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# IMPRUDENT JURISPRUDENCE? HUMAN RIGHTS AND MORAL CONTINGENCY

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ABSTRACT

Oliver O'Donovan is mistaken to think that subjective rights are irredeemably bound up with Hobbesian individualism, but correct to criticize their abstraction from deliberation about a wider range of moral considerations. As Grotius's thinking shows, the existence of a natural, moral right against physical harm depends on the contingent presence or absence of morally significant circumstances. There is, however, an important distinction between natural moral rights outside a particular, effective legal system and positive rights granted by such a system. Positive rights are less contingent and more stable, because society thinks it prudent to bear the social costs of that stability. Take, for example, the positive right against torture. This is not based simply on the intrinsic evil of what is done to the tortured. It is based partly on the intrinsic evil of the sadistic motive of the torturer. However, this motive obtains only in some cases, not others. Let us distinguish the latter as cases of "aggressive interrogation." There might be instances of such interrogation that are conscientious and morally justified, all considerations of social cost and risk apart. There is, therefore, no natural moral right against it. Nonetheless, its general legal prohibition under a positive right against torture is justified by the prudential judgment that any possible momentary advantages to national security are outweighed by the high risk of social and institutional corruption and its political costs. That said, extraordinary circumstances might still justify—morally—the rare violation of the positive, legal right.

KEYWORDS: objective right, social costs, prudence, subjective rights, torture

## THINKING AGAIN ABOUT OLIVER O'DONOVAN'S CRITIQUE

What is wrong with human rights? Certainly some people think that there *is* something wrong, perhaps with the very concept of a right as an individual's property, at least with certain ways of talking about individuals' rights. Among these critics are Christian ethicists such as my predecessor at Oxford, Oliver O'Donovan, and his wife, Joan Lockwood O'Donovan. In an article published five years ago, I argued against Oliver O'Donovan in support of Nicholas Wolterstorff's Christian justification of "subjective rights"—that is, rights attaching to human subjects.[1] I now think that O'Donovan was more correct than I then thought—albeit still less correct than he then thought.

1 Nigel Biggar, "Nicholas Wolterstorff, *Justice: Rights and Wrongs*," *Studies in Christian Ethics*, 23, no. 2 (2010): 130–37. I acknowledge the kind permission of the editor of *Studies in Christian Ethics* to quote extensively from this article.

What is it that O'Donovan argues? As representative of his thought, I take his critique of Wolterstorff in the June 2009 issue of the *Journal of Religious Ethics*.[2] Here O'Donovan makes clear that the object of his criticism is a certain modern conception of human rights combined with the political use to which it is put. This is the "rights project," which shares with "the modern tradition prevailing in the liberal West since the seventeenth century" an affinity for "grounding political community in the wills of the individuals who compose it."[3] Accordingly individuals are seen as "right-bearers prior to their communal existence."[4] Rights are set apart from social right, and are therefore destructive of society.[5] Since they derive from "the radical ontological distinctness and multiplicity of human persons," rights are themselves "radically multiple."[6] As such it is doubtful that they are "sufficient to ground the social and moral phenomenon we call *obligation* or *duty*."[7] They are "specific,"[8] the nature of individuals' attachment to them is "proprietary,"[9] and they set "what is due to each above every idea of moral order."[10] As a consequence they militate against "a conception of order, which demands *a* resolution of each controversy, *a* right thing to be done."[11] The problem with the conception of subjective rights is internally connected with the problem of its political use—that is, its being "serviceable" to the end of subverting "working orders of law and justice."[12] What is problematic about subverting "working orders" appears to be a certain heteronomy, a peremptory lack of regard for local particulars.[13]

Insofar as the concept of an individual's right is tied to a Hobbesian account of human being and society, I think that O'Donovan is quite correct to protest. For dogmatic reasons Christians cannot—and for empirical reasons they should not—endorse a view of human beings as radical atoms, originally at war each with every other and motivated basically by the will to avoid pain and death. Nor can Christians endorse the corresponding view of human society as bound together merely by positive contracts, whose ultimate obliging authority lies in the basically private interests of the contracting parties. *If* the concept of an individual's right were inextricably bound up with such an account of human nature and society, *then* a Christian would have to repudiate it. But *is* it?

