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THE NATURAL LAW AND THE RIGHT TO PROPERTY *

I stand in need of liberty myself, and I wish every creature of God may enjoy it equally with myself.—Priestley.

Men are not corrupted by the exercise of power or debased by the habit of obedience; but by the exercise of a power which they believe to be illegitimate, and by obedience to a rule which they consider to be usurped and oppressive.—DeTocqueville.

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself.—Madison.

The principal innovation . . . instead of moral values nothing but naturalistic values. Naturalization of morality. In the place of sociology a doctrine of the forms of dominion.—Nietzsche.

Before the final trumpet sounds and I enter the lists to maintain here against all comers the natural law right to acquire and hold private property and the civil or municipal law right not to be deprived of it except by due process of law, let me make some plain avowals and do some preliminary tilting.

First, I do not require anyone to admit that this right whose *devoir* I do is “the best [natural right] that God ever made or will make.”¹

Second, I shall be satisfied with these admissions: that it is a very important natural right; that the founding fathers and those who came after them profoundly believed that its recognition and just preservation were prime essentials to the pursuit of happiness here; and that, except for the Euro-

*This article originally was an address delivered December 8, 1950, at the Fourth Annual Natural Law Institute at the University of Notre Dame.

¹ “It is not enough for the knight of romance that you agree that his lady is a very nice girl—if you do not admit that she is the best that God ever made or will make, you must fight.” Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918).

pean minded radicals and their fellow travelers, witting and unwitting, the American people as a whole still hold to and act on that belief.

Third, I am a true believer in the moral law as the basis not only of the right to property but of all our natural rights, and am bound to concede that the right of the positivists, pragmatists, and materialists among us to hold to and profess a contrary belief is itself a natural right of no mean proportions; and that so long as their belief is honestly entertained and civilly and honestly put forward, I can justly make nothing of it but a good clean fight.

Fourth, I must make it clear that in plumping for the natural law right to acquire and own private property, I do not put it forward as an absolute and unqualifiable municipal or civil law right. I do, though, insist that just governments are formed not to destroy but to protect and expand this natural right as well as the others, and I do emphatically deny the moral right of any government to abrogate, deal inconsistently with, or unjustly abridge it. Further, I recognize that in any society, the slightest removed from a state of nature, the adequate and proper securement and enjoyment of natural right, particularly the right to private property, requires concreting into positive law. I, therefore, agree that a just government operating on natural law principles may, and should, in exchange for the security its laws afford the right,² properly and justly impose upon the exercise of it, restrictions and conditions not inconsistent with its basic principle.

Fifth, jealous of my reputation for at least ordinary intelligence and firmness of character, let me, by clearly stating why I came here, rebut the presumptions against both arising from my presence.

² "That which in the natural state was a mere invisible thread, in the social state becomes a cable." Jeremy Bentham, as quoted in HUTCHESON, *LAW AS LIBERATOR* 181 (1937).

When Dean Manion, singling me out as the particular target for the scoffs and gibes, the slings and arrows of the sophisticated positivists, the skeptical pragmatists, the creeping socialists, the social planners³ of all shades, dubbed me "knight of Property," he did not soft soap or Tom Sawyer me into whitewashing this fence of his. He merely raised his Macedonian cry, "Come over and help us," and, like minded with him, touching the natural law in general and the natural rights of men, particularly as they have been recognized, protected, and preserved in our constitutions, federal and state, I have girded my loins, put on my armor of proof, and come this long way to do so.

I know as well as he does that the days of the happy and peaceful wanderings through the pleasant fields of academic speculation about, and historical discussion of, natural law as the higher moral law, the universal source of all just positive law, which has characterized the first three sessions here, are over, and that the time has now come to begin the fight in earnest.⁴

Now that this Institute is leaving off talking about natural law, as an academic abstraction, to get down to cases by talking about natural rights as realities, about, in short, words become flesh and dwelling among us, from here on out it will have to be every man for himself and the devil take the hindmost, but I am not afraid.

³ These consider government and society, and the relations of man to man, only from the point of view of so-called economic democracy and a planned economy. It is their view that prices and wages and a wider, indeed a redistribution of economic goods, is to be the chief end of government, and all other, especially all older value judgments, are to be discarded. With these, hand in hand with the diminishing emphasis on moral and spiritual values, and on political and civil liberty, and the constitutional way of life here, there goes a tremendously increasing consciousness of and emphasis on government and governors.

⁴ In FULLER, *THE LAW IN QUEST OF ITSELF* 100-1 (1940), the author, of whose effective championship of natural law I make grateful acknowledgment, carefully disclaims championship of the "doctrine of natural [and inalienable] rights," and of the faith and works of the Founders. Indeed, as to them, he comes close to taking to his verbal heels.

