

# **Toward A Rational Definition Of Rights**

**By Roy A. Minet**

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## **Introduction**

What exactly is a right? Is there a definitive list of rights somewhere? Where do rights come from, if they actually exist? Some claim rights are handed down from God, or some other deity. Some say rights arise automatically from nature. Statists of all stripes insist that rights are granted by the state to its subjects. On one hand, many people pontificate at length about rights as though they have concrete knowledge of them; usually, the depth of these people's understanding is inversely proportional to their certitude. On the other hand, a number of thoughtful and intelligent scholars spanning several centuries have pondered the problem without producing any widely accepted conclusion. It seems apparent that the concept of rights remains surprisingly troublesome.

Whether valid or not, the formulation of so-called "natural rights" has arguably been the most influential, useful and beneficial. The key negative individual rights to life, liberty and property arising directly from nature, as developed by John Locke and others, were at the heart of the U.S. Constitution and are central to libertarian philosophy.

It has long been my position that rights, as they are traditionally thought of, simply do not exist.<sup>1</sup> This readily explains the prevailing confusion as well as the failure of several centuries of work to provide a truly satisfying and convincing rationale for the a priori existence of any particular set of rights. The purposes of this essay are to: 1) briefly review the "case" for the non-existence of rights as they are usually thought of; 2) suggest that there is not necessarily any benefit from a listing of theoretical rights, even if it were possible to logically construct and justify such a list; 3) explain what rights really have to be and from where they must originate; and 4) propose an objective definition of rights from which the definition of an optimal set of rights might be logically derived.

## **There Is No Such Thing as a Right**

Proving the negative is a notorious challenge. In reference 1, a non-rigorous thought experiment was employed that may be helpful in this regard. However, it really is incumbent upon those making positive claims as to the existence of some set of rights to support those claims. To my knowledge and in my opinion, no one has yet been successful in that endeavor, nor will they ever be successful. Over the centuries, scholars including (among others) John Locke, John Rawls, Robert Nozick, Friedrich Hayek, Murray Rothbard and (quite recently) Hans-Hermann Hoppe have produced a widely-cited body of work attempting to support "natural rights" as a part of, or as an inevitable consequence of, nature itself. In short, great, perhaps even uplifting, arguments have been constructed atop the premise that natural rights exist, but this premise has yet to be established. John Hasnas has done a comprehensive job of pointing out the weaknesses in the best attempts to justify the existence of a priori natural rights. He concludes his discussion with: "My critique of Locke's and Nozick's arguments does not, of course, suggest that natural rights

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<sup>1</sup> Roy A. Minet, *There Is No Such Thing as a Right* (Unpublished essay, 2009).

theorists cannot supply a secure grounding for Lockean natural rights, merely that neither Locke nor Nozick (nor anyone else that I am aware of) has done so.”<sup>2</sup>

Human beings evolved to possess two mental capabilities that distinguish them from other species. The first of these is the ability to reason and the second is self awareness. It appears that self awareness has come with a built-in tendency to glorify oneself that reason frequently fails to sufficiently counteract. In addition to similar notions, many seem to think that humans are so “special” in the universe that nature provides them with certain inalienable rights. There simply is no rational basis for nature providing rights just for humans. Nature can only be counted upon for the consistent enforcement of the objective laws of physics and the impartial, relentless enforcement of survival of the fittest under these laws. To the extent that people dream up and actually believe things that have no rational basis, they cripple their ability to reason objectively.

### **Natural Rights Would Not Necessarily Be of Any Benefit**

For the sake of discussion, assume for the moment that natural rights really do exist. Is this a wonderful thing?

One could certainly point to the fact that the founding fathers of the United States cited some of what have been considered natural rights in the Declaration of Independence (although they did assert that these were handed down by a deity). What is primarily a set of natural rights is enshrined in the U.S. Constitution. One could somewhat plausibly argue that respect for, and observance of, these rights was responsible for the greatest stretch of peace, progress and prosperity in history, although the period was a bit bumpy and appears to be ending quickly. Similarly, other nations have observed natural rights to varying degrees with results generally beneficial to humans.