O'Donovan seems to think so. Otherwise he would not feel the need to contest, as he does, Wolterstorff's claim that the concept of "subjective rights" is implicitly present in the Bible and in the thought of the early fathers of the church. Nor would he feel the need to express doubt

2 Oliver O'Donovan, "The Language of Rights and Conceptual History," *Journal of Religious Ethics*, 37, no. 2 (2009):193–207.

3 Ibid., 202–03.

4 Ibid., 198.

5 Ibid., 194. This view, among others, O'Donovan attributes to the theological critics of subjective rights, whom he refers to at a certain arm's length in the opening pages of his essay. I assume that he adopts this remote stance in order to defuse the "quarrel" with Wolterstorff. Nevertheless, it has the unfortunate effect of creating uncertainty in the reader's mind as to whether and how far the views he describes are his own. Nevertheless, in the light of what he writes later, it seems fair to attribute to O'Donovan what he says of the critics here.

6 Ibid., 195.

7 Ibid., 195. O'Donovan does not state (or show) that such rights cannot sufficiently ground obligation; he just casts doubt on their ability to do so: "The intellectual problem … is whether the distinctness and multiplicity of human persons is sufficient to ground the social and moral phenomenon we call *obligation* or *duty*." Ibid. The emphasis is O'Donovan's.

8 Ibid., 199.

9 Ibid., 200.

10 Ibid., 202.

11 Ibid., 194. The emphasis is O'Donovan's.

12 Ibid.

13 This is how I understand the statement that individual human rights "cannot … drive a *rooted* social reform, which has to be *self*-reform within some determinate political community." Ibid.

"that there are *ontological presuppositions* in what the Bible and the Fathers assert about justice . . . that individuals are right-bearers prior to their communal existence."[14] Nevertheless, O'Donovan does imply that a distinction can be made between the concept of individual rights and what he calls "modern" and I call "Hobbesian" anthropology, when he admits that, while the language of rights began to emerge in the twelfth century, it was not until the sixteenth century that subjective rights made "totalitarian claims to colonise and reorganize the whole sphere [of justice]."[15] In other words, the concept of multiple individual rights was alive and kicking for several centuries before it assumed its objectionable, Hobbesian form. Moreover, on one occasion O'Donovan explicitly admits that an unobjectionable concept of multiple rights can be distinguished, when he gingerly concedes that there is "no very great problem" with a concept of specific, multiple rights so long as they are *prima facie*, representing "*claims* that have to be balanced out in concrete deliberation."[16]

In my 2010 appraisal of O'Donovan's dispute with Wolterstorff, I concluded that O'Donovan had failed to show that the concept of rights adhering to individuals is irredeemably bound up with Hobbesian anthropology and sociology—and indeed that he himself implicitly admitted that it need not be. I still stand by that conclusion. Nevertheless, it is now clearer to me that O'Donovan had begun to identify an important set of problems with much contemporary rights-talk. In his terms, the most basic of these is the conception of a right as an individual subject's aboriginal property without any reference to an objective moral order—an order of objective *right*—in terms of which conflict between subjective *rights* can be resolved rationally (rather than just politically). Implicit in this subjectivist concept of a right is a view of the individual as originally and essentially asocial, which undermines the authority of social obligation. And from this follows a tendency not to view an individual's right as a *prima facie* claim that might be qualified by other such claims—"balanced out"—on objectively moral grounds.

O'Donovan, I believe, is onto something important here. However, I think his diagnosis requires two qualifications. First, the fundamental problem lies, not in the absence of reference to any moral order at all, but rather in the implicit reference to a moral order that has been radically reduced and impoverished. For Thomas Aquinas, following Aristotle and the Bible, human beings are essentially social. Accordingly, human flourishing, which generates the obligations of natural law, comprises a variety of goods—not only the individual's self-preservation but also his generation of children, his investment in society, and his knowledge of God.[17] For Thomas Hobbes, however, human beings

14 Ibid., 198. The emphasis is O'Donovan's.

15 Ibid., 201. I observe that O'Donovan reports that, according to Michel Villey, the shift in the concept of right in the fourteenth century was merely "synchronous with"—and not caused by—"the scholastic development of nominalism and voluntarism." Ibid., 196–97.

