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PRAGMATISM AND NATURAL RIGHTS AS SECURED BY THE CONSTITUTION

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PART II

CHAPTER IV

FOR the purposes of this discussion we shall consider rights as of two classes—legal and natural. A right that is created by the Civil authority is therefore regarded as a legal right. But antecedent to the formation of the State and drawing up of a Constitution it is not possible to think of man as an isolated creature without any rights. We conceive of man as a free, active, rational being cherishing by nature freedom and independence and a balanced social fraternity without his fellowmen. Experience and tradition bear out the statement. A right that flows from or is derived from man's rational nature we regard as a natural right. We assume the fact of creation and therefore, the relation of creature to Creator. Because of this fact of creation, man participates in the eternal law through the natural law. He is subject to the natural law and hence has imposed upon him certain divine obligations. A man attains the use of reason: he is conscious that he has as a duty to live, to conserve his own being, to develop his intelligence and his will. He has consequently a right to do whatsoever is necessary for the conservation of his intellectual and moral life. There is thus in the same person a certain correlation between rights and duties and because of certain divinely-imposed moral obligations under the natural law man must needs have certain correlated moral rights. Because of the existence of those natural moral rights the Creator, through the natural law, imposes the further duty of organizing society or the state for the protection of those rights which the isolated individual would be incapable of defending unaided. Rights, therefore, do not come from the state, nor are they children of custom and utility nor do they emanate from the will of the people as purely man-made moral entities. A right may, therefore, be defined as an inviolable moral power of doing, omitting or exacting something. A natural right emanates or

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is derived from the very nature of man; it results from the essential order of things. Being founded on nature which is in its essence unchangeable it is in consequence equal, universal, absolute. It is absolute in its existence but not in its extent. The right to tend towards one's destiny and to do all that is necessary to fulfill one's destiny is the fundamental, essential right and the source of all others.

Consider then in the light of this discussion and analysis of the philosophic basis of natural rights the second paragraphh of the Declaration of Independence. A modern writer has summed up its worth and the rights it embraces in a memorable essay.

The second paragraph of that immortal document begins thus:

> We hold these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness.

Although the last clause of this statement is not an explicit enumeration of all man's natural rights, it does embrace them all implicitly. Life and liberty are a large part of the field of natural rights: the pursuit of happiness implies the rights of marriage and of property, which embrace the remainder of that field. Man's natural rights may therefore be summarized as those of life, liberty, marriage and property. Liberty is, of course, a wide conception extending to physical movement, education, religion, speech, writing. Under the head of life is included immunity from all forms of arbitrary physical assault. All these rights belong to the citizen as a human being because they are all necessary for his existence, for the development of his personality, for reasonable human living, and for the attainment of the end which God commands him to attain.

We must distinguish the conception of natural rights outlined above from that which was defined in the eighteenth century. We have shown that those who brought into being the sacred fundamental documents of America were distinctly opposed to the doctrine of natural rights as defined by Hobbes and Rousseau: the excessive individualism which conceived of man as an abstract, isolated individual with fixed rights completely determined by natural law which the state was powerless to invade. We have seen that the greater and more influential portion of American political and juristic life did not adhere to the exaggerated democracy associated with the French political philosophers of the Revolution. In the view of the Revolutionary philosophers, "nature" and "natural" referred not to what is essential and permanent in man, but to that which is primitive and unconventional. Hence, they laid more stress on the "state of nature" than on the "law of nature." The natural law was merely that very simple and very primitive system of

rules that would suffice for the state of nature in which political restraints would be unknown, or at least reduced to a minimum. As the late Professor Ritchie has well said:

To the Thomist the law of nature is an ideal for human law, to the Rousseauist it is an ideal to be reached by getting rid of human law altogether.

In the mind of the Revolutionist, therefore, to re-establish the law of nature meant to shake off the cumbersome and obstructive political regulations of the day, and get back to the simple state of nature, the semi-anarchical conditions of primitive times. This was of course a very inadequate interpretation of man's nature and the natural law. No such "state of nature" ever existed or ever could exist compatibly with civilization. No valid conclusion regarding the individual's liberties, duties or rights could be deduced from his position and relations in this imaginary and irrational existence. Nevertheless upon it were based and by it were measured men's natural rights in the Revolutionary system. As a consequence the rights of the individual were exaggerated and the rights of society minimized. In practice this juristic liberalism means and always will mean, that the state allows to the strong the legal right and power to oppress the weak. A good example of the evil is to be found in the results of the economic policy of *laissez faire*. It is no wonder that there has been a reaction against this pernicious, antisocial and really unnatural theory of natural rights.[2] This was as we have seen certainly not the theory of natural rights adhered to by the framers of the Constitution and so splendidly enunciated by Jefferson.