For am I not a Scotch Irish Presbyterian, born in the Bible Belt in original sin, but by the Grace of God a brand snatched from the burning? Was I not nurtured on the strong meat of the Old Testament and the shorter catechism, and in the belief that "There is a spirit in man and the breath of the Almighty giveth him understanding"?⁵ Was I not moreover raised in the tough belief that "What must be, will be," and that the children of light may, indeed must, answer duty's call in the sublime confidence that human fortitude will always equal human adversity?

Besides, though in a short spell of teaching at Northwestern I did once experience a temporary metempsychosis with the spirit of the judge moving out, the spirit of the teacher moving in,⁶ I am not a law teacher. I am, and proud of it, a judge, one of those naive, simple-minded jurists⁷ "who possess ideas of honor, patriotism, and rights," and "find their strongest defense of these ideas in terms of some irrefutable, natural world to which the ideas correspond."⁸

Until now the men of little or no faith, pragmatists and positivists, the creeping socialists, the leaping-now men,⁹ have paid the project and the goings on here little mind. Particularly has this been true of those politically minded pragmatists¹⁰ and positivists, who, posing as disinterested

⁵ *Job*, 32:8.

⁶ Hutcheson, *The Worm Turns, or a Judge Tries Teaching*, 27 *ILL. L. REV.* 355 (1932).

⁷ "Occasionally we do find a jurist who resents the unfavorable comparison of jurisprudence to natural science and who is inclined to charge the critics of the law either with simple ignorance of legal learning or else with some sinister purpose to undermine respect for law. Such jurists believe that the meaning of the Constitution stands like the Rock of Ages. Unscrupulous men may ignore its strict apportionment of rights and duties; ignorant men may never reach an understanding of its beneficent provisions. There it stands, a proper object for study and veneration, but never an instrument to be used according to the needs of the times." ROBINSON, *LAW AND THE LAWYERS* 9-10 (1935).

⁸ *Id.* at 309.

⁹ These claim that nothing matters now but the new; that a backward look is regressive and destructive; that modernism, especially the conception they hold of it, is all that counts.

¹⁰ John R. Commons, in his description of Administration, thus points this out: "On the one side it is 'the pragmatic philosophy' of present day social sci-

factual observers of the passing scene, chroniclers of the "pure fact of law" seem really plugging for a naturalistic jurisprudence,¹¹ with courts and judges discredited and their independence destroyed,¹² a planned economy and government unlimited in the saddle.

Nearly one hundred years ago Amiel wrote in his *Journal Intime*:¹³

Every despotism has a specially keen and hostile instinct for what ever keeps up human dignity and independence. *It is curious to see scientific and realist teaching used everywhere as a means of stifling all freedom of investigation as addressed to moral questions under a dead weight of facts. Materialism is the auxiliary doctrine of every tyranny, whether of the one or of the masses.* To crush what is spiritual, moral, human—so to speak—in man by specializing him; to form mere wheels of the great social machine instead of perfect individuals; to make society and not conscience the centre of life, to enslave the soul to things to de-personalize man—this is the dominant drift of our epoch. [Emphasis supplied.]

Scornful they undoubtedly have been of the simple goings on here. From the lofty perch of their skeptical sophistication,¹⁴ the legal positivists who claim to see only "the pure fact of law," existing completely independent of, in-

ences. . . . It is not mere coincidence that twentieth century philosophies began to call themselves 'pragmatic'—not the individualistic pragmatism of William James, but the social pragmatism of John Dewey [See DEWEY, LOGIC OF INQUIRY (1938)]." Commons, *Twentieth Century Economics*, JOURNAL OF SOCIAL PHILOSOPHY 32 (1939). "On the other side it is the problem of collective action in control of individual action. Collective action, with its working rules, takes the place of the divine law and natural law that descended from John Locke and the eighteenth century philosophies." *Id.* at 38. Cf. Otto, *The Social Philosophy of John Dewey*, 5 JOURNAL OF SOCIAL PHILOSOPHY 42-60 (1939).

¹¹ See ROBINSON, LAW AND THE LAWYERS (1935).

¹² Hutcheson, Book Review, 3 LAWYERS GUILD REV. 58 (Nov.-Dec. 1943); HUTCHESON, NEW INSTRUMENTS OF PUBLIC POWER (unpublished lecture to the California State Bar, 1946).

¹³ 1 AMIEL, JOURNAL INTIME 58-9 (Ward transl. 1923).

¹⁴ ". . . the restraints which positivism at present imposes on legal thinking, and which prevent us from following this natural method, take the form not so much of specific beliefs as of emotional attitudes. Today it is still positivism which is the sophisticated view. It alone has 'brave true things to say.' It alone has purified its truths by a thorough washing in cynical acid." FULLER, *op. cit. supra* note 4, at 104. Cf. ARNOLD, THE SYMBOLS OF GOVERNMENT (1935), and ARNOLD, THE FOLKLORE OF CAPITALISM (1937).

deed, entirely apart from moral¹⁵ ideas and principles, have no doubt looked down their noses at what they regard as this twaddle about natural law.¹⁶ They have not, though, felt called upon to come in swinging. Ostentatiously ignoring the so-called poor bumbler who have been babbling here about natural law, the pragmatists,¹⁷ particularly the fellow traveling Pharisees among them, have gone on making broad their phylacteries and enlarging the borders of their garments. Paying tithe of mint, anise and cumin, and making a religion of cynicism, skepticism and unfaith in general, they have omitted the weightier matters of the law, Judgment, Mercy and Faith.

