rights-holder — then jurisdiction becomes the key concept. The question is no longer, “What should the authorities decide?”, but “What are the established boundaries separating the decision making units?” For a social order based on primary rights, the basic principles for social harmony are the same whether the decision making units be states or individuals: the boundary-based principles of respecting borders and restoring borders when they are violated. If the primary rights-holders are states, then justice becomes a matter of respecting the borders of the states and restoring borders when they have been violated. (Of course, viewing states as the primary rights-holders is problematic since states are created by individuals who in the process violate the rights of other individuals.) If one takes the populist tenet seriously, and thus that individuals have the right to defend their rights, then justice becomes a matter of respecting the property rights of individuals and making restitution when these rights have been violated.

Historically, those thinkers who stressed the populist tenet of natural law were also some of the strongest defenders of property rights. Locke, of course, is well known for his defense of property rights, but many of Locke’s precursors in the defense of liberty of conscience also placed strong emphasis on property rights. Las Casas, for example, when defending the rights of the Indians, stressed their property rights as well as their territorial rights: “It is evident . . . that the divine law forbids anyone to violate or transgress another’s territory or jurisdiction, for we read: ‘Do not pass beyond the ancient bounds which your fathers have set.’ . . . And so each person in this visible world is commanded to own things in such a way that he is content only with his own possessions and does not invade another’s property, does not seize a poor man’s farm, vineyard, conveyance of any kind, servants, fruit, etc.”⁶³

Castellio limited the power of the state to defending life and property:

Let rulers content themselves to prevent the bad from injuring the good either in their property or their persons, as St. Paul teaches in Romans 13.

Sins of the heart, such as infidelity, heresy, envy, hate, etc. are to be punished by the sword of the Spirit which is the Word of God. If anyone disturbs the commonwealth by an assault under color of religion, the magistrate may punish such an one not on the score of

⁶³ Las Casas, *In Defense of the Indians*, 84.

religion, but because he has done damage to bodies and goods, like any other criminal. If anyone conducts himself amiss in the Church, both in his life and in his doctrine, the Church should use the spiritual sword, which is excommunication. . . .⁶⁴

Roger Williams, likewise, described the role of the civil power as owing “protection to the persons of his subjects, (though of a false worship) that no injurie be offered either to persons or goods of any.”⁶⁵

Henry Robinson took the argument a step further and claimed, in effect, that each person had property in his conscience. He begins by noting that “In civill affaires we see by experience that every man most commonly understands best his owne businesse.” He then adds that “besides we should thinke it a most grosse solecism, and extravagant course in any State which did make Laws and Statutes, that the Subject might not goe about and dispatch his worldly businesse, save in one generall prescript forme and manner, as a thing most irrational and inequitable, because it cannot possibly be suitable to the infinite occasions and interests of a Kingdome, or lesser people.”⁶⁶ As Biblical support for this position he appeals to the parable concerning the laborer hired at the eleventh hour, “where the more early labourers murmured that the latter commers should have equall reward with them,” and Jesus said in reply, “*Is it not lawful for me to do what I will with mine own?*”⁶⁷ Robinson concludes from this that Jesus implicitly endorsed property rights: “So we know that every man is desirous to doe with his owne as he thinks good himselfe, (especially when others receive no wrong thereby, as in the said Parable) and if it thrive not in his owne way, he may thanke himselfe.” He then adds that in spiritual matters this applies even more strongly since it concerns eternity and “*I must give account, repent and beleve for my self, and cannot doe either by proxie.*” He concludes, “I desire every Christian heart . . . to consider . . . whether it is not a much safer way in spirituall affairs, for every particular man to understand his owne estate betwixt God and himselfe, and manage his own busines.”⁶⁸

During the same period, the classical defense of individual property rights, including self-ownership, was made by Richard Overton:

To every Individuall in nature is given an individual property by nature, not to be invaded or usurped by any; for every one as he is himselfe, so he hath a selfe propriety, else could he not be himselfe, and on this no second may presume to deprive any of, without manifest violation and affront to the very principles of nature, and of the Rules of equity and justice between man and man; mine and thine cannot be, except this be; No man hath power over my rights and liberties and I over no mans; I may be but an Individuall, enjoy my selfe, and my selfe propriety, and may write my selfe no more then my selfe, or presume any further; if I doe, I am an encroacher & an invader upon an other

⁶⁴ Castellio, *Concerning Heretics*, 136-137.

⁶⁵ Williams, *The Complete Writings*, 373.

⁶⁶ Henry Robinson, “Liberty of Conscience of the Sole Means to Obtaine Peace and Truth”, in *Tracts on Liberty in the Puritan Revolution, 1638-1647*, William Haller, Ed. (New York: Columbia University Press, 1934), 155.