CHAPTER V

We have considered sufficiently what the traditional attitude of juristic and political thought has been towards the theory of natural rights. We have seen that the rights enumerated in the second paragraph of the Declaration of Independence are, it is well settled, secured and guaranteed by the constitution. It is also well settled that given certain requisite conditions the United States Supreme Court has the power to declare an act of Congress constitutional or not.[3] Let us then examine a few of the more important cases and observe what judicial decision has had to say on natural rights as secured by the Constitution. Consider for instance the liberty that is protected by the Fourteenth Amendment as laid down and defined in *Allgeyer* v. *Louisiana*.[4]

The term is deemed to embrace the right of the citizen to be free in the engagement of all his faculties; to be free to use them in all lawful

[2] John A. Ryan, *A Living Wage*, p. 4-26.
[3] *Marbury* v. *Madison*. 1 Cranch 137 (U.S. Sup.)
[4] *Allgeyer* v. *Louisiana*, 165 U.S. 578.

ways; to live and work where we will; to earn his livelihood by any lawful calling, to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

The same historic tribunal in deciding a now justly famous case[5] makes its opinion clear and succinct on the question of private rights and government encroachment.

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.[6]

In a more recent case we have such emphatic words as these:

No change in ancient procedure can be made which disregards those fundamental principles which protect the citizen in his private right and guard him against the arbitrary action of the government.

A statute of the State of Michigan had for its purpose the restriction of damages recoverable in actions against newspapers for libels published by such newspapers to those actual damages which the plaintiff could show he had suffered in respect to property, business, trade, profession or occupation. Reflect on the words of the court in this decision. The statute was on its face Pragmatic and Utilitarian. What of the words of the court?

There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization. It is a thing which is more easily injured than restored, and where injury is capable of infinite mischief. And, on the other hand, it is one where the injury is frequently, and perhaps generally, aggravated by malice. The law has therefore always drawn distinctions between intentionally false and wicked assaults on character and those which were not actually designed to create a false impression.[7]

The supreme tribunals of the States have been one with the Supreme Tribunal of the Union in affirming the doctrine of natural rights as secured by the constitution.[8] There is a natural right of privacy violated by the unauthorized use of a person's picture for advertisement pur-

[5] *Hurtado* v. *California,* 110 U.S. 516.
[6] *Hurtado* v. *California,* 110 U.S. 516.
[7] *Park* v. *Detroit Free Press,* 72 Michigan 560, 40 N.W. 731.
[8] *Pavesich* v. *New England Life Ins. Co.* 69 L.R.A. 101.

poses. One finds the doctrine in *Ridley* v. *Sherbrook* stating very clearly that the natural rights of a citizen are inalienable, and no law restrictive or prohibitive of those rights can be passed by the legislature or the people of a state.[9] Again in a well-known Wisconsin case, *Lacher* v. *Venus,* we have the following splendid opinion:

> If a man's money shall not be taken away from him save by due process of law, much less shall his child. We do not deem it necessary to base this decision upon or dwell at any length upon such possible sordid, because material, grounds for our conclusion, but rest it upon the natural rights of parenthood, a far finer and higher quality, and for that reason more sacredly to be upheld.[10]

It has always seemed to the student of constitutional law that the "due process" clause bristles with difficulties. There are those of us who know and realize it. Many attempts have been made to give some kind of essential tangible definition. It, like every other clause in the constitution, has a traditional, flexible meaning, but its flexibility never should be allowed to destroy its traditional, permanent, fundamental meaning. In *State ex rel. Milwaukee Medical College* v. *Chittenden,*[11] Justice Marshall has defined "due process" in all its traditional and permanent significance as follows:

> Due process of law does not mean merely according to the law of the legislature or the will of some judicial or quasi-judicial body upon whom it may confer authority. It means according to the law of the land, including the constitution with its guarantees and the legislative enactment and the rules duly made by its authority so far as they are consistent with constitutional limits. It excludes all mere arbitrary dealings with persons or property. It excludes all interference not according to the established principles of justice.