As for me, I will be found no dissembler, sailing under false colors. Like the man called Hi, "I inform you before we embark. You may charge me with murder or want of sense. We are all of us weak at times. But the slightest approach to a false pretense was never among my crimes."¹⁸ I confess that I am, and proud of it, not a New Dealer but a Jeffersonian, Lincolnian, American, one of those "solemn men" whom the pragmatists, the scientists, the skeptical devotees of facts,¹⁹ so deprecate, "who go about the world

¹⁵ "Just what are the positivists trying to do? We know, of course, that they seek some means of drawing a sharp line between law and morality, between the law *that is*, on the one hand, the law that ought to be, or is trying to be, on the other. We know also that the positivists since Hobbes have almost without exception denied that they were drawing this line for ethical or political reasons." FULLER, *op. cit. supra* note 4, at 84.

¹⁶ Cf. ROBINSON, LAW AND THE LAWYERS 269-75 (1935).

¹⁷ Said one of them, in a revealing moment when, the cards all stacked and marked to suit him, the dealer was shuffling, cutting, dealing and calling the cards to bring about the revolution he and his followers were proclaiming: "Since the advent of the Roosevelt administration we have had the language of pragmatism embodied in messages to the Congress and in political speeches. . . . Critics of the New Deal are likely to claim that this pragmatic way of talking is only an excuse for the adoption of fundamentally unsound but politically expedient policies." ROBINSON, LAW AND THE LAWYERS 275-5 (1935).

¹⁸ LEWIS CARROLL, FIT FOURTH, THE HUNTING OF THE SNARK (1891).

¹⁹ "Throughout Europe and America men are becoming increasingly conscious of the inadequacy of prevailing social philosophy as a guide to the practical problems of social control. Karl Marx and Jeremy Bentham saw long ago that such control would ultimately have to rely upon the sense of fact that dominates natural science." ROBINSON, LAW AND THE LAWYERS 22-3 (1935).

preaching that there is something more to be relied upon than facts. . . ." ²⁰ But I am not cast down by this depreciation, for I believe on the authority of men a little more scientific than, at least as learned as, these; that ". . . facts are sterile until there are minds capable of choosing between them, . . . minds which under the bare fact see the soul of the fact"; ²¹ that ". . . a fact is nothing except in relation to desire . . ."; ²² and that "There is in the human intellect a power of expansion, I might almost call it a power of creation, which is brought into play by the simple brooding upon facts." ²³

I confess, too, that I am not ashamed to call myself a patriot, ²⁴ a moral being who believes in *honor*, *piety*, and the *other moral virtues*, a *jurist* who believes in *constitutional rights* and the justice which recognizes and protects them, in short a plain and simple man who believes in the good life and that there is more to living than mere bodily health. Compare and contrast with this simple profession of faith in moral values this questioning: ²⁵

But it is fair to ask how much the world has gained by the insistence upon these moral qualities like piety, justice, patriotism, which have an existence and glory over and above that of physical health and a sound serene mind. . . . One sometimes wonders whether we should not be better off one hundred or five hundred years from now if we could set out with the simple objective of a maximum of bodily health for the population of the world.

God forbid, I say.

²⁰ *Id.* at 17.

²¹ Henri Poincare, as quoted in HUTCHESON, JUDGMENT INTUITIVE 23 (1938).

²² Will Durant, as quoted *id.* at 26.

²³ Tyndall, as quoted *id.* at 25.

²⁴ "Jefferson was a typical representative of the liberal and humanitarian nationalism of the eighteenth century. He was a patriot: 'The first object of my heart is my own country. In that is embarked my family, my fortune, and my own existence. . . .'"

"His patriotism was devoid of any narrowness or exclusiveness. The same strict moral laws which governed the conduct of individuals were valid for the life of nations." KOHN, THE IDEA OF NATIONALISM 308-9 (1944).

²⁵ ROBINSON, LAW AND THE LAWYERS 17-8 (1935).

Compare, too, this downright repudiation of, and unfaith in moral values, this pattern and prototype of modern materialism, pragmatism and naturalistic jurisprudence so called:²⁶

. . . for Nietzsche believed that not only was the Christian God dead, but also the rational moral values, which he regarded as a secularized Christianity. He outlined his program in sharp words. "The principal innovation . . . instead of moral values nothing but naturalistic values. Naturalization of morality. In the place of sociology a doctrine of the forms of dominion."