16 Ibid., 195. The emphasis is O'Donovan's. The concept of *prima facie* multiple rights could help, I think, to resolve the dispute between O'Donovan and Wolterstorff over John Chrysostom. Wolterstorff argues that Chrysostom's view that the rich steal from the poor implies that the poor have prior property rights over the material goods that the rich possess in law. O'Donovan counters that Chrysostom held that there is only a common right to the use of the world's goods and that there are no private property rights at all. Ibid., 198–99. This raises a question, however: On what grounds did Chrysostom criticize the rich? The answer, presumably: For taking more than their fair share of the common wealth. Does this not imply that everyone has a right to a fair share? What this fair share is, of course, remains to be determined "in concrete deliberation"—that is, according to obligations and circumstances. Nevertheless, one can still assert from the beginning the right of each to such a share. What this suggests is that the problem lies in the concept, not of multiple rights as such, but of multiple rights as "specific"—that is, as determined in advance of any larger process of moral deliberation.

17 Thomas Aquinas, *Summa Theologiae*, trans. Fathers of the English Dominican Province (London: R. & T. Washbourne, 1915), Ia–IIae, question 94, article 2, 189:



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are essentially isolated. Accordingly, Hobbesian human flourishing reduces to the single good of the preservation of the individual self from pain and death, and natural law to the single right of self-defense.[18] The effect of this cynical, materialist view of human flourishing is not exactly to undermine all notions of social obligation and society, but rather to instrumentalize them. In the Hobbesian view, social contracts become merely the expedient instruments of individuals' pursuit of security, and the obligation to keep contracts is fueled by a combination of natural desire and practical shrewdness.

Second, and more briefly, the problem is not exactly that a right is seen as an individual's property, but rather that that property is seen as absolute, precluding all other considerations. The assertion of a proprietorial right marks the end of moral discussion, not the beginning.

## HUGO GROTIUS ON THE CONTINGENT RIGHTS OF INDIVIDUALS

I take my leave of O'Donovan by way of Hugo Grotius—and in particular by way of his reasoning about the morality of causing physical harm. This makes plain that O'Donovan is wrong to suppose that the concept of an individual's right is necessarily tied to Hobbesian individualism and social contractarianism.

Writing almost a generation before Hobbes, Grotius does affirm the notion of a right attaching to individuals—"a moral quality annexed to the person, enabling him to have, or do, something justly"[19] One such right is over "our lives, limbs, and liberties."[20] This natural right of liberty from bodily interference or harm, however, is not absolute. Rather, it must yield to the overriding claims of the social good, for, Grotius tells us, "if one subject, tho'altogether innocent, be demanded by the enemy to be put to death, he may, no doubt of it, be abandoned, and left to their discretion, if it is manifest, that the state is not able to stand the shock of that enemy."[21] Yet the reasoning here is not simply that the urgent requirements of the social good trump an individual's right. It is more subtle than that. Grotius argues that the virtue of charity sometimes obliges us to "a greater piece of goodness" and "to abate somewhat of our right, than rigorously to pursue it."[22] Thus, in general

> Because in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances: inasmuch as every substance seeks the preservation of its own being, according to its nature: and by reason of this inclination, whatever is a means of preserving human life, and of warding off its obstacles, belongs to the natural law. Secondly, there is in man an inclination to things that pertain to him more specially, according to that nature which he has in common with other animals: and in virtue of this inclination, those things are said to belong to the natural law, "which nature has taught to all animals" (Pandect. Just. I, tit. i), such as sexual intercourse, education of offspring and so forth. Thirdly, there is in man an inclination to good, according to the nature of his reason, which nature is proper to him: thus man has a natural inclination to know the truth about God, and to live in society.

18 Thomas Hobbes, *Leviathan*, ed. C. B. Macpherson (London: Penguin, 1968), part I, chapter XIV: "The right of nature, which writers commonly call *jus naturale*, is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything which, in his own judgement and reason, he shall conceive to be the aptest means thereunto." Here and in subsequent quotations from Hobbes and Grotius, the original capitalization and italicization has been modified in accordance with modern usage.

