

April 2014

The Justification of Human Rights

David Little

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Human Rights Law Commons](#), and the [Religion Law Commons](#)

Recommended Citation

David Little, *The Justification of Human Rights*, 2014 BYU L. Rev. 585 (2014).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2014/iss3/6>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

The Justification of Human Rights

*David Little*¹

This article is divided into two sections. The first part summarizes arguments regarding the justification of human rights and the relation of human rights to religion developed more extensively elsewhere.² The second part provides the intellectual background of the arguments, and is intended to elaborate and elucidate key ideas contained in the summary.

I

The position defended here follows from an effort to recover and rehabilitate the natural rights tradition. The idea of natural rights is taken not to depend on religious belief, though religious belief is certainly to be protected and accommodated. Rather, the idea of natural rights rests on an understanding of human nature as “rational, self-aware, and morally responsible.”³

This understanding supports a primary notion of subjective rights, which means that all individuals, simply as individuals, possess an entitlement to demand (or have demanded for them) a certain performance or forbearance under threat of sanction for noncompliance. The understanding also entails certain correlative

1. A version of this summary, entitled “The Justification of Human Rights,” was delivered at the Twentieth Annual Symposium on International Law and Religion, J. Reuben Clark Law School, Brigham Young University, October 7, 2013.

2. DAVID LITTLE, *ESSAYS ON RELIGION AND HUMAN RIGHTS: GROUND TO STAND ON* (2015).

3. BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW*, 1150-1625 (1997). “A ‘right’ is an entitlement, a due liberty and power to do or not to do certain things; ‘natural’ means what is neither of human devising (by law or by agreement) nor conferred by a special command of God [or other supernatural warrant]. Natural rights are thus entitlements belonging to human nature as such, in virtue of the superanimal sensibilities and capacities, and therefore to every human being.” T.E. Jessop, *Natural Rights*, in *DICTIONARY OF CHRISTIAN ETHICS* 225 (1967). As they developed in the Western Christian tradition, natural rights have been considered “minimal” or “vestigial” in that they are “left over” after “the fall,” or the willful defection of human beings from the divinely-appointed standards of human fulfillment. As such, they provide imperatives of moral restraint and guidance that are necessary but by no means sufficient for human fulfillment.

duties and obligations owed by every individual in respect to protecting the rights of others.

Though moral and legal rights may converge, they are distinguishable in regard to the character of the applicable sanction: *legal rights* are physically enforceable within a system of laws whose officials possess effective authority over a monopoly of legitimate force; *moral rights* are otherwise enforceable, for example, by verbal censure.

The range of subjective rights under consideration is focused especially on the protection of certain requirements for survival taken to be common to every human being. Among other things, natural rights protect against *arbitrary force*, which, minimally, is the infliction of death, physical impairment, severe pain/suffering for entirely self-serving and/or knowingly mistaken reasons. To refer only to self-interest or knowingly to deceive in the act of inflicting death, severe pain, etc., is “morally incomprehensible” because the reasons given are no reasons at all.⁴ This is not an observation about what human beings happen to believe or not. It is an observation about what, as rational and moral agents, human beings *are able* to believe or not, *are able* to make sense of or not. It is about the meaning of moral reason as regards the justification of action pertaining to critical aspects of human survival. Thus, the random slaughter of some twenty-six school children and teachers in Newtown, Connecticut in December 2012 is necessarily regarded as an act of “senseless violence.”

On this understanding, force (as sanction) may be used in response to arbitrary force so long as it is demonstrably aimed at combating and restraining arbitrary force, and does that consistent with three “rules of reason”: necessity, proportionality, and effectiveness.

4. A case of “necessity,” in which an innocent party is killed in order for someone else to survive, is not an exception to this statement since the reasons excusing the act must also include strong proof that there was no alternative course of action. Such a defense is based *not only* on a reference to the self-interest of the one doing the killing. It therefore does not utterly disregard the interests of the victim, as in a “pure” case of arbitrary force. Still, cases of necessity *are* inescapably perplexing from a moral point of view precisely because of the gravity of the prohibition against hurting others to one’s advantage. As an exhibit of the unavoidable perplexity, see, for example, Hugo Grotius’s somewhat tortuous discussion of the issue. HUGO GROTIUS, RIGHTS OF WAR AND PEACE, INCLUDING THE LAW OF NATURE AND OF NATIONS 92, 92–94 (1979).

Accordingly, it is held that human rights language, consisting of rights regarded as both moral and legal, rests on such an understanding. Six points may help clarify this understanding of human rights language.

