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HAYEK AND NATURAL LAW:  
GROUNDING SOCIAL INSTITUTIONS IN HUMAN ACTION AND MORALS

A Thesis  
Presented for the  
Master of Arts  
Philosophy  
The University of Mississippi

Ethan Davis

May 2020

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## ABSTRACT

Friederich Hayek's *The Constitution of Liberty* provides us with a theory of freedom, one that seeks to minimize coercion in the name of progress. The concept of progress is the grounding for Hayek's entire theory. It ultimately provides the value of both liberty and those things which derive their value by preserving, promoting, and constituting liberty, such as rights and laws more generally. The problem is that progress is an ill-defined concept because Hayek's descriptions of it are so vague that it cannot provide any satisfying explanation of why progress itself is desirable and, consequently, why we should promote liberty and rights. My solution to this problem is to present John Finnis's theory of natural law (as given in *Natural Law and Natural Rights*) in order to provide explicit content to the idea of progress. Using natural law's emphasis of basic goods such as life, knowledge, and sociability, I show why progress and its derivatives are, in fact, desirable. In particular, I focus on the problems this lack of grounding presents for rights and how natural law's focus on practical reason can provide moral principles by which we can distinguish good rights from bad ones.

## DEDICATION

This work is dedicated to my brother, Brandon S. Davis.

His life showed me more than he ever knew.

## ACKNOWLEDGMENTS

Generally, I owe great thanks to the Department of Philosophy and Religion at the University of Mississippi. The professors and fellow students there greatly shaped the development of this paper and helped smooth many of the rough edges which I could not see myself. In particular, I thank my thesis advisor Dr. Robert Westmoreland for the many conversations about the luminaries we both admire, as well as his generous comments on previous drafts. I also thank Dr. Steven C. Skultety who has encouraged my academic career and continuously reminds me that tact and civility are values to be cherished. Finally, I thank my thesis committee for graciously listening to my ideas during turbulent times. May liberty and human flourishing prevail.

Table of Content

ABSTRACT-----ii  
DEDICATION-----iii  
ACKNOWLEDGEMENTS-----iv  
INTRODUCTION-----1  
LIBERTY, PROGRESS, AND THE MOTIVATION PROBLEM-----5  
RIGHTS AND THE MORAL PROBLEM-----10  
THE NATURAL LAW SOLUTION-----16  
CONCLUSION-----23

BIBLIOGRAPHY .....25

VITA.....27

## INTRODUCTION

The problem before us is one of value. The primary political concepts which we shall discuss—rights, liberty, and progress—are all connected to each other through a chain of value. Rights are only good insofar as they protect liberty, which is only good insofar as it promotes progress. We owe this chain to Friedrich Hayek. For it is in *The Constitution of Liberty* (hereafter CL) that this chain is described, though not explicitly.<sup>1</sup> By and by, we wish to know what progress is and why it is desirable. If we can know the value of progress, we can know the value of liberty and, hence, answer important questions about rights. As often happens, this topic seems rather abstract at first, but the implications for our lives are immense.

The question of rights is the one with the most consequential bearing on our everyday lives and is our chief motivation in solving this problem. It seems that each day brings a new debate about what we do and do not have a right to do. Do white supremacists have a right to march on college campuses? Do women have a right to seek an abortion? Do the faithful have a right to gather during a pandemic? What answering these questions requires is a limiting principle for rights, meaning a principle which tells us why we should have some rights rather than others. Making sense of what a limiting principle is and how it functions in this case requires a robust theory of rights. Fortunately, our task is not to develop such a theory; we need

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<sup>1</sup> We should not be surprised that Hayek never placed rights, liberty, and progress in explicit conjunction. If he had, he would likely have noticed the problem which this paper addresses.



only describe one which already exists. Classical liberalism (not to be confused with the modern sense of the word ‘liberal,’ meaning a person of the political left) is just such a theory, and its greatest champion in the 20<sup>th</sup> century, Hayek, will be our guide.<sup>2</sup>

According to classical liberals, rights are a kind of social institution. That is, they are generally agreed upon behaviors in certain contexts. We will flesh out this idea much more in Section I, but we should immediately flag that a rights-as-social-institutions approach allows for a great deal of variety and granularity. We can have rights that are of different kinds, that have different functions, that are or are not codified, etc. We should always avoid narrow understandings of social institutions that reduce all of them to mere social norms. Which side of the sidewalk to walk on (a social norm) is *one kind of* social institution, but so is marriage and promise-keeping and many of the other more complex and more important forms of group behavior in which we participate.<sup>3</sup> Rights are social institutions that are not only deeply ingrained in societies but also complex, requiring careful analysis to discover what is and is not contained within the institution.<sup>4</sup>

Hayek is a wonderful expositor of this view, but his account is incomplete. Like all classical liberals, Hayek views rights as social institutions and an important part of liberty. His view can be roughly summarized by stating that the most important institutions become what we call rights. Unlike others, though, Hayek avoids relying on morality as a grounding for liberty

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<sup>2</sup> I will use the terms ‘classical liberalism,’ ‘liberalism,’ and the related forms of these words interchangeably.