19 Hugo Grotius, *The Rights of War and Peace*, 3 vols., ed. Richard Tuck (Indianapolis: Liberty Fund, 2005), volume 1, book I, chapter I, section IV, 138.

20 Ibid., volume 1, book I, chapter II, section I.3, 184.

21 Ibid., volume 2, book II, chapter XXV, section III.1, 1152.

22 Ibid., volume 2, book II, chapter XXIV, section I.1, 1133.



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charity sometimes commands us "to prefer the advantage of many persons to my own single interest,"[23] and in this particular case it obliges the subject to surrender himself voluntarily to the enemy.[24] What is more, if he will not volunteer surrender, his sovereign may force him, since sovereigns may generally force their subjects to do what charity obliges—for example, in time of great scarcity to bring out their corn.[25]

For Grotius an individual's right not to be harmed is contingent upon his own subjection to the obligations of charity—and through them to the claims of the social good. More than this, however, it is also contingent upon circumstances entirely external to him: the intentions of other agents, whether taking his life would be proportionate, and whether it would be a last resort. So, alluding to Aquinas's adumbration of the theory of double effect, he writes, "a distinction should be made between an intended and direct damage, and what is only consequentially such."[26] He also argues that, while the natural law permits us to kill an innocent person who happens to obstruct defense or escape that is absolutely necessary for our self-preservation, the evangelical law of charity, "which has put our neighbour upon a level with our selves," withdraws that permission.[27] In other words, we may not kill the innocent bystander because we have no proportionate reason to prefer our own life to his.

*Pace* O'Donovan, therefore, in Grotius' early seventeenth-century thinking Christian ethics had come to think of individuals possessing a natural, moral right against physical constraint and harm. However, this subjective right was understood in relation to a wider, transcendent moral order and therefore as not absolute. On the contrary, it was seen to be highly contingent upon the right-bearer's moral innocence, upon the motives and intentions of other agents, upon whether harm is a last resort and proportionate, and upon what are his social obligations under charity. In other words, in Grotius (and in contrast to O'Donovan) we find an affirmation *both* of an individual's right *and* of its contingency upon a range of other moral factors. All of these factors ordered together constitute objective right in a given situation. Depending on the circumstances of the situation, objective right might—or might not—include a subjective right. The rights of individual subjects are *prima facie*, not *ultima facie*.

## MORAL RIGHTS AND POSITIVE RIGHTS

However, there are rights and there are rights. On the one hand are natural, moral rights that obtain outside the jurisdiction of any effective, settled legal system—for instance, in virgin territory, during a collapse of civil order, or in a theater of war. On the other hand are positive rights granted by a particular legal system or by international treaty and backed by the threat of coercive sanctions. This is an important distinction that goes unacknowledged in the O'Donovan-Wolterstorff debate. The highly contingent, unstable right not to be harmed, which Grotius affirms, is natural and moral. It is unstable, partly because its existence depends on a variety of contingent, morally significant circumstances, but also partly because the fate of its recognition lies at the mercy of the consciences of the relevant parties. Since private consciences have been known to err, positive legal systems deliberately transfer much, if not all, of the room for discretion to public courts,

23 Ibid., volume 2, book II, chapter I, section IX.3, 405.
24 Ibid., volume 2, book II, chapter XXV, section III.2, 1153.
25 Ibid., volume 2, book II, chapter XXV, section III.4, 1154–55.
26 Ibid., volume 2, book II, chapter XXI, section X.1, 1081.
27 Ibid., volume 2, book II, chapter I, section IV.1, 398.



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strengthening the presumption in favor of the right and so stabilizing it. Such constraint of the discretion of individuals comes at a certain social cost, but it is a cost that society judges worth paying. The rationale for the granting of a positive right, it seems to me, often involves a prudential judgement of this kind, in which the social costs are considered and reckoned affordable.