But, so convinced am I that the future of civilization and of liberty lies not with the materialists, the collectivists, the pragmatists, the naturalists, the men of unfaith, but with the natural law men, the men of faith, that, crying, "Lord, I believe, help Thou mine unbelief."²⁷ I have come here to stand up with the men of faith and be counted as one. So standing, I affirm and reaffirm my faith in natural law and in the natural rights of men; faith that the state is created for the individual and not the individual for the state; faith in human dignity and in man as a collaborator with his God; faith in human destiny; faith that in preserving the principle of this Government from corruption lies the last best hope for the preservation of that dignity, the realization of that destiny; faith, in short, that when this Government was formed,²⁸

. . . Something fundamentally new and of immense importance had happened. For the first time a nation had arisen on the basis of these truths held "to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among those are Life, Liberty and the Pursuit of Happiness"—truths which the nation could not give up without destroying its own foundation.

And now, having, by these preliminary tiltings and laying about me, cleared the way, I come to my precise part in

²⁶ KOHN, *THE TWENTIETH CENTURY* 48 (1949).

²⁷ *Mark*, 9:24.

²⁸ KOHN, *THE IDEA OF NATIONALISM* 291 (1944).

this tourney. This is to prove on my body what I came here to maintain, that the right to acquire and own private property, secured and protected in and by our constitutional form, though it is now a right by positive law, is also, and primarily, a natural right having its origin and basis in natural law, and that, as such it may not justly be abrogated, unreasonably abridged, or inconsistently dealt with by positive law.

In doing this, I shall not seek to define natural law, discuss its sources, review its changeless, though changing, history and content through the ages,²⁹ or deal with it in general except in the briefest kind of way. All this has been excellently done in the Institutes and lectures which have preceded this paper.

Neither shall I undertake to catalogue and classify the sources and variations, the grades and shades of positivism, to compare them with natural law theories. This has been done with complete thoroughness, great clarity and fine feeling by Fuller in his admirable book, *The Law in Search of Itself*, on which, in the notes I have gratefully drawn.

Finally, though the temptation to do so is great, I shall not call the roll of the positivists and pragmatists, beginning with forthright, honest old Thomas Hobbes, and ending with the not so forthright and honest Adolph Hitler and Joe Stalin, to match them man for man with the natural law men of history, and to debit and credit the ledger of each with his services and disservices to human dignity and human destiny.

Of the natural law in general, it is sufficient to say that I believe with Cicero that it is the principle which lies behind all the order of the world, the universal, the ultimate, principle behind all positive law, the groundwork, the firm foundation, upon which the structures of

²⁹ See Chapter VI, "Law as Purpose, and the Will to Ever Juster Laws—The Principle of Social Peace" in HUTCHESON, *LAW AS LIBERATOR* (1937).

human society rest. It is the principle of that justice, the search for which is the bond of men in states, the end of government, the end of civil society, that justice which has ever been and ever will be pursued until it be obtained or until liberty is lost in the pursuit.

Stammler, in his *Theory of Justice*, declares that ideal justice, justice in the abstract, the constant, and perpetual disposition to render to every man his due, is and always has been the same, yesterday, today and forever; that, though in its manifestations through formal law in different countries, under different climates and conditions, and at different times, it has appeared to be different, this is only appearance; that what has in each instance appeared is not justice itself but merely the result of fallible human efforts under the pressure of natural law with a changing content to express it in positive law. He maintains, in short, that justice in its purest form as an aspiration is timeless and universal;³⁰ that at any place, at any time, justice as an ideal is, and always must be, the same. He concludes, and I agree, that justice is perhaps the purest and most binding concept men have ever entertained; that at no time or place, no matter how long or dark the night has seemed, has man been entirely free of its authority; and that "whoever maintains and defends a specific legal rule with definite content as absolute, simply because it is legal, is guilty of an objectively unjust act of will."³¹

The Right to Property

. . . the corruption of any government generally begins with the corruption of its principle, and the duration of any given form depends upon the persistence in a given society of the particular principle which is characteristic of that form.—Montesquieu.

It is certain that the right of property is the most sacred of all the rights of citizenship, and even more important, in some respects, than liberty itself. . . .—Rousseau.

³⁰ *Ibid.*

³¹ STAMMLER, *THE THEORY OF JUSTICE* 26 (1925).

Men cannot, surely, be said to give up their natural rights by entering into a compact for the better securing of them. . . .
—Priestly.

Having come now by easy stages to the very nub of my subject, the natural right to property, I shall deal with it in the same cautious and leisurely way.

First, I will admit that in the very nature of things, it is impossible to conceive of municipal or civil law, law in the concrete, without accepting so much of the positivist philosophy as considers law to be a definite rule laid down by the sovereign which the subject must obey. I will admit, too, that unless and until set down in municipal or civil law, the natural right to property and the other natural rights, except as individuals or groups have the requisite force to maintain them, have no binding force, no compulsive sanction behind them except in the moral sphere;³² and that human nature being what it is, for the effective enjoyment of these rights, the compulsive force of municipal or positive law is greatly needed.