1. Such language was drafted and codified in direct response to a paradigmatic case of arbitrary force, namely, the record, particularly, of German fascist practices before and during World War II.
2. It enshrines a basic set of rights, referred to in Article 4 of the International Covenant on Civil and Political Rights as “nonderogable” (nonabridgeable) rights, which protect everyone against the worst forms of arbitrary force: extra-judicial killing, torture, “cruel, inhuman, or degrading treatment or punishment,” enslavement, denials of certain forms of due process, and violations of freedom of conscience, religion or belief. Protection against discrimination “solely on the ground of race, colour, sex, language, religion or social origin” is also included.⁵ We should add to this list what are called “atrocious crimes,” as codified in the Statute of Rome, the Charter of the International Criminal Court. Genocide, crimes against humanity, war crimes, and aggression, as defined in the Charter,⁶ are all egregious examples of arbitrary force. Beyond these provisions, there is no list of nonderogable rights in the International Covenant on Economic, Social, and Cultural Rights (ICESCR), but there are some interesting developments in that direction. In General Comment 14, the Committee on Economic, Social, and Cultural Rights has enumerated a set of “core obligations” requisite for guaranteeing Article 12 of the ICESCR, which guarantees “the right of everyone to the enjoyment of the highest attainable

5. Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18, explicitly identified as non-derogable, appear in Article 4, paragraph 2 of the ICCPR. Int’l Covenant on Civil & Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171–78. The prohibition against discrimination is mentioned in Article 4, paragraph 1 may also be assumed to be non-derogable.

6. Articles 5, 6, 7, and 8. Rome Statute of the Int’l Criminal Court, July 17, 1998, 2187 U.N.T.S. 3–9. The crime of aggression is not defined in the Charter, but left to further negotiation and agreement. Still, endeavoring to prohibit aggression is, at the least, an effort to outlaw “wars of conquest” which regularly exemplified self-serving uses of force.

standard of physical and mental health,” and it has ruled that “a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations . . . which are non-derogable.”⁷ Failure to enforce these obligations, where feasible, would constitute *arbitrary neglect*, a close relative of arbitrary force.

3. It adds a set of “derogable” rights (abridgeable under only the most extreme circumstances, such as emergencies), like freedom of speech, assembly, and participation in government, that are designed to assure maximum protection against the violation of nonderogable rights.
4. Though human rights language explicitly obligates individuals, it also obligates states,⁸ meaning that states exercise force legitimately insofar as they enforce human rights; otherwise, they administer force illegitimately, which is to say, arbitrarily.
5. With the development of the modern state, the technology of repression has outstripped the organs of restraint, making all the more urgent the protection of human rights.
6. Violations of nonderogable rights and prohibitions against atrocity crimes are “wrong in themselves”—

7. The core obligations, which every State party is bound to comply with, are such things as, “ensuring the right to access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups”; “ensuring access to minimum essential food which is nutritionally adequate and safe, and to ensure freedom from hunger for everyone”; “ensuring access to basic shelter, housing, and sanitation, and an adequate supply of safe and potable water”; and “ensuring equitable distribution of all health facilities, goods and services.” Comm. on Econ., Soc., & Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, U.N. DOC. E/C.12/2000/4 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. DOC. HRI/GEN/1/Rev/6 at 85 (2003), available at <http://www.unhcr.org/refworld/docid/4538838d0.html>.

8. Preambles of the ICCPR and the ICESCR: “*Realizing* that the individual, having duties to other individuals and to the community to which [the individual] belongs, is under responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,” and “*Considering* the obligations of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms[.]” Int’l Covenant on Civil and Political Rights, *supra* note 5, at pmb1.; Int’l Covenant on Econ., Soc., & Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

”outrages,” that is, against the “conscience of humankind,” in the updated language of the Preamble to the UDHR, and they are also a severe threat to “peace in the world,” as the Preamble also states.

Thus, the moral foundation of human rights language consists of “natural” rather than “extranatural” or “supernatural” assumptions concerning the absolute inviolability of prohibitions against arbitrary force. The idea of natural rights also pertains to the protection of public goods—health, safety, order, and morals⁹—that are assumed to be of common natural concern as vital requirements for human survival. The natural grounding in both cases is “secular” in the sense that it is accessible to and obligatory upon all human beings, regardless of distinctions “such as religion,” in the words of Article 2 of the UDHR.

Where, then, does religion come in? A key feature of arbitrary force as practiced by the German fascists was the relentless imposition by force of a specific set of beliefs upon everyone under their control. That meant the systematic persecution of all religious and other forms of dissent. Such actions were a serious violation, according to a natural rights understanding, because coercion is not a justification for believing the truth or rightness of anything. When someone says, “Believe what I tell you or I’ll punish you,” that is a clear case of arbitrary force—of using force without justification. Expressions of belief can of course be curtailed by coercion, but that just begs the question whether such coercion is justified.