## WHERE IS THE WRONG IN TORTURE?

Take, for example, the right against "torture." In one sense, there is obviously a moral right against torture, insofar as the word *torture* means the wrongful, deliberate infliction of harm. Of course, one has a right against a kind of action that is wrong by definition. But what exactly is it that makes torture wrong? Since I am a proponent of Christian "just war" reasoning, it follows that I believe that under certain conditions—such as right motive and intention, last resort, and proportion—it is permissible for someone deliberately to perform harmful acts that he knows will have the effect of punching bloody holes through others' bodies, tearing limbs off them, wrenching their heads from their shoulders, or causing them simply to evaporate. Therefore, when I come to the issue of torture, what is immediately striking is that the kinds of physical and psychological damage that torture involves are not necessarily *and obviously* graver than those permissibly inflicted on the battlefield. This raises the question: If it can be morally right to shoot or dismember an enemy soldier, why can it not be right to subject a terrorist prisoner to verbal threats, sleep deprivation, or waterboarding? If torture is immoral, then it does not seem to be because of the objective harm that it does to the tortured.

Here I disagree with views of Jeremy Waldron and Jean Porter, for both of whom torture is intrinsically evil, in part because of *what it does to the victim*. I have explained elsewhere and at length why I disagree with them.[28] In a nutshell, I am not persuaded of two things. First, I am not persuaded that any act that chooses to inflict pain in order to force a change of will is, as such, objectively evil. That, for example, is exactly what I am doing when, having brought the mugger to the ground, I twist his arm up his back until he releases my wallet.[29] Punishment is usually, if not invariably, about forcing wrongdoers to act against their own will; and sometimes punishment may even take the form of the lethally destructive force of war. Second, I am not persuaded that all deliberate infliction of pain is, as such, subjectively vengeful or sadistic, suffering no limits. It seems to me that some kinds—for example, waterboarding—could in fact be well motivated, rightly intended, and disciplined by the requirements of proportion. Therefore, I distinguish between sadistic "torture" and non-sadistic "aggressive interrogation."[30]

## WHAT IS THE REASON FOR A POSITIVE RIGHT AGAINST AGGRESSIVE INTERROGATION?

About torture there is nothing further to say except that it should be abhorred. But what about aggressive interrogation? If the wrongness of aggressive interrogation cannot be located either in what it does to the victim or in the motivation of the agent, where else might it lie?

28 Nigel Biggar, "Individual Rights versus Common Security? Christian Moral Reasoning and Torture," *Studies in Christian Ethics*, 27, no. 1 (2014): 11–14. In this and the following section, I use some of the 2014 article verbatim. I acknowledge the kind permission of the editor of *Studies in Christian Ethics* to do so.

29 I believe that I owe this example to Richard McCormick, S.J., but I am no longer able to locate the source.

30 I prefer *aggressive interrogation* to the more common *enhanced interrogation*, because it is less euphemistic.

One non-intrinsic reason why it might be immoral is that it does not work—that is, it does not produce information that can be relied upon. However, again as I have argued elsewhere, the evidence suggests that aggressive interrogation can sometimes work.[31] If that is so, then to refrain from it—all other considerations apart—is to weaken one's defenses. It is to incur a cost. Nevertheless, there might be prudential reasons for bearing this cost. For example, crucial to winning a counterterrorist campaign is the business of "draining the swamp," of robbing terrorists of popular support, of winning hearts and minds. That is certainly a major consideration in present British counterterrorist efforts to suppress homegrown Islamic jihadism, given the showing of the 2006 Populus survey that 13 percent of British Muslims regarded the London suicide bombers of the 7 July 2005 as martyrs.[32] That 13 percent amounts to over two hundred thousand people—which is a much, much larger pool of supporters and potential recruits than that ever enjoyed by the Irish Republican Army in the recent "Troubles" in Northern Ireland. If the British government were known to subject terrorist suspects to aggressive interrogation (even of the non-sadistic, proportionate kind), its efforts to woo British Muslims would be severely damaged. This fact, therefore, gives the government a strong political, prudential reason to eschew such interrogation and to grant all British citizens a positive right against it.