However, considering the entire world population over all of recorded history, quite a small percentage of human lives can be said to have benefited substantially from natural rights. Even in the modern world, most people do not appear to derive a great deal of benefit from natural rights. A person deeply believing or vociferously insisting that s/he has some natural (or other) right a few seconds before an armed gang denies that right seems to be a far more common occurrence than is the opposite.

It is obvious that proving natural rights exist (or deriving a list of rights in any other way) is purely an academic exercise unless said rights have some impact (presumably favorable) on human beings. In order to have an impact, rights must be *secured*; that is, some dependable mechanism must guarantee that an acceptably large percentage of people actually can exercise their rights an acceptably large percentage of the time. One can postulate a peaceful society where all members mutually respect the rights (however defined) of others. However, as population increases and/or as time passes, the probability of violations increases and approaches certainty for large numbers of people or long periods of time. History illustrates this fairly well.

There are two general paths by which rights have been “secured.” A strong individual or small group manages to accumulate enough power to dictate to others what rights they may have; or a sufficiently large percentage of a population may agree to define a set of rights along with a

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<sup>2</sup> John Hasnas, *Toward a Theory of Empirical Natural Rights* (Social Philosophy and Policy Foundation, 2005) P124.

power structure designed to secure them. Convincing evidence indicates that the latter has a dismayingly strong tendency to degenerate to the former, at least for structures that have been tried thus far. In any case, it seems apparent that those people who say that rights are conferred by the state to its subjects are quite correct.

### **What Rights Must Be and Where They Must Originate**

Those on board so far will agree that there is no pre-ordained list of human rights either that is a part of nature, that arises directly or automatically from nature, or which has been handed down by some deity. The concept of a right or rights is purely an idea or construct of the human brain. As such, a detailed definition of rights must necessarily come from a human brain or a collection of contributing human brains. A list of rights however derived has no practical value unless said rights are secured by some sort of power structure. There are many who seem to be certain about what rights people should have, and yet disagree with each other. The key question to be answered, then, is: Can a way be found to arrive at a list of rights that a very large percentage of rational people could be convinced is an optimal list?

In his essay, *Toward a Theory of Empirical Natural Rights*, John Hasnas has suggested a refreshing, pragmatic approach. His idea is to examine carefully what rights people actually do decide to secure *when left to do so on their own*. The primary “Petri dish” chosen is Norman England following the collapse of Roman rule in the fifth century. The disappearance of all central authority left the English people in something akin to a Lockean “state of nature” where problems had to be resolved solely through interactions among themselves. Over the ensuing few hundred years, common law arose as a practical and effective means for dispute resolution and violence avoidance. The laws form a detailed definition of rights to be secured and those turn out to bear a striking similarity to the three negative Lockean natural rights of life, liberty and property; no positive rights evolved. (This is an extremely terse summary of the core idea; one really should read the entire essay for its many interesting insights.)

Empirical natural rights differ markedly from “theoretical” rights in several significant ways. Instead of being derived in a “clean room” as an end in themselves, empirical rights developed in the rough and tumble real world in parallel with, and actually defined by, the very mechanisms that secured them. The process was rather Darwinian, with “good” laws surviving and propagating widely while “bad” laws were discarded or mutated. Theoretical rights are, so far, cleanly (simplistically?) defined philosophical entities, while empirical rights tend to be a bit messy. “The empirical natural right to property can only be described in extremely inelegant terms as the right to a great amount of use and control of an object most of the time, with exclusive use and control at some time and no use or control at others.”<sup>3</sup>