I refuse, though, to admit their claimed corollary that the theory of natural rights is a delusion and snare; that the history of man's struggles for liberty in that name is now just an old wives' tale; and that in claiming that we believe in the existence of natural rights and in the eternal verity of man's struggles to secure and preserve them, we natural law men are ignorantly or knowingly dealing in moonshine and roses.

³² In an early Texas case, *Mellinger v. City of Houston*, 68 Tex. 37, 3 S. W. 249, 253 (1887), there is a very interesting discussion of this point. Said the court: "A right has been well defined to be a well-founded claim, and a well-founded claim means nothing more or less than a claim recognized or secured by law.

"Rights which pertain to persons, other than such as are termed natural rights, are essentially the creatures of municipal law, written or unwritten; and it must necessarily be held that a right, in a legal sense, exists, when, in consequence of the existence of given facts, the law declares that one person is entitled to enforce against another a given claim, or to resist the enforcement of a claim urged by another."

With due and becoming deference and humility in presuming to differ with the positivists, these naturalistic jurists, these "pure fact of law" men, I make bold to say that I think the shoe is on the other foot. Indeed, I think that in refusing to recognize, as we do, both natural and positive law rights, both morals and law, it is the pragmatists and not we who are the self-deceived moon gazers. It is they who are mainly responsible for the prevailing confusion of thought which permits some to propound as necessary and irrepressible a conflict here between human rights and property rights.

John Austin, the patron saint of the moderate positivists, began the law's descent to the Avernus of unfaith by proposing to distinguish morals from law. Some of the modern but less moderate pragmatists have continued it by proposing to divorce morals from law, while the down-right radicals among them, including the fellow travelers, preferring headlong descent, propose, as Nietzsche did, to abolish morals altogether.

When we natural law men speak of rights, including the right to acquire and own property as natural and unalienable, we speak of them as they were in man's natural state. We do not speak of them as they are set down and secured in the municipal law of government organized as ours is on natural law principles and subject to constitutional limitations, the law which is at once the will and consent of the people. We freely recognize the right, indeed the duty, of such a government, to affix conditions to the exercise of natural rights consistent with the declared aims and ends of the society. We recognize its right, too, within constitutional limits, to impose upon the enjoyment and exercise of it, restrictions not inconsistent with the basic right. But this recognition is not at all inconsistent with the belief in natural law rights, or in the bedrock premises and arguments on which that belief rests. These premises are that life, liberty, and property, and the natural right to them

does not exist because men have made laws. On the contrary, laws exist because life, liberty, and property, and the right to them existed before there were laws, and because men formed themselves into social orders and set up governments in order to make laws wherewith the better to preserve and protect these rights.

Further, it must be admitted by all that before any social order was formed or any laws made, no man had a natural, a moral, right to deprive another of his life, his liberty, or his property. It must be admitted, too, that in the event of attack, upon them, each individual had a moral right derived not from positive, but from natural law, and inherent in him as a moral being, to defend his person, his liberty, and his property to the full extent of his force and power.

While, therefore, any political society that men form has the right, indeed the duty, to organize and support by law a common force to protect constantly and enhance the enjoyment of those rights which its members have by their very nature and which they formed the society to preserve and protect, no society can justly use that common force against an individual or a group to deprive him or them of any of those rights for which the society was organized to maintain.

Such a perversion of force would be equally contrary to our premise if used by an individual or by the organized society. Force has been given to us as individuals to defend our individual rights, and no one can justly say that this force when aggregated into the common force may be used by us as members of society to destroy or unjustly abridge or impair the equal rights of any of our brothers.

To restate: no individual acting separately can morally or lawfully use force to infringe upon or destroy the natural rights of others. The common force is nothing more than the organized combination of the individual forces. It

logically follows, therefore, that it may not be so used; and that if it is, individuals have the natural right to resist that force to the extent, if need be, of throwing off the government altogether and setting up a new and just government in its place.

Nothing, then, can be more evident than that, in any given society organized on just principles, positive law is the collective organization of the natural and individual right to the lawful defense of individual rights. Substituting common force for the individual forces, it authorizes it to do what the individual forces have a natural and lawful right to do. It preserves and protects the rights of individuals in their persons, their liberties, and their properties. It maintains the right of each and causes justice to reign over all.³³

It is on this simple but completely sound conception of natural rights, including the right to acquire and own property, that I here take my stand. It was on this bedrock conception that the seventeenth and eighteenth century philosophers, when they dreamed of human liberty, of a new heaven and a new earth, raised their political and philosophical edifices toward heaven to make their dreams come true. It was on this bedrock conception that the founding fathers based their claims to natural rights and their ideas of a governmental form which would secure and advance them. It was on the solid basis of this conception that, with dynamic and shattering force, the politico-legal ideas of the natural law and the rights of man, of law as liberator, of the dignity and greatness of the individual human soul, and of man as a collaborator in Human Destiny with his God, came to dominate the political thinking and action, indeed the life of a great part of the western world.