There are other prudential reasons, too. While I do not think that the practice of aggressive interrogation necessarily corrupts the interrogator or the institutions that support him, there is certainly a risk that it will. And if your anthropology is like mine—if not exactly pessimistic, then a lot less than starry-eyed—that risk will appear high. Insofar as the *libido dominandi* is a widespread human motive, insofar as we humans take deep and frequent pleasure in the sheer domination of others, the psychological forces tending to make the practice of aggressive interrogation a source of individual and institutional corruption are great. Jeremy Waldron puts the point well:

> [T]he use of torture [including aggressive interrogation] is not an area in which human motives are trustworthy. Sadism, sexual sadism, the pleasure of indulging brutality, the love of power, and the enjoyment of the humiliation of others—these all-too-human characteristics need to be kept very tightly under control, especially in the context of war and terror, where many of the usual restraints on human action are already loosened. If ever there was a case for an Augustinian suspicion of the idea that basic human depravity can be channeled to social advantage, this is it. Remember too that we are not asking whether these motives can be judicially regulated in the abstract. We are asking whether they can be regulated in the kind of circumstances of fear, anger, stress, danger, panic, and terror in which, realistically, the hypothetical case must be posed.[33]

As I see it, then, the rationale for the granting of a positive right against both torture and aggressive interrogation contains judgments about prudential considerations, and it is upon these judgments that the rationale stands. Prudential features, however, wax and wane according to circumstances: it will not always be the case that aggressive interrogation is politically

31 I take this to be implied by David Omand, formerly intelligence and security coordinator in the British government's Cabinet Office from 2002 to 2005, when he writes, "[a]lthough some of the methods used by the U.S. on those captured were not accepted as legitimate by the U.K., the intervention in Afghanistan did provide valuable intelligence that, in the words of the U.K. parliamentary oversight committee 'saved lives.'" David Omand, *Securing the State* (London: Hurst & Company, 2010), 175.

32 See "Muslim 7/7 Poll," Populus, July 5, 2006, http://www.populus.co.uk/the-times-itv-news-muslim-77-poll-050706.html.

33 Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (Oxford: Oxford University Press, 2010), 221.



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counterproductive or corrupting, any more than it will always be sadistic. Therefore, notwithstanding the prudential wisdom of granting a positive right against aggressive interrogation, there is no correspondingly absolute natural, moral right. Accordingly, there might arise an extraordinary case where a conscientious interrogator judges that the stakes are so very high as to warrant the use of aggressive methods and so the violation of a positive right against them; and, morally speaking, he might be quite correct. In support, I observe that even a liberal philosopher such as Henry Shue concedes such a possibility—and so, implicitly, does Jeremy Waldron.[34] In such a rare case, the interrogator should follow his conscience, render himself accountable to the courts, make a moral case for his law-breaking, and entrust his fate to the discretion of the judge and jury.

## SUSPENDING POSITIVE RIGHTS *IN EXTREMIS*: THE CLOSED MATERIAL PROCEDURE, DIPLOCK COURTS AND MR. JUSTICE HIGGINS

Positive rights often contain and stand upon prudential judgments about social costs and their affordability. The prudential nature of their rationale makes it possible to argue, in rare cases, that extraordinary circumstances justify their violation, morally speaking. Again, I call as friendly witness Jeremy Waldron, who writes, "there are very few [philosophers] who believe that rights should be utterly impervious to very large changes in social costs."[35]

My impression is, however, that lawyers do tend to regard positive rights of all kinds as absolute and so impervious to morally significant changes in circumstance, with the result that their jurisprudence becomes imprudent. And imprudence, you will remember, is a moral vice.

As illustration, I offer the following example. In 2011 the UK government began to propose the introduction of so-called closed material procedures into ordinary court hearings of civil cases. The reason for this was that former detainees in Guantanamo Bay, most notably among them Binyam Mohammed, had brought a civil claim for damages against the UK government, which, they alleged, had been complicit in their illegal detention and ill treatment by foreign authorities—that is, the United States. In its defense, the government had wanted to use material that had been gathered and supplied by US intelligence agencies. However, it could not use this material, because its public disclosure in open court would seriously discourage the United States from sharing intelligence in the future, to the detriment of British national security. Consequently, the UK government had been forced to settle out of court. This not only involved considerable public expense, but it also robbed the Government of the opportunity to have its name publicly exonerated.