In human rights language, therefore, such reasoning protects “conscience, religion, or belief” against “being subject to coercion which would impair . . . freedom to adopt a religion or belief of [one’s] choice.”¹⁰

When held up alongside the “natural” justification of human rights language, the special protection of “conscience, religion, or belief” (and the practices associated with them), assured by Art. 18 of the UDHR and ICCPR, introduces what I call, a “two-tiered” system of justification.

9. See Int’l Covenant on Civil and Political Rights, *supra* note 5, at 178 (referring specifically to Article 18, paragraph 3). It is not clear that the term “public morals” has any determined meaning in human rights jurisprudence.

10. *Id.* at 178 (Article 18, para. 2).

The first tier lays down a “natural” (secular) justification that serves to hold people everywhere accountable to the terms of the language, backed by a provision for universally legitimate enforceability (subject to the three “rules of reason”), as well as to provide standards of protection to which everyone may appeal, regardless of religious or other identity.

The second tier permits and secures a wide, highly pluralistic range of “extranatural” justifications for human rights language, and, of course, for much else related to the broad expanse of human social life and experience. Second-tier matters are irreducibly pluralistic because, among other things, they involve intimate, subjective experience in regard to social attachment, loyalty, and identity, as well as ultimate sacred commitments not readily given up. Learning to tolerate and respect without violence these inescapable differences, by upholding the right to freedom of conscience, religion, or belief, appears to be both “right in itself” and critical to achieving peace, as is conclusively shown in the recent book by Grim and Finke on the connection between violence and violations of religious freedom.¹¹

Religious and other forms of second-tier justification are undoubtedly indispensable for mobilizing adherents to the cause of human rights. It is also clear that whether it supports or challenges human rights language, sustained attention to that language by different communities of conscience, religious or not, can help identify lacunae or blind spots in the human rights instruments. Such attention also can assist in finding, where necessary, colloquially acceptable substitutes for human rights language, and can even bring about significant change, for example, in interpreting and applying religious freedom, as has happened as the result of litigation by minority religions in the United States and elsewhere.

Engagement with human rights matters in these ways illustrates the importance of the second tier in the ongoing, often complicated, and sometimes testy negotiations between the two tiers. One additional function of particular significance, performed by the second tier, is the process of appealing for conscientious exemptions from general and neutral laws permitted by human rights

11. BRIAN J. GRIM & ROGER FINKE, *THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY* (2011).

jurisprudence.¹² Of special note is the requirement that in imposing restrictions on conscientious belief and practice, the state bears the burden of proof in demonstrating both that there is a compelling state interest at stake, and that the restriction is as unintrusive as possible. In that way tier two serves to limit the reach of tier one, and to remind it of its obligation of special deference to tier two.

At the same time, all these second tier undertakings are themselves constrained by the first tier, in accord with the underlying assumptions of human rights language. Tier-two justifications must yield to the inviolability of the “natural” prohibitions against arbitrary force and arbitrary neglect, as well as of the state’s responsibility, “as prescribed by law” and as is “necessary,” for protecting the public goods of safety, health, order, and morals, and the “fundamental rights and freedoms of others.”¹³

The proposal, in sum, is that human rights language rests on a natural rights understanding that prescribes a two-tiered theory of justification. Accordingly, the first tier protects, encourages, and is limited by the second tier, but it also constrains the second tier in very important ways.

II

I started attending seriously to the subject of human rights in the 1980s, sparked initially by the election of President Ronald Reagan at the beginning of the decade. Reagan’s predecessor, Jimmy Carter, together with an active cohort of members of Congress, had given human rights a central place in the conduct of U.S. foreign policy. When Reagan came to office, he made clear his strong opposition to Carter’s emphasis, and his determination to reconfigure radically the role of human rights in foreign affairs. At first, it appeared he would ignore human rights altogether. But gradually he turned to enlisting human rights in the fight against Communism, with especially controversial effects in Central America, where Reagan’s policies were perceived by critics as being much more attentive to the abuses of the Communists than of their anti-Communist opponents.

12. Human Rights Comm., *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18)*, July 30, 1993, CCPR/C/21/Rev.1/Add.4, available at <http://www.refworld.org/docid/453883fb22.html>.