Our ancestors, “. . . men who possessed ideas of honor, patriotism, and rights . . .,”³⁴ those moral qualities which

³³ Cf. BASTIAT, *THE LAW* 1-9 (1950).

³⁴ ROBINSON, *LAW AND THE LAWYERS* 309 (1935).

our fact-devoted pragmatists so scorn, staked their fortunes and their lives on the eternal verities of the natural or moral law, the natural or moral rights which just governments are created to preserve and, therefore, may not abrogate or unjustly impair.

The very nature and origin, the very genius of their laws, had taught them, as Englishmen, that laws came up from the people, not down from the prince. They had taught them, too, that laws were based on the ideals, and flowered from the customs and needs of the people when these were strong enough to become articulated into law, and that laws should change when the times required. Laws with them were made for men, not men for laws. Oceana, not Leviathan, was their model. Harrington, not Hobbes, their preceptor. *Lex* was *rex* with them, not *rex, lex*.

Nurtured on the common law, the notion of the civil law that law is the command of the prince which the people have no part in making and yet must unquestioningly obey, had never been a welcome familiar with them, and if it had been, had they not thrown off the prince for the people? The history of England and of America had taught them to demand their rights and liberties, not as new rights and liberties, but as confirming those which had, or should have been, theirs immemorially.

For centuries it had been the English habit of mind to go from liberty to liberty, as though these liberties had always been theirs. The Anglo-Americans of the Revolutionary period were, too, the full heirs of the complete and final overthrow in England of authoritarianism as a dogma, and of the triumph there of the ideas of the natural law, of just law as supreme ruler, and of consent and will as the fundamental basis of just law. They, therefore, found themselves, the revolution over and the slate clean, in a position to enter upon and fully enjoy their inheritance.

Determined to do this not only for the time being but for the future and having no stomach for the omni-competence of Parliaments, they set about to constitute their governments so that those having special and partial interests, and desiring to substitute their private interests for the justice of the common good, could not unite to obtain control and pass unjust laws, that is, laws violative of the natural law principles on which their governments had been founded and their constitutions adopted to maintain.

It was not a new idea to them that the legislative should not, indeed could not, enact laws which ran counter to what were then regarded as the natural rights of man. They knew that in their last analysis all governments rest on force and that the great end of justice is to substitute the notion of right for that of violence and to place a legal barrier between the power of the government and the use of physical force.

When, therefore, our forebears, in breaking off from England and in forming a government of their own, wrote and spoke of the "laws of nature and of nature's God" and of the natural rights of man, they were not dealing with theoretical abstractions. They were dealing with the realities, with words become flesh and dwelling among men. They knew from their reading and from their own experience with unjust governments and governors the nature of governments and of men. They knew they had not bought liberty in fee simple absolute for a price paid down in full, that they had only made a down payment on it and that eternal vigilance was the price they and their posterity must be forever paying.

Knowing that it was the nature of men to learn but to forget, to learn and forget again, they took the greatest pains in the Declaration of Independence, in the constitutions and bills of rights, federal and state, and in the *Federalist Papers*, to tell us so. In these documents of eter-

nal significance and verity, to those of us who as real inheritors revere and cherish our heritage, they wrote down at once their understanding and distrust of the nature of governments and governors, and their abiding faith in natural law and the natural rights of man. Written down at a time when men really believed that "Men who their duties know, but know their rights, and knowing, dare maintain, these constitute a state,"³⁵ they were testaments to that faith. They were written down by men who thought in first principles, whose minds were steeped in the notions of natural law and the rights of man, the dominant political philosophy of their day. Their hearts were lifted up with the vision of a new freedom on a new earth, and who believed, with the philosophers, in the perfectibility of man, and with them, that the human species was capable of an unbounded improvement.

Yearning toward posterity, the founders greatly desired that theirs would some day reach the delectable mountains, from whence they could see the Heavenly City of a perfect and equal justice far shining and some day later even pass over the sacred river to rest under the shade of the trees.

But they were not philosophers, and they spent little time in dreaming. Intensely practical, they believed with Priestley—though like him they believed in a limited government—that "government being the great instrument of this progress, that form of government will have a just claim to our approbation which favors this progress, and that must be condemned in which it is retarded."³⁶

Many of them were lawyers; all were law-minded. Burke's *astrophe* to the American Colonists, in his *Speech on Conciliation*,³⁷ was known to them all. They knew that:

Nothing is more certain than the indispensable necessity of government, and that it is equally undeniable that whenever

³⁵ HUTCHESON, *LAW AS LIBERATOR* 5 (1937).

³⁶ *Ibid.*

³⁷ Edmund Burke, as quoted *id.* at 6.

and however it is instituted, the people must cede to it some of their natural rights in order to vest it with requisite powers.