⁶⁷ Matthew 20:15.

⁶⁸ Robinson, “Liberty of Conscience”, 155-156.

mans Right, to which I have no Right.⁶⁹

When Overton said that “No man hath power over my rights”, it was clear that he did not believe that rights somehow mysteriously protected us. What he had in mind was self-defense. It was a principle of reason that “in pursuance of the just and necessary *defensive Opposition* we may lawfully, and are in Conscience bound to destroy, kill and slay the otherwise irresistible enemy for our own preservation and safety whether in our lives, our Lawes or our liberties: And against the justice of this *defensive principle* no degrees, Orders or titles amongst men can or may prevaile”, for without this principle there can be “no humane society, cohabitation or being”.⁷⁰

VI. Property Acquisition

There is one remaining aspect of Rothbard’s libertarian theory of natural rights that we have not addressed — his homesteading theory of property acquisition. For many critics this is the most controversial aspect of his theory. It can be easily shown, however, that it follows from the basic tenets defended so far.

As we have argued above, any theory of justice that is to apply to the world as it is must take into account two facts — scarcity, including scarcity of time, and diversity, including the diversity of opinions. In particular, it needs to recognize that people are never going to agree in practice on how various resources ought to be used. Given that the contractarian option of consensual joint control is impossible, the only peaceful alternative is divided control, i.e., private property rights. Furthermore, any praxeologically operational theory of justice needs to recognize that people are never going to agree on how resources ought to be (optimally) divided any more than they are going to agree on how they ought to be used. Since man is a physical being who needs to use resources to survive and who at the very least needs a place to stand, the only peaceful alternative is to make a presumption in favor of current boundaries and current property holdings. This does not mean that robbers have the right to their plunder. The concept of a ‘presumption’ in favor of current property rights only makes sense if it is coupled with the principle of restitution — the right to have property that has been taken restored. These two principles taken together provide the basis for the homesteading axiom, i.e., the first-user theory of acquisition. Starting with a presumption in favor of the existing property distribution, if the only way the *de facto* owner’s presumptive right can be challenged is by showing that a prior right is being restored, then the homesteading axiom can be inferred by chaining backwards until we reach the first user, for the first user of something cannot have his possession challenged since there is no prior right to be restored.

The first-user principle of acquisition is often contrasted with the Lockean labor-mixing theory of acquisition. I believe, however, that the labor theory compliments the first-user theory. Suppose we grant that the first user of an unused resource acquires a property right to that resource. If I pick up a

⁶⁹ Richard Overton, “An Arrow Against All Tyrants”, 1646, Henry E. Huntington Library collection, San Marino, CA., 3.

⁷⁰ Richard Overton, “An Appeal”, In *Leveller Manifestos*, Don M. Wolfe, Ed. (New York: Thomas Nelson and Sons, 1944), 177-178.

couple of stones and juggle them, are they now mine until I give or sell them to someone else? There is one more alternative: I can abandon them, i.e., return them to their unowned status. The question for any theory of property rights is not simply when rights to unowned things are acquired, but when are they abandoned. In the case of the stones, my dropping them on the ground and walking on would indicate abandonment. But usually my letting go of an object does not indicate abandonment. What is the difference? I believe that the Lockean labor theory goes a long way in answering this question: When people “mix their labor with an object”, the presumption is that their simple abandonment of the object, i.e., letting go of it and moving away from it, does not signify abandoning title to the object. After tilling a field all day, the farmer’s returning home in the evening does not signify that he has abandoned the field, because it is reasonable to assume that if someone mixes his labor with a resource then he may have future plans for that resource and has not abandoned it. So although Rothbard chose to describe his theory of property acquisition in terms of the Lockean labor theory, this is not incompatible with the first-user derivation of the homesteading axiom.

VII. Conclusion

As Murray Rothbard noted, for the libertarian “the only genuine order among men proceeds out of free and voluntary interaction; a lasting order that emerges out of liberty rather than by suppressing it. With Proudhon, the libertarian hails Liberty as the ‘Mother, not Daughter of Order.’ In this way, the libertarian sees the harmonious interaction of free people as akin to the harmonious interaction of natural entities that is summed up as ‘natural law’.”⁷¹ This is the essence of what I have called the social harmony tenet. Rothbard, like his libertarian predecessors, argued that such an order is only possible if boundaries are respected — i.e., a social system based on property rights. Any other alternative reduces, at least in practice, to the hegemonic principle that might makes right.

⁷¹ Murray N. Rothbard, *Frank S. Meyer: The Fusionist as Libertarian* (Burlingame, CA: Center for Libertarian Studies, 1984), 16.