13. See Int’l Covenant on Civil and Political Rights, *supra* note 5, at 178 (Article 18, para. 3).

The intense and continuing debates between Carter and Reagan supporters at the time piqued my interest in human rights on the level of law and policy, as well as of theory. It was not, it seemed, simply a question of how the state and others might interpret and apply human rights, but also of how, if at all, they could be justified. That is where the idea of natural rights came in. Whatever other influences there are, human rights language is undeniably rooted in the natural rights tradition, associated, as it is, with Western philosophical and theological thought. The problem was that, at the time, controversies over the status of natural rights theory were as acute and seemingly intractable as the controversies over law and policy. The idea of natural rights is not the only conceivable basis for supporting human rights, but to refute it successfully removes human rights' most venerable foundation.

The idea of natural rights—that human beings “are entitled to make certain claims by virtue simply of their common humanity”¹⁴—has long been under assault, going back to the well-known attacks in the eighteenth and nineteenth centuries by David Hume, Jeremy Bentham, and Karl Marx. Related attacks continued into the twentieth century, gaining momentum around the time of the adoption of the UDHR by the UN General Assembly in December 1948. Anticipating that event, the American Anthropological Association, for example, submitted a widely noted statement on human rights to the UN Human Rights Commission in 1947, denouncing the very idea of universally binding moral claims. Margaret Macdonald's influential essay on natural rights, written that same year, supported this conclusion.¹⁵ Subsequently, similarly skeptical statements appeared up into the eighties, advanced by figures like Alasdair MacIntyre¹⁶ and Richard Rorty.¹⁷

In the midst of all the controversy, I, however, remained unconvinced by the opposition. In 1986, I published an essay on natural rights and human rights,¹⁸ reexamining the ideas of John Locke (1632-1704) in some detail, and arguing that Locke's natural

14. Margaret Macdonald, *Natural Rights*, in HUMAN RIGHTS 40, 40 (1970).

15. *Id.*

16. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981).

17. RICHARD RORTY, *THE CONSEQUENCES OF PRAGMATISM* (1982).

18. David Little, *Natural Rights and Human Rights: The International Imperative*, in NATURAL RIGHTS AND NATURAL LAW: THE LEGACY OF GEORGE MASON 67 (Robert Davidoff ed., 1986).

rights theory did not fit the fashionable Marxist model, according to which rights talk expresses nothing more than bourgeois interests that are essentially egoistic in character. On the contrary, the whole point of natural rights for Locke was to protect everyone everywhere *against* self-serving rule, something that permitted anyone in command to “do to all his subjects whatever he pleases, without the least liberty to anyone to question or control those who execute his pleasure[,] . . . and . . . whatsoever he does, whether led by reason, mistake, or passion, must be submitted to.” Such an arrangement also allowed individuals to stand as judges in their own case, where “he who was so unjust as to do his brother an injury, will scarce be so just as to condemn himself for it.”¹⁹ Nor did Locke exempt economic life from these strictures: Everyone everywhere possesses “a right to the surplusage of [another’s] goods. . . as will [prevent] extreme want, where [there is] no means to subsist otherwise.” Moreover, no one may “justly make use of another’s necessity, to force him to become his vassal, by withholding that relief God requires him to afford to the wants of his brother, than he that has more strength can seize upon a weaker [person], master him . . . , and with a dagger at his throat offer him death or slavery.”²⁰

Having endeavored to set the record straight, I proceeded in my article to mount a constructive case in favor of a natural rights approach. The line of argument was stimulated by a passing comment of Locke’s and by some perceptive insights of Gregory Vlastos²¹ and Thomas Nagel²² about the nature of the conditions under which pain may or may not be inflicted or relieved. Commenting on the education of youth, Locke bemoaned the high esteem bestowed on military conquerors “who for the most part are but the great butchers of mankind.” Their typical exploits, he says, tend to encourage an “unnatural cruelty,” “especially the pleasure [taken] to put anything in pain that is capable of it.”²³ The implication, supported by the suggestions of Vlastos and Nagel, is

19. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, 2d Treatise, ch.II, § 13, at 316–17 (1965).

20. *Id.* at 1st Treatise, ch.4, § 42, at 205–06.

21. Gregory Vlastos, *Justice and Equality*, in *SOCIAL JUSTICE* 51 (Richard B. Brandt ed., 1962).

22. Thomas Nagel, *Limits of Objectivity*, in *TANNER LECTURES ON HUMAN VALUES* 108 (Sterling M. McMurrin ed., 1980).

23. JAMES L. AXTELL, *THE EDUCATIONAL WRITINGS OF JOHN LOCKE* 226–27 (1968).

that giving self-serving reasons for inflicting pain or for taking advantage of someone in pain by withholding relief is the essence of cruelty, something morally unthinkable or indisputably “wrong in itself.”

In this way the idea of a natural right can, I contended, be justified. The argument provides warrant for the notion of a subjective entitlement possessed by all individuals, simply as individuals, to demand (or have demanded for them) that no one of them shall be subjected to arbitrary force or arbitrary neglect under threat of sanction for noncompliance. Given that a claim of this sort is meant to be respected universally, certain correlative duties and obligations so to respect the right are, by implication, owed by every individual to every other individual.