They knew with Montesquieu that the corruption of any form of government generally begins with the corruption of its principle, and they knew that if the spirit of the laws—that government was made for man, not man for government—failed, then also would fail the law. They knew that the nature and principle of each government had a strong influence on its laws and that if they could but establish and maintain the government on natural law principles, the laws would appear to flow thence as from their source. They believed with Rousseau, that “It is to law alone that men owe justice and liberty. It is this salutary organ of the will of all which establishes in civil rights, the natural equality between men.”³⁸ They knew with him, too, that “Obedience to a law which we prescribe to ourselves is liberty,”³⁹ and that “the passage from the state of nature to the civil state produces a very remarkable change in man, by substituting justice for instinct in his conduct, and giving his actions a basis they formerly lacked.”⁴⁰

They particularly adopted as their own Rousseau’s doctrine that:⁴¹

Apart from the primitive contract, the vote of the majority always binds all the rest. This follows from the contract itself. . . . *This presupposes, indeed, that all the qualities of the general will still reside in the majority; when they cease to do so, whatever side a man may take, liberty is no longer possible.* [Emphasis supplied.]

They agreed with him, too, that it would be entirely:⁴²

. . . possible for the Council of a Democracy to pass unjust decrees and condemn the innocent; but this never happens unless the people is seduced by private interests, which the credit or eloquence of some clever persons substitutes for those

38 ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES ON POLITICAL ECONOMY 256-7 (Everyman’s Library ed.).

39 As quoted in HUTCHESON, LAW AS LIBERATOR 83 (1937).

40 *Id.* at 84.

41 *Id.* at 83n.

42 *Id.* at 101.

of the state; in which case the general will will be one thing, and the result of public deliberation another. [Emphasis supplied.]

When they drew up their written constitutions, their written consent and will to be governed, they took the greatest pains to provide against this happening by limiting governmental powers and by marking out freedom areas, areas of individual conduct and action, into which state power could not enter to forbid or to command.

It was accepted as axiomatic with them that "all men desire in this world a happy life,"⁴³ and that a happy life meant one in which by diligence, enterprise, and opportunity, each could advance his fortunes and secure the feelings of independence and of security which ownership sufficient for his present needs, with some provision for his future, always gives to man. Nobody then denied that the right to acquire and own property was a natural right which governments must preserve and protect; no one could be found who believed differently, and if any had been found, he would have been dismissed as a fool or a knave.

They knew that life and liberty alone could not give happiness; that a man would be no better than a slave if he could not exercise his natural right to acquire and own property and to retain it free from arbitrary control; and that a government which did not recognize and preserve this right could not be just. Locke, by whom they were greatly influenced, had put it this way:⁴⁴

The great and chief end, therefore, of men uniting into commonwealths and putting themselves under government, is the preservation of their property; to which, in the state of nature, there are many things wanting.

For the legislative acts against the trust reposed in them when they endeavor to invade the property of the subject, and

⁴³ *Id.* at 179.

⁴⁴ *Ibid.*

to make themselves, or any part of the community, master or arbitrary disposer of the lives, liberties, or fortunes of the people.

The reason why men enter into society is the preservation of their property; and the end while [why] they choose and authorize a legislative is that there may be laws made, and rules set, as guards and fences to the properties of all the society, to limit the power and moderate the dominion of every part and member of the society.

Thirdly, the supreme power cannot take from any man any part of his property without his own consent for the preservation of property is the end of government, and that for which men enter into society.

Rousseau, strong contender though he was for the authority of society and the sovereignty of the general will, as long as, but only while, the general will remains just—that is, acts in accordance with the principles of natural law—proponent and advocate though he was of the view that a society organized on natural law principles should, in accordance with those principles, have full and adequate power over its members, including their lives and their property, is yet one of the strongest advocates of natural rights,⁴⁵ including particularly the right of the individual man to acquire and own property. He declared, as vigorously as

⁴⁵ "He [Rousseau] was concerned with establishing government on a basis compatible with the freedom of man and with his dignity as a rational being. Natural man and natural order were for him not historical facts, belonging to a dim past, but eternal norms which alone were able to guide the peoples wishing to replace the shaky and arbitrary foundations of government by force with the permanent and lasting ones of a rational society of free men. Thus alone the paradox could be overcome that man was born free, and everywhere was in chains. Since force does not create right nor establish a legitimate power, and since society must exist and man can live only within it, a way must be found for him to will society out of his own free will, and obey laws because he has prescribed them for himself.

"In this new contractual society in which the people are sovereign, inalienable individual rights are not abolished, but made secure in a state based not on arbitrariness and force but on the moral law." KOHN, *THE IDEA OF NATIONALISM* 240-1 (1944).

"Rousseau's importance for and influence on the development of modern political thought could hardly be exaggerated. . . ." *Id.* at 237.

Locke did, that the protection of private property is the end of government. In his *Discourse on Political Economy*, he said: ⁴⁶

It would be still worse . . . if their lives, liberties, and properties lay at the mercy of persons in power without—it being possible for them to get relief from the laws.