<sup>3</sup> This does not mean that mere social norms are not institutions. It does, however, mean that the difference between mere social norms and rights is large, just as the difference between a garden and the agricultural system is so great that it makes more sense to think of them in very different ways, even if the same basic thing—planting seeds and harvesting them—is at play.

<sup>4</sup> We should also caution against conceiving of social institutions as mere agreement. Though institutions may rightly be conceived as partly constituted by psychological phenomena such as expectations, they are certainly not *solely* within the mind.

and thus for rights as well. He does not claim that liberty is a moral good; he claims that liberty is good because it promotes progress. Unfortunately, just what progress is and why it is valuable is something very much unclear. This lack of grounding leaves us unmoored when it comes to analysis and defense. As we will see, it becomes incredibly difficult to figure out how to reject intuitively bad social institutions without a grounding, which means that we lack justification (i.e., a limiting principle) for why some rights should stay rather than others.

We can only address these issues if we tackle two prior but related topics: human action and morality. Due to the ambiguity of ‘progress,’ Hayek’s approach ultimately fails to give us sufficient explanation of why liberty is valuable. Call this ‘the motivation problem.’ Liberty’s to-be-pursued quality only comes if we first outline some normative principles of human action that tell us what progress is and why liberty is important for us. Because liberty itself is insufficiently motivated, we cannot answer pressing questions about rights. What rights are is an easy topic for us: they are social institutions. What rights we should and should not have is something we do not know, and we cannot answer this question by appeal to an unmotivated concept of liberty.<sup>5</sup> A normative question requires a normative answer, which means that we need a moral basis upon which to separate good rights from bad ones. Call this ‘the moral problem.’<sup>6</sup>

My contention is that a natural law theory, which seeks to establish basic values that all humans pursue and derive morality from them, is uniquely suited to solve these problems. John

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<sup>5</sup> A related question is “What rights do we in fact have?” Though this question is difficult, it does have an answer for the classical liberal. We have a right to  $\phi$  insofar as there exists a sufficiently important social institution of which  $\phi$ -ing is either a part or the entirety of the institution. Fleshing out such a statement would be fascinating but is only tangential to our concerns and is thus well beyond the scope of this paper.

<sup>6</sup> Distinguishing these issues by the terms ‘motivation’ and ‘moral’ is merely an attempt to provide a somewhat explanatory name to each. We need not accept this nomenclature, nor should we forget that the essential problems as to how rights relate to liberty and how liberty relates to progress are *both* grounding problems.

Finnis' *Natural Law and Natural Rights* will be our source here. Natural law theory as presented by Finnis is amenable to classical liberalism, but it is not a replacement. Not all aspects of natural law, nor indeed all natural law theorists, are friendly to liberalism. We must keep it ever before us that our goal is not to show that Hayek was or should have been a natural law theorist. We instead aspire to show that Hayek's theory is 1) incomplete and, therefore, vulnerable and 2) amenable to a natural law solution.

We shall proceed as follows. In Section I, we will define liberty and argue that its value is derived from progress. We will then demonstrate that progress is so ambiguous that we cannot make sense of the value of liberty. In Section II, we will define rights and show that the grounding problems for liberty also affect rights, preventing us from sorting the good social institutions from the bad. In Section III, we will offer natural law as a solution to both of these problems.

## I. LIBERTY, PROGRESS, AND THE MOTIVATION PROBLEM

Though the impetus for our project is first and foremost to help us decide among rights, we must first discuss liberty. The main reason for this is that, until we understand the problems attendant to liberty and progress, we have an “easy” answer to the problems of rights. If we wish to know which rights we should and should not have, we can simply say that we want those that help promote liberty. We are attempting to head off this response at the pass by showing that we do not know why liberty is something we should promote. More specifically, we do not know why liberty as Hayek presents it is valuable.