The right is “natural” because *any* mature, competent human being, “without [that is] distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status,”²⁴ is expected to recognize the blatant incongruity, and, hence, patent unjustifiability, of inflicting pain or taking advantage of those in pain for self-serving motives, and, consequently, is obligated to refrain from acting in that way. Anyone reliably suspected of so acting is therefore liable to sanction—subject, of course, to the three “rules of reason”: necessity, proportionality, and effectiveness. That is true whether, as Locke implies, the motives are disguised by reason, or are the result of a knowing or negligent mistake or simply of passion. Indeed, Locke’s whole theory of government, including the design for administering legal sanctions, is grounded in this understanding. “I easily grant,” he says, that civil government is the proper remedy for the inconveniences of the state of nature” where “self-love will make men partial to themselves and to their friends, . . .and that ill-nature, passion, and revenge will carry them too far in punishing others[.]”²⁵ In short, the ultimate objective of government is that everyone “may be restrained from invading others’ rights and from doing hurt to one another, and [that] the law of nature be observed, which wills the peace and preservation of all mankind.”²⁶

24. UNIVERSAL DECLARATION OF HUMAN RIGHTS, art. 2 (1948).

25. LOCKE, *supra* note 17, at 316, 2d Treatise, ch. II, § 13.

26. *Id.* at 312, ch. II, § 7.

Around the time the article supporting natural rights appeared, I published a related essay on the Puritan dissident and founder of the Rhode Island colony, Roger Williams (1603-1683), in which I analyzed and promoted his defense of freedom of conscience and separation of church and state.²⁷ I believed the effort was important not only because Williams's arguments were intrinsically appealing, as well as anticipating some of Locke's ideas, but also because Williams had, for the most part, been so badly misunderstood by those who should know better. In particular, there was (and continues to be) the widespread failure to understand the Calvinist roots of Williams's thinking, a point I introduced in the essay, but went on to develop more extensively in subsequent writings.²⁸ The key idea is the distinction between the two tables of the Decalogue, or the Ten Commandments. The article focused on the deep and abiding tension in Reformed Christianity, beginning with Calvin himself. Early in his career, Calvin taught that it was not the state's job to enforce the first table—matters of religious belief or conscience, but only the second table—moral and civic matters, whose principle is that “all individuals should preserve their rights” in regard to life, liberty, and property, or what Calvin often called natural rights. This teaching assumed a distinction between the “inward forum” or conscience that should not be coerced, and the “outward forum” or affairs of state that should. Later in his career, Calvin sharply altered his position, authorizing the state to regulate the first as well as the second table.

Williams's position on freedom of conscience and church-state relations was, in large part, simply an elaboration of the early Calvin, whereas his opponents, the authorities of the Massachusetts Bay colony who expelled him, sided with the later Calvin. In defending himself, Williams provided extensive commentary on the two tables of the Decalogue, on the distinction between the jurisdictions of the “inward” and “outward” forums, and, like Calvin and other members of the Reformed tradition, on the importance of constitutional government, including protection of “natural and civil rights and liberties” that make up the “natural freedom of the

27. David Little, *Roger Williams and the Separation of Church and State*, in *RELIGION AND STATE: ESSAYS IN HONOR OF LEO PFEFFER 3* (James E. Wood, Jr. ed., 1985).

28. David Little, *Roger Williams and the Puritan Background of the Establishment Clause*, in T. JEREMY GUNN & JOHN WITTE, JR., *NO ESTABLISHMENT OF RELIGION: AMERICA'S ORIGINAL CONTRIBUTION TO RELIGIOUS LIBERTY* 100 (2012).

people.” Noteworthy was his ability to advance his views in the Rhode Island colony by successfully excluding any reference to religious privileges in the Charter of 1644 and the Civil Code 1647, and by explicitly codifying an expansive right to freedom of conscience in the Charter of 1663. His mode of discourse, intermixing extensive biblical exposition with “free-standing” appeals to reason, nature, and experience is very much in the Calvinist tradition, starting with Calvin himself.²⁹

While for Williams the idea of temporal government is divinely ordained, he leaves no doubt that the “power, might or authority” of particular governments “is not religious, Christian, etc., but natural, humane, and civil.”³⁰ Clearly implied is a notion of “secular” or “public reason,” according to which any well-ordered government should be conducted. The notion rests on “natural” rather than “extranatural” or “supernatural” assumptions concerning the protection of public goods, like health, safety, and order, taken to be of universal concern as vital requirements of human survival.