From judicial decision as well as from the juristic and political theories contemporary with the "Founding Fathers" we conceive the Constitution as permanent, fundamental, guaranteeing rights that are natural and absolute, as well as acquired, never as an instrument that changes with the whim and caprice of human reason which as we well know historically and actually has lead not to truth but far distant therefrom. Truth it is true is the object of the human intellect but of the human intellect aided by revelation or very correctly used. Therefore have societies and states embodied fundamental principles and self-evident truths, the primal rights and obligations of individuals that flow from the natural law and are recognized by the light of pure reason, in instruments that are permanent but reasonably flexible. Such is the

[9] *Ridley* v. *Sherbrook,* 3 Cold. 569. (Tenn.)

[10] *Lacher* v. *Venus,* 188 N.W. 613. (Wis.)

[11] *State ex rel. Milwaukee Medical College* v. *Chittenden,* 127 Wis. 468.

Constitution of the United States; such was it regarded both in juristic thought, political theory and judicial decision until the advent of the utilitarian with his exaggerated ideas of grossly exaggerated individual rights and the sociological jurist stressing Patent Pragmatism as a basic philosophy of law.

CHAPTER VI

However, the individualistic social philosophy associated with Benthan, and Mill and Spencer with its emphasis on *laissez faire* and absolute freedom of contract has played a great part in the interpretation of the "due process" clause. Already we have pointed out that the Constitution never contemplated natural rights absolute in extent as well as in existence. Furthermore, as Justice Holmes declared in his dissenting opinion given in *Lochner* v. *New York:*

The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statistics.[12]

We have recently had a number of cases in which the Eighteenth Century theory of natural rights and the Nineteenth Century doctrines of Utilitarianism play havoc with the traditional idea of natural rights absolute in existence but limited in extent that are secured by the Constitution. Above all notice the Utilitarian economic doctrines as applied to freedom of contract. Justice Bradley pointed out in the famous Slaughter House cases[12] the individual's constitutional right to "reasonable" freedom of contract. Later on we find this expanded into an absolute freedom to enter all contracts that do not interfere "with the equal rights of others." Kant coined that phrase, Bentham and Spencer had repeated it. We find that the "due process" clause has been interpreted in the light of *laissez faire* capitalism. The legislature of the State of New York enacted a law prohibiting bakers from working more than ten hours a day. The Supreme Court of the United States in the case of *Lochner* v. *New York*[13] declared the law unconstitutional, on the ground that a law prohibiting the employment of a baker for more than ten hours a day "is an unreasonable, unnecessary and arbitrary interference with his personal liberty and his rights to enter contracts."[14]

A recent reference to those cases seems very much to the point. In the *Modern Commonweath* Holcombe comes to the following very valid conclusion:

Thus the Supreme Court read into the Federal Constitution an interpretation of the liberty of the 'due process' clause by which the Utilitarians' philosophic idea of liberty was substituted for the specific jur-

[12] *Lochner* v. *New York,* 1928 U.S. 45.
[13] *Lochner* v. *New York.*
[14] Holcombe, *The Modern Commonwealth,* p. 252.

istic liberty of the Founding Fathers. The personal liberty of Blackstone's commentaries was transmitted into the freedom of contract of Spencer's "Principles" of Sociology.

It is true that the pragmatic jurists dissented from the opinions given in this group of cases. So also do those jurists and sociological writers who uphold a theory of natural rights that is a golden mean between the exaggerated conception associated with the Utilitarians' and the negative and very fluid conception associated with the Pragmatists. The latter have dissented on purely sociological rather than on moral and traditional legal grounds. The opinion given by the majority of the court in the *Columbia Children's Hospital case* v. *Adkins* has been attacked more violently by such a champion of traditional natural rights as John A. Ryan than by such an outstanding Pragmatist as Justice Holmes.

CHAPTER VII

There is in modern philosophy a growing insistence on realism. There has been a distinct revolt against the intellectualism associated with Kant and as a consequence against metaphysics and first principles. Kant rejected the traditional and only definition of truth as a conformity between the mind of the subject knowing and the thing known. His metaphysics were vague, abstruse and incomprehensible. Since the revolution initiated by Bacon men had begun to forget ultimate causes and confine themselves to proximate causes. They have persistently stressed the factual, the law for things rather than the law for men. The growing acceleration of matter has retarded the intellect in the field of purely speculative thought particularly in English-speaking countries.