### Section I.I: What is Liberty?

Liberty is a minimum of coercion, that is, “[t]he state in which man is not subject to the arbitrary will of another or others” (pg. 58).<sup>7,8</sup> You have liberty insofar as others do not have the power to impose their will upon you arbitrarily, to manipulate the circumstances so that the least disagreeable option available to you is the one orchestrated to comply with their desires rather than your own. Such manipulation of circumstances can include everything from government intervention to a highwayman demanding money at gunpoint.

Liberty, then, is a characteristic of social and political arrangements measured by how

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<sup>7</sup> This is similar to Isaiah Berlin’s comments: “It is only because I believe that my inability to get a given thing is due to the fact that *other human beings* have made arrangements whereby I am, whereas others are not, prevented from [some action] that I think myself a victim of coercion or slavery” (emphasis mine, 1969, pg. 3).

<sup>8</sup> Though liberty increases as coercion decreases, maximizing liberty is not logically equivalent to minimizing coercion since liberty requires other things, namely robust social institutions, to exist. However, it seems safe to follow Hayek and use the phrases as if they are equivalent so long as we remember this caveat. In any case, Hayek seems to have preferred to couch liberty in terms of minimizing coercion: “I know of no way of preventing coercion altogether and...all we can hope to achieve is to minimize it or rather its harmful effects” (1981).

well we can plan our lives against a backdrop of possibilities for action. “The law tells him what facts he may count on and thereby extends the range within which he can predict the consequences of his actions... This means that what he is allowed or required to do must depend only on circumstances he can be presumed to know or be able to ascertain” (pg. 225). We have more liberty when we are free to plan our lives in the absence of coercion. This planning component is what makes law and social institutions constitutive of liberty. Part of what it means to be free in this sense is to rely on broad agreement of what actions are and are not permitted, thereby making coercion unnecessary. What laws and social institutions do is give us frameworks that create stability so that we can better plan.<sup>9</sup>

To plan is to use our knowledge effectively. “The rationale of securing to each individual a known range within which he can decide on his actions is to enable him to make the fullest use of his knowledge, especially of his concrete and often unique knowledge of the particular circumstances of time and place” (pg. 224). Hayek’s point is that the knowledge that we have of our lives is unique and something that only we possess and, as such, something which only we are in a position to use best. However, the effective use of our particular knowledge rests on other people doing the same, which creates a network of knowledge no one can fully understand. As a result, most of what we do in our daily lives relies on events of which we know nothing. “It might be said that civilization begins when the individual in the pursuit of his ends can make use of more knowledge than he has himself acquired and when he can transcend the boundaries of his ignorance by profiting from knowledge he does not himself possess” (Hayek pg. 73). We

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<sup>9</sup> See Feser (2003) for an in-depth discussion of Hayek’s views on the role law and tradition play in creating stability. See also Budolfson (2018) and Ostrom (1990, 1998, 1999, 2010, 2007) for how social arrangements can produce stability absent formal systems of authority such as law.

should always remember that ‘knowledge’ is an exceptionally broad term for Hayek; it means not only explicit propositional knowledge but also know-how and the past experience of centuries and millennia passed down through traditions.

Liberty, then, is the state at which broad agreement in the form of social institutions allows us to outsource an enormous amount of work. “The manner in which we have learned to order our day, to dress, to eat, to arrange our houses, to speak and write, and to use the countless other tools and implements of civilization, no less than the “know-how” of production and trade, furnishes us constantly with the foundations on which our own contributions to the process of civilization must be based” (pg. 86). We build on what has come before, and this is why social institutions are so important. They allow the transmission of knowledge from one generation to another, which means that each generation does not have to learn anew what its predecessors already discovered. Put another way, liberty allows people to make the best use of their knowledge.

### **Section I.II: Progress and the Motivation Problem**

We now must ask what it is that makes liberty valuable. Liberty is the state in which coercion is minimized, which allows people to make the best use of their knowledge. It is hard to overstate Hayek’s insistence on any one individual’s ignorance of the system of which she is a part and the need to allow individuals to use their unique knowledge. “If there were omniscient men, if we could know not only all that affects the attainment of our present wishes but also our future wants and desires, there would be little case for liberty” (pg. 81). He then goes on to say that “we want [liberty] because we have learned to expect from it the opportunity of realizing many of our aims” (pg. 81). We should be clear that Hayek is not making a pragmatic (that is,

related to our interests) or subjectivist case for liberty here. He is not merely saying that liberty is good because it gets us what we want. He thinks that liberty does gain its value from something objective, namely, progress.