It also rests on the idea that any attempt by an earthly government to regulate coercively matters of conscience or belief, beside those that incite to a violation of public safety or order, constitutes an act of arbitrary or unjustified force—of “soul rape,” as Williams repeatedly calls it. “The binding and rebinding of conscience [by force], contrary [to] or without its own persuasion, so weakens and defiles it that it . . . loseth its strength and the very nature of a common honest conscience.”³¹ The essence of conscience is inward consent based on a conviction of truth and right. Physical force, in and of itself, cannot produce that. Belief depends on reasons consisting of argument and evidence, and the threat of force, as in a case of robbery or rape, is not a reason in the proper sense because it lacks justification. Thus, the only “weapons” suitably employed in the inward forum are “spiritual,” namely appeals and arguments subject to rational standards, whose object is consensual or heartfelt agreement. Accordingly, “forcing the conscience of any person” is action that deforms conscience by inducing hypocrisy, narrow-mindedness, or self-betrayal.

29. See David Little, *Calvin and Natural Rights*, 10 *POL. THEOLOGY* 411 (2009).

30. 3 *THE COMPLETE WRITINGS OF ROGER WILLIAMS* 398 (1963).

31. 4 *THE COMPLETE WRITINGS OF ROGER WILLIAMS* 209 (1963).

Consequently, Williams favored a broadly pluralistic society including all manner of Protestants, Catholics,³² Jews, “Mohammedans,” and “pagans” or Native Americans, and even those “who turn atheistical and irreligious.” By no means did he support protection only for those groups manifesting a “hyperindividualistic,” strongly “protestant” religious outlook, as has been alleged. On the contrary, Williams advocated accommodating as diverse a range as possible in matters of religion and conscience, urging only that the rights and duties, the benefits and burdens, of citizenship be kept scrupulously separate from such considerations. As with Locke, the overriding objective of such an arrangement is “keeping the peace.” “Among those that profess the same God and Christ as Papists and Protestants, or the same Muhammed as the Turks and Persians, . . . civil peace would [not] be broken (notwithstanding their differences in religion) were it not for the bloody doctrine of persecution, which alone breaks the bonds of civil peace, and makes spiritual causes the causes of their bloody dissensions”³³

It is true that throughout his lifetime, and well into the eighteenth century, Williams’s ideas had little impact outside Rhode Island. However, as I argued in the article, that all changed around the time of the American Revolution and the founding of the Republic by way of Williams’s influence on Locke and Isaac Backus (1724-1806), the intrepid lobbyist for religious liberty at the time of the Constitutional convention. Williams’s impact on Backus is indisputable, since Backus wrote what amounted to an early biography of Williams, and regularly cited him, even though he was not as radical as Williams. Backus sought to remove established religion such as existed in many of the colonies at the time, but he still advocated support for a form of civil religion requiring a religious test for public office. Williams’s influence on Locke is a more uncertain matter, though there is significant scholarly support

32. Williams does flirt at one point with the acceptability of requiring the display of special insignia on members of religious groups like the Catholics in protecting national security, though he does that in the context of a discussion of reasons for trusting and respecting Catholics, and, in fact, for considering some extremist Protestant sectarians as a greater threat to national security than Catholics. *Id.* at 313–15.

33. Roger Williams, *Bloody Tenent Yet More Bloody*, in *ON RELIGIOUS LIBERTY: SELECTIONS FROM THE WORKS OF ROGER WILLIAMS* 183 (James Calvin Davis ed., 2008).

for it,³⁴ and the similarities of argument in regard to natural rights, freedom of conscience, and the separation of church and state are striking. Nevertheless, whatever Williams's impact on Locke, Locke, like Backus, was not as liberal as Williams, arguing that atheists, Catholics, and Muslims should not be accorded freedom of conscience.

Since I wrote those two essays in the 1980s, the literature on natural rights, including the connection to freedom of conscience, has grown substantially, often in appreciation of certain lines of argument in the tradition. Brian Tierney's book, *The Idea of Natural Rights*,³⁵ published in 1997, revolutionized study of the topic by refuting the popular belief that natural rights represent a "deformed version of Christian ideas." Tierney also rejected the assertions that natural rights glorify egoistic individualism (as Marx claimed), and emphasize an anti-religious bias derived from the Enlightenment (as many still claim). Rather, the natural rights are to be understood as the product of a "great age of creative jurisprudence" in twelfth- and thirteenth-century medieval Europe at the hands of inventive canon lawyers and monastic theologians whose moral and legal theories "may still prove of value in our political discourse."³⁶ Of special importance in anticipating Locke's arguments against arbitrary force is Tierney's description of the right of self-defense—considered in the tradition as "the greatest of rights"—namely, "a natural inalienable right [inhering] in individuals and communities . . . that could be exercised by subjects against a tyrannical ruler."³⁷