Hence the proposal to introduce the closed material procedure. Already used in other circumstances, this procedure would involve part of the court's proceedings being held in secret. In these secret or closed sessions, the intelligence material would be presented to the judge and to a security-cleared 'special advocate' of the plaintiff. This advocate would be allowed to provide their client with a "gist" or loose summary of the material, but would be forbidden to reveal precise details. At the end of the proceedings, the court's open judgment would be supplemented by a closed one.

34 Henry Shue concedes the possibility of rare cases of morally justified, but presumably non-sadistic, "torture": "I can see no way to deny the permissibility of torture in a case *just like this* [where a fanatic has set a hidden nuclear device to explode in the heart of Paris]." Henry Shue, "Torture," *Philosophy and Public Affairs* 7, no. 2 (1978): 141. And so, implicitly, does Waldron, when he comments on Shue: "But few cases are *just like this*." Waldron, *Torture, Terror, and Trade-Offs*, 41–42.

35 Waldron, *Torture, Terror, and Trade-Offs*, 32–33.



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The government's proposal provoked vociferous criticism from the legal profession and far more opposition than support—at least, judging by my daily perusal of the press. The most fundamental criticism was that it threatened the basic principle of "open justice." By this was meant, in my analysis, three distinct things: first, that all evidence against the plaintiff should be tested; second, that the reasons for a court's judgment should be made plain to the parties involved; and third, that the court's proceedings should be fully transparent, in order to maintain public confidence.

I do not intend to assess this set of criticisms, far less all the others. I simply observe that not a little of the legal rhetoric implied that the proposed closed material procedure would involve a fundamental betrayal of justice. Thus, for example, Philippe Sands, barrister, human rights advocate, and professor of law at University College London, argued that the government's proposal "is wrong in principle, and will not deliver justice. It will be used to shield governmental wrongdoing from public and judicial scrutiny. The bill threatens greater corrosion of the rights of the individual in the U.K."[36] So far, it appears, so uncompromisingly principled. But let us look again. The statement that the government's bill "is wrong in principle, and will not deliver justice" is preceded by the phrase, "under conditions prevailing today"; and the whole sentence in which it appears is preceded by these two: "There may be times when the country faces a threat of such gravity that the exceptional measure of closed proceedings might be needed. This is not such a time." This bears critical reflection. Sands concedes that there might come a time, when the introduction of the closed material procedure would be justified. But if that is so, then how exactly is it wrong "in principle"? And if the procedure could (presumably) deliver justice then, why can it not do so now? What these symptoms of inconsistency reveal is the overreach of the rhetoric of absolute principle. What Sands should have said, I think, is that the closed material procedure makes the court proceedings less than optimal, that it weakens (without altogether removing) the plaintiff's power to defend himself, that it reduces (without altogether abolishing) the transparency of the court's judgment, and that it raises the risk that public confidence—or at least that part of it inclined to skepticism—will be lowered. In short, the closed material procedure does not so much contradict the principle of open justice as compromise it; and it is not so much simply unjust, as less securely just.[37] The issue is one, not of principle, but of risk.

So, there are safer and riskier ways of trying to do justice; but justice can still be done in riskier ways. Here I call as friendly witness a candidate even less likely than Jeremy Waldron: Eamon Collins, a member of the Irish Republican Army who was, by his own admission, responsible for the murder of a policeman at point-blank range. In 1987, Collins was brought to trial in a Diplock court. Diplock courts were introduced into Northern Ireland early in the thirty-year-long Troubles in order to overcome the problem of the terrorist intimidation of jurors in cases suspected of involving paramilitary activity. In such courts the right to trial by jury was suspended and the accused was tried by the judge alone, although counsel for both parties were present to test the evidence. The Diplock system was abolished in 2007, but while it lasted it was, of course, highly controversial and its procedures were less safe than normal ones. Did this mean that justice could not be scrupulously done? No, it did not. In his autobiography, Eamon Collins tells us that the judge before whom he stood strongly suspected his guilt but nevertheless dismissed the case on the

36 Philippe Sands, "I've Quit the Lib Dems Too," *Guardian*, March 12, 2013.

37 I think that I detect in (Lord) David Pannick's thinking a similar tension to that in Sands's. According to a report in the *Guardian*, Lord Pannick said in the House of Lords that "[c]losed … procedures are *inherently damaging* to the judicial process. [They are] a departure, *maybe necessary*, from the principle of transparent justice." Owen Bowcott, "Secret Courts Bill Savaged by the House of Lords," *Guardian*, November 22, 2012, 2. The emphasis is mine.