Liberty is not a good-in-itself; it is only progress that makes it worth preserving. The complex system of knowledge use and transmission fostered by liberty allows us to move forward in some way. Progress does not come in the form of any “striving by known means toward a fixed aim” (pg. 94). Hayek, in fact, prefers the term ‘evolution’ because we do not know at any point what comes next. Progress encompasses advances of all kinds. We progress when we discover new material goods, new cultural treasures, new ways of doing something. It was progress when the materials for the piano were invented, when the piano was assembled, when music for it was written, and when an artist performed that music. ‘Progress’ clearly does an enormous amount of work here. But, what is it?

The answer to this question is something at which Hayek only gestures. The clearest definition is the following: “What matters is the successful striving for what at each moment seems attainable. It is not the fruits of past success but the living in and for the future in which human intelligence proves itself. Progress is movement for movement’s sake, for it is in the process of learning, and in the effects of having learned something new, that man enjoys the gift of his intelligence” (pg. 95). Even though this passage is beautiful, it is rather uninformative. Hayek seems to be gesturing at some form of teleology, though that term may be controversial in this context. There is just something about humans that makes progress worthwhile. We are driven to “movement for movement’s sake” because we are hardwired in that way.

This answer is pointing in the right direction but is entirely insufficient. Unless we are

willing to regard the human tendency to progress as a brute fact, we cannot answer our questions about the value of liberty. Saying that liberty is valuable because it tends to promote progress only moves the question up a level; it does not answer it. Attempts to explain liberty as a value lead us to highly subjectivist camps because we have to say that people merely prefer progress rather than not. As we shall see, this problem not only affects liberty but also the means by which we secure it.



## II. RIGHTS AND THE MORAL PROBLEM

We will now turn our attention to rights and the problems previously adumbrated. The grounding problem of rights is most basically that we need a way to show why some rights are good while others are bad. If rights are social institutions, we need a way to show why some institutions should be allowed and others should not. In general terms, we might appeal to liberty as a good, but we do not yet know what goodness liberty has to offer, what desirability makes it preferable to the alternatives, at least in the abstract. As we discuss rights, we will bring to light Hayek's comments on morality and show how the lack grounding for liberty is also a problem for rights.

### **Section II.I: What are Rights and What Do They Do?**

For Hayek, and indeed all classical liberals, rights are *individual* rights. The individual, on a liberal view, is a primarily social creature “whose whole nature and character is determined by [her] existence in society” (Hayek 1957, pg. 6). It should be immediately stated that this characterization is not meant imply any socialist, communist, or collectivist elements. In fact, it is the erasure of the moral and political significance of the individual in favor of the collective that liberals abhor. Rather, the social and empirical conception of an individual is contrasted with the abstract, purely rational conception championed by philosophers such as T. H. Green and Jean Paul Sartre. The former view means that the many ways people lead their lives will be in large part based on traditions no one individual can establish or efface, and a great deal of deference should be paid to those traditions. The latter view demands a rational demonstration of

the legitimacy of any societal element before it is accepted, and the rational faculty of the individual rises paramount to all tradition. This disdain for what came before is that which turns men into Burke's "flies of a summer," isolated from the knowledge and purpose that make progress possible.

Rights are social institutions that assign to us a known sphere of influence. Most rights are not, in fact, singular institutions. They are bundles of expectations and behaviors. Property rights, for instance, are not as simple as "you own what you buy, create, and inherit." There are a large number of contingencies recognized in law and tradition that restrict that statement, such as the doctrine of adverse possession. That being said, rights are so well established both in common practice and in law that they allow us to predict how others will react to our actions.

This means that rights are not logical derivatives of human nature or something "God-given." They are evolved tools that we use to coexist and benefit from one another. When we give the most fundamental social institutions (freedom of speech or of religion, say) the status of rights, we prevent their erosion and thus go a long way toward securing liberty.

The exact nature of these institutions is difficult to formulate for many reasons. One obstacle is that social institutions are malleable; they must adapt to changing circumstances or fall out of use. Another problem is that social institutions are often not explicitly known or considered by those who use them. This fact, of course, serves only to reinforce Hayek's point that we are ignorant of large parts of those things that make our lives possible

Despite these difficulties, Hayek does offer some helpful comments. As to what determines the specific content of a right, Hayek says if "people are to make the best use of their knowledge and capacities and foresight, it is desirable that they themselves have some voice in

the determination of what will be included in their personal protected sphere” (pg. 206) What having a voice looks like is complicated and involves the interaction of several institutions. First, a person can accept or deny a certain right and add a bit (albeit an infinitesimal bit) of determination to an institution. Second, a person can actively stop the proliferation of an institution to others, children and friends, say. Third, a person can use one institution (i.e., right) to attack a another one, such as voting for or against an amendment to a constitution.