Hence it is no wonder that we look for the origins and influence of Pragmatism in those countries where industrial and material progress has been so phenomenal, where power, speed and utility are stressed in social life as well as in the economic mart, where emphasis is laid on facts and scientific laws. One will of course reflect that scientific laws and theories ought not to be considered as probable, not even as more or less true, but simply as contingent and expedient for the explanation of phenomena. Action and practice rather than speculation are characteristic of the thought of such countries. Pragmatism is all but convertible with action. It denotes action and results rather than reason and essential constituents. It stresses the purpose and use rather than the why and wherefore. It acknowledges no absolutes. It confuses the concepts of the good and the true. It has rejected the traditional definition of truth. It has also rejected objective evidence as the criterion of truth and substituted therefor, the utility, the fitness, the

expediency of a thing. With the Pragmatist action is the measure of truth and the foundation of certitude.

As we are concerned mainly with the influence of this new system on American law, where the attitude of the Pragmatist towards those natural rights which are secured by the Constitution it is only desirable to give a brief historical sketch of the rise of Pragmatism in this country.

The first of its champions was Charles Sanders Pierce. He it was who laid the immediate foundations of the new doctrine. He strove to propose a method for greater progress in science. The fundamental principle in the proposed method is that the whole purpose of thought is action. Whatever is associated with thought but does not concur in a resulting action which is its proper end must be considered as a mere accessory. To develop the significance of a thought it is necessary to determine what habits it produces for the meaning of a thing consists simply in the habits that it implies. Therefore the truth or falsity of a thought will depend on the good or bad nature of the habits, the results that it will produce in us.[17]

The greatest name in the story of Pragmatism is that of William James (1842-1910). He was professor of philosophy at Harvard and was gifted with a clear, lucid and persuasive English style. He took up the principle enunciated by Pierce and gave it more than a philosophic vogue. James[18] was influenced by a teleological conception of thought suggested to him by the biological theories of Darwin. He argued in the following manner: If all our activities are exercised with the end of our adaptation to our environment why should the intelligence be made the sole exception to this universal law and should it not have some other end rather than itself in the disinterested contemplation of some cold and abstract notion? One should think of the intelligence as an instrument of action rather than of speculation. Therefore its chief problems lie in the realm of the practical and experiential. The truth of an idea really lies in the reactions and results that follow upon it. The real significance of that curious attention which the mind gives to each new object is not to demand what it is in itself but rather what ought I do. The validity of an idea must therefore be sought in the results that accrue therefrom. The validity of religious belief should then be measured by its utility and its efficacy in the amelioration of the conditions that human life is heir to. Other noted pragmatists are John Dewey, whose influence in a field of pedagogics mainly in America

[17] Illustration of the Logic of Science. Articles in the *Popular Science Monthly*, November, 1877, and January, 1878.

[18] William James. *The Will to Believe*, 1897. *The Varieties of Religious Belief*, 1902. *Pragmatism, A New Name for some Old Ways of Thinking*, 1907. *A Pluralistic Universe*, 1909. *The Meaning of Truth*, 1909.

is all-controlling. In England we have Schiller of Oxford who learned his Pragmatism in America but who has enlarged on the concept of Pragmatism and elaborated a general philosophy that he has termed Humanism. Humanism is really an extension of the pragmatic principles to ethics, metaphysics, esthetics and theology. Man becomes, in what is really a resuscitation of the principle of Protagoras, the measure of all. The chief philosophic problem, therefore, concerns itself with human beings seeking to understand the world of human experience as an aid to the resources to the human mind. Humanism subordinates the intelligence of the will, the intellect as speculative to the intellect as practical, knowledge to action. The following passages from a discourse entitled Error given by Schiller at Boulogne, 1911, will serve to illustrate what Humanism or better this extension of Pragmatism means.[19]

"The original assertion has provoked its refutation either by the protests of others or by the logic of events. It has led to consequences which destroy its claim to truth. The recognition of an error means neither more nor less than an adverse decision which refutes a claim by the consequences to which it has led and this should help us to see that the discrimination of Truth and Error always proceeds pragmatically. Truth-claims which have worked badly are those condemned as errors; those which have worked well are those accepted as truths." [20]

"The truths of one generation become the errors of the next, when it has achieved more valuable and efficient modes of interpreting and manipulating the apparent facts, which the new truths are continuously transforming. And, conversely, what is now scouted as error may hereafter become the fruitful parent of a long progeny of truths."[21]

Such briefly is the story of the development of Pragmatism. We have outlined its main tenets. We have enumerated the chief pragmatists. However, we cannot omit the name of the eminent British statesman, Lord Balfour, who professes social Pragmatism.[23]

Chapter VIII

When we come to the province of law we find one of the ablest and best equipped juristic writers of our day ardent in the application of a diluted Pragmatism for the solution of legal problems. Said this eminent jurist who is none other than Roscoe Pound,

Let us think of jurisprudence as a science of social engineering . . . . Engineering is a doing of things not a serving as passive instruments through which mathematical formulas and mechanical laws

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[19] Schiller, F. C., *Studies in Humanism.*

[20] Schiller, F. C., *Error,* p. 145-146.