Judith Shklar's influential essay, "The Liberalism of Fear," appearing in 1989,³⁸ strongly reinforced the approach I was developing. She claimed that the critical feature of a liberal theory of government is the prevention of "arbitrary, unexpected, unnecessary, and unlicensed acts of force [including] habitual and pervasive acts of

34. See MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY, 371 n.18 (2008) (noting that Quentin Skinner confirmed that "Williams [was] a prominent part of the literature . . . with which Locke was certainly familiar"); cf. EDWIN S. GAUSTAD, LIBERTY OF CONSCIENCE: ROGER WILLIAMS IN AMERICA 196 (1991), and WILLIAM LEE MILLER, THE FIRST LIBERTY: AMERICA'S FOUNDATION IN RELIGIOUS LIBERTY 176 (2003).

35. TIERNEY, *supra* note 3.

36. *Id.* at 27, 42.

37. *Id.* at 314.

38. Judith Shklar, *The Liberalism of Fear*, in LIBERALISM AND THE MORAL LIFE 21, 21–38 (Nancy L. Rosenblum, ed., 1989).

cruelty and torture performed by military, paramilitary, and police agents in any regime.”³⁹ She eloquently rephrased and updated Locke’s view, which I had highlighted in my 1986 essay. She also contended that the liberalism of fear “certainly does begin with a *summum malum*, which all of us know and would avoid if only we could”—namely, the deliberate infliction of physical and emotional pain on the weak in order to satisfy the interests of the strong.⁴⁰

Shklar did caution against too readily drawing moral conclusions from the fact that “the fear of systematic cruelty is so universal,” since stating facts about beliefs does not prove they are morally right or wrong.⁴¹ However, that difficulty is avoided, as it seemed to me, since the implication of Locke’s theory is not, finally, about what human beings do believe, but about what they are capable of believing; not about reporting facts, but about what makes sense, about what can be believed, in taking a position on right and wrong.

The Realm of Rights by Judith Jarvis Thomson, published in 1990,⁴² gave new energy to the philosophical defense of natural rights, arguing in a way consistent with the tradition that “there is no possible world in which an act’s being an instance of ‘causes a person pain’ is irrelevant to the question whether it is wrongful.”⁴³ Going further, she advances a proposition very close to the conclusion drawn earlier about Locke: That non-trivial necessary moral truths exist such as, “[o]ne ought not torture babies to death for fun.”⁴⁴

As to Locke scholarship, John Simmons’s volume, *The Lockean Theory of Rights*,⁴⁵ appearing in 1992, goes a long way toward showing both that Locke had “a developed and consistent theory of rights,” which deserves to be taken seriously, and that his theory serves not only “as a viable foundation for *his* political philosophy,” but also “may serve as a viable foundation for *ours*.”⁴⁶

John Witte’s book, *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (2007), illuminates

39. *Id.* at 29.

40. *Id.*

41. *Id.* at 30.

42. JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* (1990).

43. *Id.* at 15.

44. *Id.* at 18–19.

45. A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* (1992).

46. *Id.* at 354.

the way the Calvinist tradition carried forward the natural rights narrative, more or less picking up where Tierney left off. Unlike Tierney, Witte also shows the relevance of the natural rights tradition to questions of freedom of conscience and religious pluralism. This tradition is both the more restrictive approach of the later Calvin, Theodore Beza, and Johannes Althusius, as well as the more inclusive approach of John Milton, a friend and ally, personally and intellectually, of Roger Williams.

Martha Nussbaum's impressive study, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (2008), compellingly commends Williams for his distinctive contribution to guaranteeing equal freedom of conscience in the American experience. To her credit, she correctly emphasizes Williams's appeals to natural or "secular" reason, which are certainly there. Unfortunately, she ignores the importance of his supplementary appeals to scripture and doctrine, as well as the central place in his thought of natural rights thinking, impressed upon him by the Calvinist tradition in which he stood. Her failure to appreciate the role of natural rights is especially surprising since she highlighted it in an earlier book,⁴⁷ and has proceeded, revisionistically, to be sure, to appropriate it in developing her "capabilities" approach to social reform and development.