A final characteristic that we should mention is that rights are general. Free speech, for example, is only useful or empowering as a right if it does not tell us which speech is allowed. The sheer number of possibilities for speech makes it far easier to say what kinds of speech are prohibited, e.g., defamation. Rights cover a range of possible cases and must remain general to be useful.

## **Section II.II: Morality and the Grounding Problem**

We are now at the main point of our argument and can summarize what has come before as follows. Liberty, for all of its dignity, is not valuable in itself. As Hayek presents it, liberty is the key to progress, which is the real benefit. Progress is “movement for movement’s sake” and the process by which “man enjoys the gift of his intelligence.” Exactly what this means is unclear, but it seems to assume some theory of human action, some explanation of motivation and desire that makes progress worth pursuing, perhaps even on its own terms. Liberty, then, is to be secured because we want progress. Rights are both causal of and constitutive of liberty. They are social institutions which protect us by assigning to us certain spheres of influence so that we can plan our actions and thus take advantage of and participate in progress. This requires that we be free from the arbitrary coercion of our fellow men. Given all of that, the practical

question is what rights should we have to promote liberty?

And that question is where the problems truly begin. Saying rights should be only those institutions that promote liberty and thus allow us to enjoy the gift of our intelligence is (pace Hayek) useless. Just as justifying a public policy by simply appealing to the “greater good” is unhelpful, so too does promoting movement for movement’s sake leave us with more questions than answers. What we need is an understanding of progress that does not leave us unable to distinguish between types of lives. Clearly, Hayek wishes to rule out certain types of living, e.g., the murderous highwayman, but he does not offer an idea of human flourishing or goodness to achieve this goal. We only have ‘progress.’

It is here, at the level of rights, that we see this problem fully. David Sobel (2018) points out that non-moralized conceptions of rights—that is, conceptions that do not take rights to have a moral justification—create enormous problems. If we ask why we should not have a right to murder, our initial response is that it is morally wrong. However, Hayek does not give us this option. We cannot say that progress (and, therefore, rights) rules out murder because “movement for movement’s sake” is too vacuous. We need to know which actions should be protected and which prohibited. In other words, we are attempting to apply general normative principles of human action to specific social institutions, which in the final tally is a moral task.<sup>10</sup>

An example can help illustrate the nature of our project. In the Antebellum South, white southerners had a right to own slaves. This right was well established within both society and the legal system: the infamous Supreme Court case of *Dred Scott vs. Sanford* proves as much. How are we to condemn slavery given what has come so far? We might say that this right should be

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<sup>10</sup> In fact, Steiner refers to rights as “normative allocations of liberty” (2018, pg. 77).

prohibited because it conflicts with liberty, but the nature of Hayekian liberty is attuned to the idea of progress. What prevents us from saying that intelligently crafted subjugation allows us to progress more overall? Or why assume that all men should enjoy the gift of their intelligence, especially if taking it some a few benefits the many? Without knowing more about progress, we cannot appeal to liberty, and (from a theoretical standpoint) we cannot properly limit the kinds of rights that are to be allowed.

So, what does Hayek say about morality? The short answer is that we inherit our morality, which explains why it can change throughout history.<sup>11</sup> We receive from birth instruction in what we might call basic moral precepts that have a powerful sway over our minds and seem quite “real,” more “real” than other social conventions. Remember, we are individuals “whose whole nature and character is determined by [our] existence in society.” This feeling—the ‘emphatic ought,’ as Philippa Foot (2011) calls it—is actually quite good because it deters us from upending traditions, which make liberty possible. “It is indeed the truth, which all the great apostles of freedom...have never tired of emphasizing, that freedom has never worked without deeply ingrained moral beliefs and that coercion can be reduced to a minimum only where individuals can be expected as a rule to conform voluntarily to certain principles” (pg. 123).

To be clear, Hayek is not a cultural relativist. He takes the preservation of some moral beliefs over time as evidence of their independent value (Feser 2003). Furthermore, cultural groups compete with each other for survival and flourishing. Over time, it stands to reason that the cultures with the right beliefs will continue to thrive, while those who do not will die out. The idea seems

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<sup>11</sup> This is clearly a gloss on a much more sophisticated take on the role of traditions. For a more in-depth look at the role of rules of conduct, see Part I, Chapter 4, Section 6 of CL.

to be that this evolution is some kind of discovery method for correct moral beliefs. Presumably, that independent value which traditions have—evidenced by longevity—is also aimed at progress. Traditions are good when they promote progress, just as liberty is good because it promotes progress.

