Introduction

The Introduction is divided into three parts. The first section constitutes, it is hoped, a perspicuous summary of the arguments regarding the justification of human rights and the relation of human rights to religion that underlie the essays in this book.[1] The second section provides some background and elucidation of key ideas. The third section provides a brief description of the relevance of the central themes introduced in the first two sections to the various essays in the book.

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."[2]

[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] Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law, 1150–1625* (Atlanta: Scholars Press, 1997), 76. "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," *Dictionary of Christian Ethics*, ed. by John MacQuarrie (Philadelphia: Westminster Press, 1967), 225. The phrase, "superanimal sensibilities and capabilities," is important. Given that the capacity for sentiency is common to human beings and animals, some rights, such as a right against cruelty, also apply to animals and may be claimed on their behalf. But the full range of human rights, including equal protection of rights to "freedom of conscience, religion, or belief," legal due process, freedoms of speech, assembly,

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 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, destruction of property, and involuntary confinement 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, and so on, is "morally incomprehensible" because the reasons given are no reasons at all.[3] That is because the natural aversion to force gives everyone a very good reason to avoid or resist it, and appealing purely to self-interest as a basis for inflicting force does not even address, let alone override, such a strong reason. As an attempt at justification, such an appeal is simply irrelevant. The same is true where unfounded or mistaken reasons are offered. 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*

participation in government, and so on, are, of course, unique to human beings. They make sense only if there is what Locke called the capacity for "abstract rationality" or what Calvin designated the ability "to comprehend the principles of the law." As natural rights developed in the Western Christian tradition, they have been considered "minimal" or "vestigial" in that they are "left over" after "the fall," or the willful defection of human beings from divinely appointed standards of human fulfillment. Implied is that human perversity and limitation are, as it were, "baked into" the idea of natural rights. As such, natural rights provide imperatives of moral restraint and guidance that are necessary but by no means sufficient for human fulfillment.

3 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 because 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 so described *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 in *Rights of War and Peace* (Westport, CT: Hyperion Reprint, 1979), 92–94.

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, perpetrated by a gunman acting as he pleased, is necessarily regarded as an instance 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.

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 (ICCPR) as "nonderogable" (nonabridgeable) rights, which protect everyone against the worst forms of arbitrary force: extrajudicial 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 required.[4] This list should include what are called, "atrocity 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,[5] are all egregious examples of arbitrary force. In addition, there is an important connection between human rights law and the law of armed combat or "humanitarian law," as exemplified in the Geneva Conventions of 1949 and, particularly in Article 3, common to all four conventions. That article enshrines nonderogable human rights protections against such things as "violence to life and person, murder of all kinds, mutilation, cruel treatment or torture," and so on.

[4] Articles 6, 7, 8.1 and 2, 11, 15, 16, and 18 explicitly identified as nonderogable, appear in Article 4.2 of the ICCPR. The prohibition against discrimination is mentioned in Article 4.1 and in the context may also be assumed to be nonderogable.

[5] Statute of Rome, Articles 5, 6, 7, and 8. 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" that regularly exemplified self-serving uses of force.

Beyond these provisions, there is no comparable list of nonderogable rights in the International Covenant on Economic, Social, and Cultural Rights, 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 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."[6] Failure to enforce these obligations, where feasible, would constitute *arbitrary neglect*, a close relative of arbitrary force.[7]

3. It adds a set of "derogable" rights (abridgeable under only the most extreme circumstances, such as emergencies), as, for example, 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

[6] 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." Committee on Economic, Social, and Cultural Rights, General Comment 14, The right to the highest standard of health (Twenty-second Session, 2000), reprinted in a compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev/6 at 85 (2003).

[7] Although the subject of "arbitrary neglect" is referred to in a number of the essays in this volume, it is by no means developed to the degree it needs to be. The arguments worked out in Chapter 1 and elsewhere focus primarily on the "civil and political rights" aspect of human rights language. I believe, as I hint here and there, and as I think representatives of the natural rights tradition clearly held, that the same basic arguments employed in Chapter 1 can, with some adjustment, be applied to the question of economic, social, and cultural rights. However, I readily concede that those of us who advocate such arguments bear the burden of proof. It is the new thinking by the Committee on Economic, Social, and Cultural Rights in respect to the "nonderogability" of certain basic economic and social rights that has prompted me to appreciate the need to expand the arguments in this book to include more explicitly economic and social rights. To be sure, there already exist some good general studies on the subject; for example, William F. Felice, *The Global New Deal: Economic and Social Human Rights in World Politics* (New York: Rowman & Littlefield, 2003), and George Kent, *Freedom from Want: The Human Right to Adequate Food* (Washington, DC: Georgetown University Press, 2006).

