

# The Perils of Positive Rights

[Unpublished]

One of the most powerful ideas in opposition to the free society is what political philosophers call *positive rights*. In contrast to the theory of basic natural rights every individual possesses -- by virtue of having a *human nature* -- positive rights require other persons to engage in involuntary servitude. We also know the doctrine by way of the doctrine of entitlements.

This gist of the idea is that human beings by nature owe, as a matter of *enforceable obligation*, part of their lives to other persons. It is often supported by people who adhere to vastly different political philosophies -- e.g., both the leftist Karl Marx and rightist Thomas Hill Green thought that every one has positive rights the government must to protect. In plain terms this means that both believed governments must force us to serve our fellow human beings, whether or not we choose to do so.

The doctrine of positive rights has served statist well in America because this country was founded on a famous theory of basic human rights, the theory originally developed by the 17th century English philosopher John Locke that every individual human being has the unalienable right to life, liberty and property.

The rights Locke identified -- following several centuries of political and legal thinking during which various theorists have begun to identify them more or less precisely -- are negative. They require that human beings abstain from intruding on one another. That these rights exist means that no one ought to enslave another, force another to act in various ways, or deprive another of property, and that each of us is justified in resisting such conduct when others engage in them. (Ordinary criminal law is grounded on such a theory of individual rights -- murder, assault, kidnapping, robbery, burglary, trespassing, etc., all involve the violation of such negative rights, requiring nothing from anyone but to abstain from intruding on others.)

Those who wanted to retain some elements of the political outlook which Locke's position displaced, namely, the view that people belonged to the country -- were, in fact, subjects of the country's head, the king -- found a way to use the concept of or human rights to advocate their essentially reactionary position. (Yes, Virginia, Karl Marx was a reactionary!) They stole the concept of human individual rights and attached to the idea of wishes or preferences that people often have to gain what others might provide for them. Positive rights are, in fact, nothing more than mislabeled preferences people want the government to satisfy for them.

Of course, if individual rights were no more than expressions of preferences, there would be no end of conflict between our rights. Indeed, there are many conservatives who have some sympathy for elements of classical liberalism, including John Locke's views, who see rights the same way. They embrace the basic view of Thomas Hobbes and David Hume that an assertion of a right, for example, to private property is nothing but a preference for owning something and as such it could be in conflict with some other right, for example, another person's similar preference to own something. That is because for these theorists these assertions are, in the last analysis, no more than expressions of private or collective preferences. Many economists view matters this way, even as they try to oppose the view that we have positive rights or entitlements.

So both some conservatives who deny that rights are natural and modern statist who believe in the existence of positive rights, we find ourselves with the very unhappy situation that perfectly nor-

mal claims to having certain rights are usually in conflict. Governments, therefore, cannot just protect our rights but must pit some rights against other rights. Instead of government having the task of "securing these rights," government invokes some standard by which to tell which and whose rights should get protection. And, as we know well enough, our current politicians believe that positive rights are more important than negative rights, since they want to force people to serve one another -- e.g., by paying for one another's health care.

In the Lockean natural rights classical liberal tradition a conflict of (justified, true) rights claims cannot exist. In this political framework when a claim is made as to someone's having a basic (not, however, legal) right, this claim may be checked out by reference to a correct understanding of human nature. That such an understanding is possible is itself a controversial issue. Yet skepticism here, as in many other cases, stems from a wholly unrealistic conception of what it takes to know something. With the idea that when we know something we have the clearest, most self-consistent, and most complete conceptualization possible to date of what it is we supposedly know, skepticism does not arise.

In any case, the natural rights position sees human nature as resting on our correct grasp of a portion of reality. And with human nature we discover that morality and politics have emerged as new concerns in reality. In this we need to answer a question concerning ourselves, namely, "How we ought to live?" -- since we haven't the instinctual knowledge of other living beings that will just take care of living for us, that will avoid mistakes automatically. Furthermore, we need to answer the question "How should we organize ourselves in communities?"

In both these human spheres of concern we are dealing with reality and just as anywhere else -- say between economics and biology -- no conflict is tolerable between true claims, so in ethics and politics no such conflict is possible. The reason is metaphysical, in the last analysis, justified in Aristotle's defense of the Law of Non-Contradiction, a defense that still hasn't been adequately challenged and the challenge of which will always be self-defeating. In particular, the natural rights classical liberal tradition identifies the rights to life, liberty and property as basic *for human community organization* but not, however, to human life at the personal level. No concern with rights arises on a desert island for Robinson Crusoe. Only among strangers, in larger communities, does the issue of how we ought to treat one another become pre-eminent and thus of great significance for political and legal purposes.

From the right to life and liberty there emerges, with suitable analysis, the right to private property. It rests on two considerations: (a) human beings require sphere of individual or personal jurisdiction, so that they may carry out their moral responsibility to choose to do the right thing; (b) the choice to acquire valued items from nature of trade is a moral responsibility, the exercise of the virtue of prudence.

Any bona fide political system must be organized in large measure so as to protect the rights to life, liberty and, in the practical respect of both of these, the right to private property. Thus any political rights -- to be free to engage in decision making *vis-à-vis* political matters -- must not violate those basic rights. Political rights include the right to vote, serve in government, take part in the organization of political campaigns, etc. Practically speaking, the exercise of one's political rights may have an impact on who governs, various internal rules of government, and the organization of political processes. But there is no political right to override anyone's right to life, liberty or property. Any evidence of some community's legal system overriding these rights is ipso facto evidence of the corruption of that system from a bona fide political one into one of arbitrary (even if majority) rule. Indeed, one of the failings of contemporary conservative legal theory is not to appreciate the intimate connection between

Lockean individualism and democracy. Because of this, many think democracy may trump our basic rights.

The main reason that founders established a government that was to secure our rights is that they agreed with Locke and a few others throughout human history that a just society has to abide by individual rights, lest our basic nature as moral beings, with the personal responsibility to govern our own lives, is violated. With the introduction of the perversion known as positive rights, it has become impossible for government to govern by a set of consistent standards that had been provided by the theory of individual rights. Positive rights must be in inherent conflict. And they conflict, most of all, with our basic negative rights to life, liberty and property. In the last analysis, the doctrine of positive rights leaves government free to impose its arbitrary standards of government -- one day it is to help AIDS research, the next to foster the arts by supporting Public Broadcasting Service, and the following day it is to solve the problem of immoderate smoking habits among the citizenry. No standards of restraint apply -- indeed, as in a fascistic system, anything goes the leaders think is important. The only difference is that the leaders still abide some modicum of democracy.

As we judge communities across the globe, we must keep in mind that what is comparatively best is not always the best that is in fact possible. Thus we can affirm the greater merits of certain political communities or countries despite their evident violation of basic rights. Just as in personal assault cases we can distinguish between major and minor cases, as well as those in between, we can also tell when communities rest on principles that render those systems entirely corrupt, those that simply are confused and messy, and those that come reasonably near to meeting the standards of basic human rights. In a formal way we already apply this method of judging communities, even if not for all purposes. We should go much farther and apply it more strictly and substantively, including as we appraise our own country's laws.

It would behoove us all to make sure that the doctrine of positive rights receives what it deserves: carefully articulated and unmerciful lambaste from us all. With its demise the more humane idea that we have certain moral responsibilities to others we ought freely choose to carry out will gain greater impact on our society, thereby fostering the solution of problems that the advocates of positive rights only pretend to tackle, however benign their intentions may be.