Hasnas suggests slipping empirical natural rights in as the foundation under the derivations of limited government from Locke and Nozick. There should not be too much objection to replacing nothing with something. At a bare minimum, empirical natural rights provide an encouraging endorsement of Lockean natural rights, or something very similar to them. Also, empirical natural rights surely should command a lot of respect, having arisen in the real world out of an approximation of the state of nature and having demonstrated that they, *coupled with the associated mechanisms that secured these rights*, provided “pretty good” relief for some

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<sup>3</sup> John Hasnas, *Toward a Theory of Empirical Natural Rights* (Social Philosophy and Policy Foundation, 2005) P135.

obvious human discomforts. A final very good thing is that empirical natural rights in no way depend for their existence upon any moral justification.

Clearly, we are better off with empirical natural rights than we were before with nothing. However, we should not call off any efforts to objectively derive a list of rights that all rational people can agree is “optimal.” There is no way to know whether empirical natural rights are optimal or not. Do they not exactly match Lockean natural rights because they are not optimal or are Lockean rights not optimal? Differing conditions could affect exactly what empirical rights evolve. Perhaps greater accumulation of wealth would result in positive rights evolving (horrors!). Some might even argue that that has actually happened.

### **Toward a Rational Definition of Rights**

The obvious first step must be to define “optimal” in an objective way. My proposal is to base this definition upon human happiness; a formalization of the pursuit of happiness, if you will.

I contend that *every* human being wants to be as happy as possible and that *every* decision or choice an individual makes is solely made on the basis of what that individual thinks will maximize his or her happiness. Humans have evolved the capacity to reason and think about the future, so most are quite able to forego a small amount of immediate happiness if it will result in a large amount of future happiness. So, more correctly, each individual makes each choice or decision so as to maximize the integral of his or her expected instantaneous happiness multiplied by the expected probability of being alive at each instant, from the time of the decision forward.

$$H = \int_{t_0}^{\infty} h(t) p(t) dt$$

In most cases, this is an extremely complex calculation. Some people are amazingly adept at estimating their integral quickly. Others take longer or are rather poor estimators who make decisions as though “there is no tomorrow” or worse.

Someone may ask about “altruistic” choices. Do such choices violate the rule? I claim they do not, and that there, in fact, is no such thing as altruism. Choices which appear to benefit others and not the decision maker still are made because the individual thinks his or her happiness integral will be increased. Perhaps the person greatly values the esteem of the community or perhaps s/he simply derives great enjoyment from helping others. Even under duress, decisions are made the same way. In extreme cases, say, with a gun pointed at your head, the overriding consideration may be increasing the probability that you will still be alive for more than a short time.

Can one person calculate another’s integral? No. An individual’s instantaneous happiness is dependent in a complex way upon the set of values that the individual has adopted, as well as the individual’s history, experiences and outlook on the future; this is sometimes difficult for the individual to calculate and substantially impossible for others. However, for a small set of cases, it is possible for one person to predict whether a specific change or decision would increase or decrease another person’s integral. When one person “knows” another very well, s/he may be able to make such predictions correctly in more than half of the attempts. Or we may be able to make such predictions and be correct more than half the time for people we don’t “know” in very simple cases where it is reasonably safe to assume that a large percentage of people’s integrals

would be changed in the same direction. This is always risky and, in the vast majority of situations, it is so fraught with error as to be worthless or foolhardy.

Now, I am going to suggest that we define an optimal set of rights as those which, when properly secured, result in maximizing the sum of all people's happiness integrals.

$$\sum_{i=1}^n H_i$$

I believe that this is indeed an objective and reasonably rigorous definition that a large percentage of rational people can, at least conceptually, understand. I do not attempt to justify this definition on the basis of any moral considerations, and I don't think doing so is either necessary or useful since morality is entirely subjective and a matter of individual opinion. Pragmatically, one would not expect many objections to defining something aimed at helping people be happy since this is exactly in accord with everyone's built-in primary motivation.