However, Hayek also repeatedly states that the moral beliefs that guide civilizations change and that this change is part of progress. If social evolution once more produced the widespread belief that slavery is good, what would make it bad? We just don't know enough about progress to be able to say. Furthermore, if values can change to seemingly any degree over the course of time, why should liberty not be devalued as a matter of course? It seems that we are left with a soured cultural relativism. After all, if our moral beliefs are *only* social institutions, why believe that liberty and progress are not mere subjective preferences? Clearly, we have a grave problem.

### III. THE NATURAL LAW SOLUTION

#### Section III.I: Human Action and Basic Goods

Natural law theories are often derided for their reliance on a naturalistic fallacy. The accusation is that they attempt to draw conclusions about morality based on claims about human nature. We should f because our (non-normative) natures are such that f-ing is good. This line of reasoning is certainly fallacious because it derives an ‘ought’ from an ‘is,’ and it is important to address this concern now. In *Human Law and Human Justice*, Julius Stone raises the issue this way: “Have the natural lawyers shown that they can derive ethical norms from facts?” And John Finnis’ answer is brisk: “They have not, nor do they need to, nor did the classical exponents of the theory dream of attempting any such derivation” (pg. 33).<sup>12</sup> Despite a worrisome trend that has lasted until modern day,<sup>13</sup> natural law theory in its classical form made no such commitments, and we will happily stick to this form as expounded by Finnis.

The bedrock of natural law theory is the basic values.<sup>14</sup> The list that Finnis provides is as follows: Life, Knowledge, Play, Aesthetic Experience, Sociability, Practical Reasonableness, Religion.<sup>15</sup> We will discuss them in more detail in the coming paragraphs, but we should first

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<sup>12</sup> All references to Finnis will be from *Natural Law and Natural Rights*.

<sup>13</sup> Even scholars such as Feser (2014 and 2018) seem to fall into this trap.

<sup>14</sup> Finnis takes great care to distinguish a basic value from an instrumental good, and his terminology reflects that labor. For our purposes, I will use the terms ‘basic good’ and ‘basic value’ interchangeably.

<sup>15</sup> This list is merely the one that Finnis gives, but other theorists have different lists, some with more goods, some with less. However, our goal is show that classical liberalism is amenable to this kind of moral theory, not that Finnis and his list of goods is, in fact, the correct one.

describe their nature and the purpose they serve. What are we pursuing when we undertake a project? We have basic inclinations that make us aware of certain goods upon which we base our actions. When we identify a good, we can perceive its value upon reflection. This grasp of a basic good's value is underived. We cannot demonstrate it, but it is not in need of demonstration. It is not an inference from any other fact or observation because it is self-evident.

We should stop here to address the concerns that often arise when self-evidence is mentioned. To say that something is self-evident is not to say that it is something one knows from birth. On the contrary, the basic good of knowledge, say, will only appear self-evidently valuable to someone who has experienced the desire to know. There is the urge to know something because it will serve some purpose, and then there is raw curiosity, the desire to discover the answer to something merely to know it. This inclination is what points us in the direction of knowledge, but it is not what gives knowledge value. The fact that our desire to know has psychological roots does not denigrate knowledge's value. We cannot call on other things to show the value of the basic values because our evaluation of everything else is based on them.

The list from earlier serves as an explanation of human action. Finnis claims that "those seven purposes are all of the basic purposes of human action" because they exhaust the reasonable categories of motivation for a human being (pg. 92). It is important to note that we are now talking only of value, which is not the same thing as talking about morality. That comes later. Right now, all the basic goods provide is an understanding of the most basic kinds of human motivation toward a reasonable goal. Recall that our critique of Hayekian liberty is that we do not know exactly why it is valuable. We have an idea of something called 'progress,' but that term is so broad that our explanation is rather quickly overwhelmed by vacuity. What natural law and the basic values



provide is a way to make sense of human action in explicit terms.