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grounds of a legal technicality. In a chapter entitled "Their Justice and Ours," Collins describes his reaction:

> [T]he judge's words had sent a real shock through my body. I felt peculiarly emotional about them. The law ... had revealed its genuine dignity: there could be such a thing as the impartial application of the rule of law. This judge had brought to life for me, even though he loathed the I.R.A., principles which were important boundaries between civilization and barbarism. The implied judgement on what I had been doing for the past six years was one that I absorbed, and the contrast with our revolutionary justice was extreme ... [E]ven though he suspected I was as guilty as hell, he was willing to let me walk free on grounds that many people would have regarded as a ... foolish abstraction ... [T]his civilized idea, this majestic abstraction, had set me free. When the reality had sunk in. I knew I really could abandon violence because the system, for all its manifest injustices, carried within itself the possibility of justice. When British justice worked ... it could still represent the highest achievement of a civilized society ... I could feel nothing but admiration for this judge [Mr. Justice Higgins] who, on such a fragile legal abstraction, had set free a man from an organization which even during the trial had tried to murder him by firing a rocket at his home.[38]

Even in the less than optimal judicial proceedings of a Diplock court, where the court's judgment was not the expression of the common mind of a plurality of jurors, a conscientious judge, notwithstanding severe personal provocation, could still scrupulously permit the letter of the law to acquit a probably guilty man. And even in those procedurally less secure conditions, conscientious judges might have acquitted the innocent and convicted the guilty—and they probably did.

## CONCLUSION

A Christian is bound to insist that rights-talk have reference to a larger, given, created, natural moral order. On this general point Oliver O'Donovan is quite correct. Where he errs is in supposing that acknowledgment of this objective moral order excludes recognition of subjective rights altogether. Rather, the elements of the objective order—goods, social obligations, proportionality, motives, intentions—should be seen as potentially qualifying, rather than necessarily excluding, the subjective rights of individuals. The objective elements are most likely to qualify natural, moral rights, which are highly contingent and unstable, fading in and out of existence according to circumstances. But they can even qualify positive rights in extraordinary circumstances.

The rationale behind the granting of positive rights sometimes, perhaps often, incorporates a prudential judgment about the tolerability of social costs. The cogency of a prudential judgment is contingent upon social circumstances, and when those change, its cogency might weaken. Rights are not always trumps. Christian anthropology conceives the flourishing of individuals as social: individuals flourish in gladly and freely meeting their social obligations, even unto death. Therefore, morally speaking, social obligations can trump individual rights—or, rather, it can cause them to vanish. And since Christian anthropology also believes in sin, it believes in punitive coercion. Sometimes, where a sinner refuses to meet his social obligations, he may be forced to do so.

For example, as Grotius says, in time of famine the private citizen's moral right to own a surplus of grain and withhold it from the market lapses. What is more, since public authority may compel the release of the grain, the corresponding positive right is suspended. Had the British government in the 1840s so compelled Irish landowners, the horror of the Irish famine might have been lightened.

38 Eamon Collins, *Killing Rage* (London: Granta Books, 1997), 339–41.

Are all positive rights susceptible of suspension *in extremis*? I am not sure. Obviously, a right against treatment that is by definition immoral is necessarily absolute—for example, sadistic, disproportionate "torture." And I cannot imagine how social exigency could ever justify the suspension of a right to racial equality before the law. So I will not say that all kinds of positive right are susceptible of suspension by social obligation. Nevertheless, I think that some are. Notwithstanding the political rhetoric of their advocates, the positive rights of individuals to trial by jury and to know all the evidence against their civil cases are not absolute and can be trumped by the moral, social obligations to which extraordinary circumstances can give rise. And even if we think it wiser never to suspend the positive right against aggressive interrogation, courts should nevertheless be prepared to recognize—somehow—extraordinary cases where such interrogation is morally justified.



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