[21] Schiller, F. C., *Error,* p. 150.

[23] Balfour, Arthur James, *A Defence of Philosophic Doubt, being an Essay on the Foundations of Belief.*

realize themselves in the eternally appointed way. The engineer is judged by what he does. His work is judged by its adequacy to the purpose for which it was done, not by its conformity to some ideal form of a traditional plan. We are beginning, in contrast to the last century, to think of jurist and judge and lawyer in the same manner.[24]

According to this new philosophy that is being set forth as the basis for our jurisprudence and judicial decision, both juristic writers and courts will not be concerned with right or wrong with the ideal of justice; rather shall be concerned with the functioning of a law and the results that accrue from it as beneficial to the social body. Social claims and wants and desires will therefore be stressed to the exclusion of rights, duties and obligations. We then shall not have a law flexibly evolving itself to meet new social conditions, the adjusting of time-old principles to new situations and circumstances but a law that may be dictated by the opinion of majorities, paternalism and the ardor for sociological reform of some crusading legislature. Such a law will inevitably lose sight of the origin and destiny of man as a creature invested by a Creator with natural inherent, inalienable rights. This is certainly alien to the spirit and traditional interpretation of the Constitution.

In the very recent case of *Meyer* v. *Nebraska* the Supreme Court of the United States, stressing the natural rights of parents as regards the education and control of their children, enunciated very clearly and succinctly an opinion that is the very antithesis of Pragmatism.

> Corresponding to the right of control it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws . . . . Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own children. [25]

The case of *Adkins* v. *The Children's Hospital*[26] declared null the minimum wage statute of the District of Columbia. The pragmatic jurists have attacked this decision and hold the doctrine of natural rights responsible for it. But the most sterling champions of natural rights, not understood in the exaggerated Bentham-Spencer sense, are one with Justice Holmes in attacking the majority opinion in this case.

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[24] Roscoe Pound, *Interpretations of Legal History.*
[25] 43 Sup. C.T. 625.
[26] 43 Sup. C.T. 394.

From this we gather that one need not apply the tenets of Pragmatism to the law so as to achieve that amelioration in social conditions that is so desired and desirable in our day. The case of *Euclid* v. *Ambler Realty Company* is very much in point here. This case shows that the principles and provisions of the Constitution are flexible and that constitutional law is adaptable to modern conditions. The opinion of the court is well worth quoting.

> While the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted not to the meaning but to the application of constitutional principles, statutes and ordinances which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, must fall.[27]

We gather from this opinion that the Supreme Court is still jealous of the doctrine of natural rights and that it endorses the permanency and fundamental nature of the clauses of the Constitution which the pragmatists would dissolve by their fluid philosophy of relativism. There is another recent case, that of *Herbert* v. *Louisiana,* in which the Supreme Court stresses fundamental and universal principles as a basis of our American law.

> The due process clause of the 14th Amendment requires that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as the "law of the land." Those principles are applicable alike in all states and do not depend upon or vary with local legislation.[28]

We have shown in the early part of this dissertation Justice Holmes' contempt for and utter disbelief in the natural law and self-evident principles as manifested by him in a now famous article which appeared in an issue of the Harvard *Law Review* a few years ago. For Justice Holmes there are no inalienable natural rights. Dean Pound is in the forefront of the sociological jurists who are battling for a reform of the law. They advocate an application of the tenets of Pragmatism as a solution. We have shown that those tenets are diametrically opposed to the spirit and interpretation of the Constitution. Furthermore, the pragmatic jurists seem to place material happiness, social needs and the

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[27] *Euclid* v. *Ambler Realty Company,* U.S. 71. L.Ed. 303.
[28] *Hebert* v. *Louisiana,* 47 Sup. C.T. 103.

general welfare of society as the ultimate end of the state. We contend that there is a higher and more ultimate end and that if the pragmatists have their way with the legal reforms advocated the rights of the individual will disappear at the whim and caprice of majorities or of the state. Thus will be blown to pieces the great framework of liberty which guarantees to each person in the United States both as a human being and a citizen those rights that come with the very facts of creation and the natural law and have been woven into the texture of our legal system and jealously guarded by the supreme tribunal of the Republic.