An exceptionally important point is that the values are all similarly basic. There is no hierarchy that makes one more important than another because each is irreducible, valuable, and incommensurable with the others. How, then, are we to make sense of the great variety of human enterprises? Each value is general and can be participated in by an inexhaustible number of activities. One never achieves Knowledge or Life or Play because it is not an endpoint; it is a value in which we participate. Our projects and commitments are only a select few of the ways that these goods can be instantiated in the world. What makes one choose one value over another in a given circumstance is a matter of contingency, but that does not make it unreasonable. We all have tendencies to commit more to some values than others, but these tendencies have nothing to do with a greater value of the ones we choose. “[O]ne’s reasons for choosing the particular ranking that one does choose are reasons that properly relate to one’s temperament, capacities, and opportunities, not to differences of rank of intrinsic value between the basic values” (pg. 94).

If we interpret progress in light of this, we have a much clearer picture of why liberty matters. We need freedom to try different things, make different commitments, concretize the goods in unique ways because our motivations are geared toward the basic, underived, self-evident goods. When our liberty is restricted too much, we lose our ability to participate in goods in ways that we may find quite valuable and fulfilling. However, some restrictions of liberty only serve to bring to light greater possibilities that we get from coexistence.<sup>16</sup> What progress does, in Hayekian terms, is give us the ability to build on the work that past generations have done and thus see more

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<sup>16</sup> See Daniel C. Russell (2018) for an excellent analysis of the challenges and benefits of coexistence and how rights enable us to maintain the conditions of peace and prosperity.

possibilities for concretization than we otherwise would have had.

Hayekian liberty highlights the need for natural social evolution, and natural law is amenable to this point. Our participation in the values is particularly valuable to us because it is *we who participate in them*. Part of the meaningful, authentic participation in the values requires that they are not forced upon us. A lack of liberty in this area via coercion not only infringes the bounds of practical reasonableness (as we will see in the next section) but also prevents us from accessing the array of possibilities that allow us to choose the projects that best suit the things outside of our control, such as temperament. This is a great boon for Hayek since such unchosen aspects of our lives are incredibly important for his version of individualism. In other words, the things in our lives which are out of our control will largely shape our commitments to the values, and these social forces are key aspects of both progress and liberty.

### **Section III.II: Practically Reasonable Rights**

Morality, as we traditionally conceive it, only now emerges for the natural law theorist. Until now, the basic values have had no moral valence whatsoever. They are pre-moral explanations for human action, goods that we pursue and that are no doubt valuable, but the goodness they possess is in no way derived from ethics.<sup>17</sup> However, the question of how the goods take shape in our lives *is* a question for morality, and it is a question that is answered by way of practical reasonableness.

Roughly, practical reasonableness is the good we participate in when we reason soundly

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<sup>17</sup> Throughout this paper, I use the terms ‘morality’ and ‘ethics’ interchangeably to signify the system of values and reasoning about those values which tells a person or a group what ought to be done. Ronald Dworkin (2013) uses these terms discretely to mean right conduct toward others (morality) and how we should live our own lives (ethics). Though this distinction is useful in many contexts, I do not think it necessary for our purposes.

about which course of action to take. It is the same idea as Aristotle's *phronesis*. A person with practical reason (or *phronesis* or practical wisdom) is one who can reason well about particular situations and choose a course of action that is the best all things considered. In other words, a practically wise person—and by 'practical' we mean related to human action, that is, those considerations pertinent to the excellent practice of something—is someone who can decide on the best course of action because she has considered not only the local contingencies but also how this one decision will affect the various other goods and commitments she has in her life. Such a person will not monomaniacally focus on a single good but will instead give each basic value due attention because she understands that all of the goods are basic. Of course, she need not (and, given human limitation, should not) try to participate equally in all the goods, but she will respect each good as equally basic and equally valuable in the abstract.

Because practical reason yields results only in specific situations, laying out the moral commitments one must have is difficult but not impossible. The problem of general moral commitments requires general solutions, and that is what natural law can provide. A long tradition of "philosophical reflection has identified a considerable number of requirements of *method* in practical reasoning" that we can provide here (pg. 102, emphasis in original). These requirements of practical reasonableness are: **(i)** a coherent (i.e., rational) plan of life, **(ii)** no arbitrary preference amongst values, **(iii)** no arbitrary preference amongst persons, **(iv)** detachment (from one's specific projects),<sup>18</sup> **(v)** commitment (to not lightly abandon one's projects), **(vi)** the limited relevance of consequences, **(vii)** respect for every basic value in every act (or, no act can directly attack a basic

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<sup>18</sup> By this, we mean that one must understand that one's actions do not solely impact one's own projects, and so reasoning well about a course of action requires a certain level of detachment from one's particular projects and interests. This detachment *does not* entail that one should completely avoid considering one's own projects, though.

value), **(viii)** promoting the common good, **(ix)** following one's conscience.