Having adopted a definition based upon a calculation that we can never hope to compute, the challenge now is to deduce more specifically what rights will achieve the maximization of this calculation. First note that the two factors critical to the calculation of each integral are the happiness at each instant and the corresponding probability of being alive at each instant. The probability is always a number greater than or equal to 0.0 and less than or equal to 1.0; it can never be negative, so the sign of the product must always match the sign of the instantaneous happiness. There is not much that we can know about the happiness factor since it is impossible to know how it is computed and there is no good way (except for a special case to be discussed later) to even compare one person's instantaneous happiness or integral with another's. However, we can say that, generally, choices or events that make both happiness and the probability more positive must increase a person's integral; reducing happiness and the probability of being alive will reduce a person's integral.

That is enough to easily land the right to life at the very top of the list of rights that must be well secured. Not securing this right would deal a "double whammy" to substantially everyone's integral. Not only would the probability of being alive be lower, but also instantaneous happiness would be generally reduced by the increased threat of death.

Can a person's instantaneous happiness be negative? Yes. Can someone's integral be negative? Yes. When someone's integral goes negative it means that s/he sees no way to get expected instantaneous happiness back up into positive territory far enough, soon enough and long enough to achieve a positive integral. The only way s/he can maximize the happiness integral under such circumstances is to set the probability of being alive to zero. This is when people decide to commit suicide (presumably after double checking their calculations). It also is the special case that enables us to compare integrals among people, and it only enables us to say that those who have not decided to commit suicide have positive integrals while those who have decided to commit suicide have (or had) negative integrals. From this, we conclude that, along with the right to life, we need to also secure the right to a premature death, if an individual so chooses.

Here, I want to mention the fact that every individual will require some wealth or property to achieve any level of happiness at all, even if this is just the minimal food required to keep the probability of being alive above zero for the immediate future. I would assert that increasing the

wealth or property controlled by an individual will always have the effect of increasing his or her happiness integral, even though this might be a trivially small increase in some cases. I would also assert that a lesser amount of wealth or property available to an individual will always mean that the integral will be smaller, even though it might sometimes be trivially smaller, and excepting any cases where wealth previously possessed was then voluntarily relinquished (gifts).

Next consider what would be the fastest, most direct, most effective and most certain way to make someone, substantially anyone, unhappy. It would be to use force, coercion or the threat thereof either to make them do something they do not wish to do, or to prevent them from doing something they do want to do. Forcibly interfering with the decision making process by which people try to maximize their integrals has the direct and immediate effect of reducing their happiness as well as the longer term consequence of forcing less-than-optimum decisions upon them. People have to be free to pursue their own paths to happiness as they are the ones who have the best chance of maximizing their integral. We can add the right to individual liberty as a solid second on the list of rights.

The fact that force and coercion directly reduce liberty and happiness is a key. From this, we can conclude that the use of force and coercion must be minimized in order to maximize the calculation. I think the addition of this rule supports the deduction of universality. Whatever the final list of rights that may be derived is, it will have to apply universally to all people. First, I would argue that designing and consistently securing “customized” sets of rights for individuals or groups is so difficult that it is practically impossible and unlikely to be successful, especially over a long period of time. But even if a way could be found to implement customized rights, we are still virtually certain to fail. Suppose that we have arrived at a single set of rights that maximizes the calculation when applied to all people universally, and that we then attempt a Pareto optimization by customizing the rights for some subset of the population. There are several considerations that tend to thwart achieving a maximum higher than the original one. First, different rights for different folks will likely cause some general loss of happiness attributable to concerns about fairness. It may also cause conflicts to arise that result in the use of happiness-reducing force or, at least, require force for their resolution. The size and complexity of the mechanism that secures rights would necessarily be larger and entail a greater use of force. This mechanism consumes some wealth for its operation and said wealth must be forcibly extracted from the people. Forcibly removing more wealth reduces happiness both because of the increased coercion and the reduction of property controlled by individuals.