But most important in the effort to bring natural rights and human rights together—my overall objective in the 1986 article—was a book published in 1999 by Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*.⁴⁸ Morsink indicates that at the very start of the process of drafting the UDHR, one delegation proposed to begin the document with the following words, "Recognizing that the United Nations has been established for the specific purpose of enthroning the natural rights of man"⁴⁹

Although the words were not adopted, Morsink thinks they support the presumption that there is "some kind of connection" between "natural rights philosophies," which Morsink identifies with

47. MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 9–92 (2006).

48. JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT (1999).

49. *Id.* at 282.

the Enlightenment, and the language adopted in the UDHR.⁵⁰ It is not that the drafters self-consciously and intentionally attempted to enshrine natural rights theory. For the most part, they were not interested in philosophical questions and wanted to minimize, as much as possible, what they took to be loaded terms.⁵¹ Rather, they shared, usually unreflectively, certain moral assumptions with the natural rights tradition. One assumption was that “by nature” everyone everywhere possesses an “inalienable” set of moral rights that are independent of, and prior to, any legal rights temporal governments may bestow, thereby constituting a standard for judging the conduct of government, and especially the administration of force.⁵²

Another assumption was the expectation of standard moral reactions to events of a certain kind. Drafters did not object to the language of the Preamble, “Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind,” because they all shared the view that any other way of assessing the practices of the Nazis before and during World War II was unthinkable.⁵³ More than anything else, it was their common “outrage,” prompted by the “horrors of the war,” and dramatized, particularly, by the Holocaust, that energized and guided the drafting of the UDHR.⁵⁴ In his careful analysis of some of the articles of the UDHR, Morsink shows how the final wording was consciously and specifically formulated in reaction to what were considered egregious violations in regard to taking life, inflicting pain and suffering, enslaving, and so on.⁵⁵ Morsink states that one reason the drafters did not draw on “Enlightenment precedents” is that they “had no need for examples from the Enlightenment The horrors of World War II gave them all . . . they needed to be justified” in producing the UDHR.⁵⁶

Part of the underlying expectation in face of the “outrages” under consideration was an assumption concerning the two-fold foundation of rights language. In the first place, “the drafters surely

50. *Id.*

51. *Id.* at 294.

52. *Id.* at 290–295.

53. *Id.* at 90–91.

54. *Id.* at 27, 91, 300.

55. *Id.* at 36–58.

56. *Id.* at 320.

thought that proclaiming [the] Declaration would serve the cause of world peace,” a sentiment strictly in line with the thinking of Williams and Locke.⁵⁷ However, Morsink continues, “[T]hey did not think of the human rights they proclaimed as only or merely a means to that end.”⁵⁸ They also thought “these rights have an independent grounding [for] the members of the human family to whom they belong and who possess them as birthrights. If this were not so, a government could torture people (or violate any other right) as long as it was thought . . . to serve the cause of . . . peace.”⁵⁹

Morsink does not call attention to a third assumption concerning a connection between natural rights and human rights over the question of freedom of conscience, but a connection would be hard to miss in light of what he says about the understanding underlying the provisions in the UDHR. “There is no presumption in the Declaration that the morality of human rights requires any kind of religious foundation. . . . [T]he drafters went out of their way to avoid having the Declaration make a reference to God or to man’s divine origin. . . . [It] gives everyone total freedom of religion, including the right not to have one.”⁶⁰

As indispensable as Morsink’s discussion is for connecting natural rights and human rights, it is seriously deficient in that he unduly limits the natural rights tradition to the Enlightenment. Thanks to Tierney, we now know how mistaken that view is, as are beliefs that natural rights are to be understood as invariably egoistic and anti-religious.

Morsink also causes confusion when he states that the drafters paid no heed to natural rights thinking since all they needed was their impression of “the horrors of World War II” to feel justified in producing the UDHR. The point is that the drafters’ reaction to the horrors of World War II was a prime example of natural rights thinking. The practices designed and implemented by Hitler and the German Nazi regime exemplified paradigmatically “disregard and contempt” for the fundamental moral prohibitions aimed at punishing and preventing arbitrary force (and its relative, arbitrary neglect). Those prohibitions underlie all three of the common

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 263.

assumptions just laid out between natural rights and human rights: Priority of moral rights over legal rights; the expectation of standard moral reactions to events of a certain kind, including convictions concerning the two-fold justification of basic rights—promoting world peace, and considering the violation of basic rights “wrong in itself”; and the “natural” (secular) grounding of basic rights.

In keeping with our summary of a proposed way of justifying human rights and the relation of human rights to religion, we have argued that a common theme of great importance brings the natural rights tradition and human rights language together. That is a fundamental commitment to a set of moral and legal rights designed to combat and restrain arbitrary force (and arbitrary neglect), whether manifested as inflicting death, suffering, or pain; or failing to prevent or relieve them for purely self-serving reasons; or coercively regulating expressions of conscience, religion; or belief that pose no threat to public order, safety or health. In regard to the subject of religion and human rights, we hope, in a word, to have provided some “ground to stand on.”