These requirements of reasonableness help narrow the range of what one ought to do, and, for us, they are the normative limiting principles of rights. There may seem an initial lack of fit because practical reasonableness functions on the level of individual actors. In true practically wise fashion, though, we can reasonably interpret those requirements into a more satisfactory form for our purposes, especially since these methodological requirements are such that they describe a principle of reasoning that is not logically limited to individuals. For example, instead of saying that rights must have a coherent plan of life (a strange claim to be sure), we will simply state that rights must enable a person to achieve a rational plan of life. And, relatedly, they cannot be of a form that damages the ability of a person to form such a rational plan. Other requirements seem to need no interpretation. It seems fairly straightforward to say that rights must show respect for every basic value, so one would not have a right to directly attack the good of Life. In other words, one does not have a right to murder.

To go into almost any amount of detail about these requirements would unduly burden our very limited space here. However, the general statement that rights-as-social-institutions must be bounded by these requirements yields exceptionally satisfying results. Recall our earlier example of slavery as a right. Immediately, we can say that a right to own slaves violates the first, third, fourth, and seventh requirements.<sup>19</sup> Slavery certainly destroys the ability of persons to form a rational plan of life, and it egregiously shows arbitrary preference among persons. These two violations alone are enough to make the right morally untenable.

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<sup>19</sup> In fact, a more detailed study of the requirements would show that it violates nearly all of them, but these four are *prima facie* violated, which is more than enough to rule out slavery as a right.

A question immediately arises about whether or not a single violation of a requirement is enough to rule out a right. The answer to this question is, unfortunately, unclear, and the ambiguity comes from many areas. First, it depends on how one translates the requirements to the language of rights as to how exactly they will conflict. The requirement that one follows one's conscience, for instance, seems to pose a particularly challenging task for the translator. Does it mean that rights must enable one to follow one's conscience? If so, does that mean always or in as many situations as possible? Second, we might question the nature of the task before us. Are we attempting to look back on past mistakes and decide which rights were morally justified and which were not? Or are we attempting to make clearer the considerations which factor into public policy today? The former allows us to speak with a clarity only time provides; the latter is much more difficult and may prompt one to reach different conclusions.<sup>20</sup> The short answer is that we do not have sufficient space to decide this issue and can only speak in the most general terms. If we can show why some rights and, *a fortiori*, why some kinds of rights are morally prohibited (which I think we have), then our task is accomplished.

We should make one final point in this section. Everything we have put forward so far can and should be up for debate. We began with a list of basic values; what belongs on that list is contested. We asserted that things out of our control play a role in determining our concrete commitments to those values; the extent to which those things should and in fact do make such determinations is contested. We provided a list of requirements of practical reasonableness; the content of that list is contested. Finally, we claimed that some translation is required to fit the requirements to the language of rights; all translations are contested. This debate is part of what

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<sup>20</sup> Whether or not these conclusions are justified by a natural law approach is a different matter.

allows us to reach agreement on these issues. More importantly, it keeps alive the body of scholarship that is natural law and classical liberalism and allows others to benefit from the work done by previous generations. (And the classical liberals cheered.)

## CONCLUSION

In the course of this paper, we have attempted to accomplish two main goals. First, we demonstrated that Hayek's theory gives insufficient grounding for liberty. The fundamental level of liberty (and civilization for that matter) is progress, but just what constitutes progress is something Hayek does not give us. We then showed that a lack of grounding for liberty infects our account of rights because rights gain their value from liberty. If rights are social institutions, we need criteria by which to filter the good from the bad. Second, our solution to this problem is to offer natural law as both a theory of human action that shows why progress and, therefore, liberty is good and how we can reach conclusions about which rights should and should not exist. The fundamental level of a natural law theory is the basic values, which allow us to describe human action and progress in explicit terms. Such a description shows us why we need liberty. Practical reasonableness provides the method by which we decide how we ought to instantiate the goods in our lives. This move gives us the moral principles we need to have limiting principles for rights, which allows us to sort good rights from bad ones. It is no surprise that many natural law theorists find Hayek (and classical liberalism writ large) an attractive ally in the fight for freedom. Our contribution has been to show that the two traditions can be more than allies. For as much as Hayek attempts to avoid moral arguments, he needs them. To the extent that we have demonstrated that, we have succeeded in our goal.

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## VITA

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