[8] The Preamble of the UDHR states, "The General Assembly proclaims this [document] as a common standard of achievement for all peoples and nations, *to the end that every individual*

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" – "outrages," that is, against the "conscience of humankind," in the updated language of the Preamble to the Universal Declaration of Human Rights (UDHR), and they are also a severe threat to "peace in the world," as the Preamble also says.

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 morals[9] – 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 on 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 on 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

and every organ of society, . . . shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance" (italics added). Similarly, the Preambles of the ICCPR and the ICESCR state, "*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, ..." *Considering* the obligations of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms" (italics in original).

9 See Article 18.3, ICCPR. It is not clear that the term "public morals" has any determined meaning in human rights jurisprudence.

impair . . . freedom to adopt a religion or belief of [one's] choice" (Art. 18.2, ICCPR).

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 Article 18 of the UDHR and ICCPR, introduces what I call a "two-tiered" system of justification.

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.[10]

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; 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

[10] Brian J. Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century* (New York: Cambridge University Press, 2011).

rights jurisprudence.[11] 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.[12] In that way tier two serves to limit the reach of tier one and to be a reminder 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" (Art. 18.3, ICCPR).

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, but 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 that his administration would ignore human rights altogether. But gradually it 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 much more attentive to the abuses of the communists than of their anticommunist opponents.

The intense and continuing debates between Carter and Reagan supporters at the time peaked 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

[11] Human Rights Committee, General Comment No. 22, para. 11 in Tad Stahnke and Paul Martin, eds., *Religion and Human Rights: Basic Documents* (New York: Center for the Study of Human Rights, Columbia University, 1998), 94.

[12] Ibid., para. 8, 93–94.

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"[13] – 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, and that conclusion was supported by an influential essay on natural rights written in the same year by Margaret Macdonald.[14] Subsequently, similarly skeptical statements appeared up into the 1980s, advanced by figures such as Alasdair MacIntyre[15] and Richard Rorty.[16]

In the midst of all the controversy, I, however, remained unconvinced by the opposition to the idea of natural rights. In 1986, I published an essay on natural rights and human rights,[17] reexamining the ideas of John Locke (1632–1704) in some detail and arguing that Locke's natural 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,

[13] Margaret Macdonald, "Natural Rights," in A. I. Melden, ed., *Human Rights* (Belmont, CA: Wadsworth Publishing Co., 1970), 40.

[14] Ibid.

[15] Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame, IN: University of Notre Dame Press, 1981), 67.

[16] Richard Rorty, *The Consequences of Pragmatism* (Minneapolis: University of Minnesota Press, 1982), xlii–xliii.

[17] David Little, "Natural Rights and Human Rights: The International Imperative," in Robert Davidoff, ed., *Natural Rights and Natural Law: The Legacy of George Mason* (Fairfax, VA: George Mason University Press, 1986), 67–122.

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."[18] 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."[19]

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 Vlastos[20] and Thomas Nagel[21] about the nature of the conditions under which pain may or may not be inflicted or relieved. Commenting on the education of youth, Locke denounced 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."[22] The implication, supported by the suggestions of Vlastos and Nagel, is 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

[18] John Locke, *Two Treatises of Government* (New York: New American Library, 1965), Second Treatise, ch. II, sect. 13, 316–317.
[19] Locke, ibid., First Treatise, ch. 4, sect. 42, 205–206.
[20] Gregory Vlastos, "Justice and Equality," in Richard B. Brandt, ed., *Social Justice* (Engelwood Cliffs, NJ: Prentice-Hall, Inc., 1962), esp. 51.
[21] Thomas Nagel, "Limits of Objectivity," in Sterling M. McMurrin, ed., *Tanner Lectures on Human Values* (Salt Lake City: University of Utah Press, 1980), esp. 108.
[22] James L. Axtell, *The Educational Writings of John Locke* (Cambridge: Cambridge University Press, 1968), 226–227.

obligations 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,"[23] 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[24] 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]

Around the time this 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 the 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

[23] UDHR, Article 2.

[24] By implication, any appeal to reason under a system in which "whatsoever [a person in command] does . . . must be submitted to" is illicit. An appeal to reason is in principle subject to correction and need not be submitted to unless it passes certain common standards of "good reasons" shared by commander and commandee.

[25] Locke, *Two Treatises of Government*, Second Treatise, ch. II, sect. 13, 316.

[26] Ibid., ch. II, sect. 7, 312.

[27] David Little, "Roger Williams and the Separation of Church and State," in James E. Wood, Jr., ed., *Religion and State: Essays in Honor of Leo Pfeffer* (Waco: Baylor University Press, 1985), 3–23.