From the above discussion we see that the “overhead” mechanism used to secure rights really needs to be minimized. It will use force to secure rights and it will forcibly remove property from individuals to support its operation; both happiness killers that must be minimized. What rights the mechanism must secure will affect its size/complexity, and that must feed back into the consideration of what rights are to be secured. Just as was true for empirical natural rights, it should be apparent that rational rights and the mechanism that secures them are intimately entwined, and that the mechanism is, in fact, the ultimate definition of the rights. It does not appear that the definition of an optimal set of rights can be considered without simultaneously considering and defining the mechanism that secures them.

Since happiness is generally increased by property, it would be good if people have lots of it. However, the requirement that force and coercion must be minimized constrains how people may acquire property/wealth. An individual may either produce it independently by means of his or

her own labor or s/he may acquire it through force-free exchanges with others that are voluntary on both sides.

Extending from the framework established thus far should enable us to derive and define the limits to liberty and property. From here on, things likely will grow somewhat more complex because, as with empirical natural rights, rational rights likely will not be simple philosophical entities and instead will probably sport some lumps, bumps and exceptions. If/when a rational definition of an optimal set of rights is completed, it will be fascinating to see whether they more closely match empirical natural rights or Lockean natural rights.

## Summary and Conclusion

Several centuries of work has failed to tease a list of pre-existing human rights out of nature in any truly satisfying way. Such efforts are not likely to succeed in the future as there is no rational basis to believe that such rights exist. However, the topic of rights continues to generate much heat and smoke because the securing of a “good” set of rights is of fairly obvious importance to human well being.

The whole idea of rights is nothing but a construct of the human intellect. As a purely human concept, it is entirely up to human beings to define what rights should be. It has recently been suggested that empirical natural rights might be able to fill the void. These were developed, along with the mechanisms that secured them, by many human contributors over a few hundred years with the objective of improving human life. There is no way to know that the rights that so evolved are the “best” set of rights. However, having been optimized by a Darwinian process over at least hundreds of years, and having demonstrated considerable success, one might have some confidence that they probably are “pretty good.”

The author asserts here and in a prior essay that it is past time for us reasoning human beings to step up to the plate and construct a rational definition of rights. One approach to doing this is outlined which attempts to define a set of rights that, when properly secured, would maximize the total happiness of all human beings. The outline is incomplete and fundamentals certainly can be debated. Other approaches may be possible. The main point is to suggest that some effort along these or similar lines is more likely to arrive at a well grounded set of rights that rational people can agree upon than has the centuries of fruitless work in other directions.

The traditional right has been a clean, simple (simplistic?) philosophical entity that has always existed and will always exist unchanging. Empirical natural rights turned out to be a little messy around the edges and do not fit this mold. It might be important to note that such rights could have further evolved and morphed with time and changing conditions. Rationally defined rights might turn out to be most like empirical natural rights. It is conceivable, but unlikely, that they could vary with time. What makes people happy could change with time, but the basic nature of the calculation does not, and it is only upon this that arguments are based. It is fervently to be hoped that a rational definition of rights will turn out to be reasonably easy to understand and explain as well as substantially time invariant. This certainly is possible, even probable. Simple and unchanging rights surely would be easier to secure, and this consideration may itself rule out variability and excessive complexity in an optimal set of rights.

Finally, it is important to again emphasize that rights have zero practical value unless they are properly secured. The force structure that secures rights actually forms the definition of the rights, and therefore rights cannot be considered (for any practical purpose) without also simultaneously considering and defining the force structure that secures them. The mechanisms that have been tried to-date have an awful track record. Much work remains to be done on how to effectively secure rights in a way that remains stable and does not deviate from its intended purpose over very long periods of time. Even if the ultimate optimal set of rights has not yet been defined, creating a good, safe, dependable, minimum overhead mechanism to secure a set of rights known to be “pretty good” would be a great benefit to humankind.