It is certain that the right of property is the most sacred of all the rights of citizenship, and even more important, in some respects, than liberty itself; . . . or finally, because property is the true foundation of civil society, and the real guarantee of the undertakings of citizens. . . .

Montesquieu declared it to be the duty of the laws to see that rights in property given by the civil law should be invariably preserved; that it would never be to the public good to deprive an individual of his property. Bentham, the utilitarian, the active apostle of the greatest happiness principle, the moderate positivist, was a firm and active believer in the general beneficence of laws which secure men in the possession of their property. He maintained that the great virtue of law was “to give men that strong and permanent expectation that they could hold what was theirs.” ⁴⁷ Said he: ⁴⁸

But perhaps it may be alleged that the laws of property are good for those who have property and oppressive to those who have none. The poor man, perhaps, is more miserable than he would be without laws.

Not so. The laws in creating property have created riches only in relation to poverty. Poverty is not the work of laws; it is the primitive condition of the human race.

Conclusion

A word or two about the confusion of thought which makes some propound as irrepressible and irreconcilable here a conflict between natural rights and social rights, be-

⁴⁶ Rousseau, *op. cit. supra* note 38, at 271.

⁴⁷ As quoted in HUTCHESON, *LAW AS LIBERATOR* 181 (1937).

⁴⁸ *Ibid.*

tween property rights and human rights, or, as some put it, between democracy and property,⁴⁹ and I am done.

There is, there always will be, until perfect justice comes, a conflict between the justice and the injustice of opposing claims upon and to property asserted by government acting for and through the majorities which have the power and by private owners acting for themselves. There certainly is a complete, an irreconcilable, opposition between state socialism⁵⁰ of any kind and the natural right to acquire and own property, the same complete and irreconcilable opposition that there is between those forms of government and the form which we enjoy.

There certainly is not, there cannot be, if terms are properly defined and used, any conflict, any antagonism between property and the limited constitutional government we enjoy, any between human rights and rights in property, as we know them here. All rights are and must be human. A fundamental tenet of a liberal, limited constitutional democracy—the only kind we know—is the right of free men to a reasonable approximation to equality, not of ability, but of opportunity to acquire, to own, and to hold property, and not to be deprived of it except by due process of law. There is not, there cannot be, therefore, any opposition between property and the limited constitutional democracy we have, or between the ownership of property and the principle of democracy.

⁴⁹ See *id.* at 175 *et seq.*

⁵⁰ "Call it what you will, Fascism, Naziism, Communism, every totalitarian movement has meant and still means the destruction of a government of checks and balances, even of the possibility of the evolution of such a government. It has meant the establishment of government by decree, by bureaucratic planning, by concentrated and irresponsible power. It has meant the regimentation of peoples by means of the expropriation not only of natural resources but also of employing capital, and the eventual taking over of the ownership of the total wealth of the nation by a class of professional politicians. In the end, it has meant the loss of freedom, in any sense that Americans understand the word—not only free enterprise but also free speech, free elections, free press, and every other freedom as well." Sproul, in an address, May 31, 1948.

The theory of such a democracy requires the mutual recognition that the individual has no rights in his property which are in conflict with the justice of the general will, that justice which is seated in natural law and prescribed in the constitution; and that the government has no rights and the individual no duties and obligations in respect of his property except in aid of and measured by that justice. In a society like ours, the discovery, in a controversy between them, whether the claim of the individual or that of the government is in accord with that justice, completely and at once determines the issue.

Discussions then in terms of conflicts between property and democracy, between human rights and property rights are foolish and misleading. They should be restated as conflicts between the owners of private property and the government over the extent and the manner of the exercise in a particular case of public control over it. This latter conflict is by no means inevitable. It arises only where unjust claims are put forward on either side.

In October, 1820, when this country had stood and withstood for thirty years. Thomas Jefferson, with that pride and devotion to his country and its institutions which marked him as the foremost apostle of Americanism, wrote to Richard Rush: ⁵¹

We exist and are quoted as standing proofs that a government so modeled as to rest continuously on the will of the whole society, is a practicable government. Were we to break to pieces, it would damp the hopes and efforts of the good, and give triumph to those of the bad through the whole enslaved world. As members therefore, of the universal society of mankind, and standing high in responsible relation with them, it is our sacred duty to suppress passion among ourselves, and not to blast the confidence we have inspired of proof that a government of reason is better than one of force.

In bringing to a close this appeal for the preservation from corruption of the natural law principles on which this gov-

⁵¹ As quoted in 3 RANDALL, LIFE OF THOMAS JEFFERSON 458 (1858).

ernment was formed, may I not commend these views to all men of good will who believe in our country and its institutions and, believing, work and pray earnestly without ceasing that its principle be preserved from corruption. May I not too in that spirit and in all humility, in these dark and troubled times, urge upon us all natural law men and positivists alike, in Jefferson's phrase "suppressing passion among ourselves" to strive earnestly and in good faith, to understand, to minimize, and, if possible, to reconcile our points of difference, and to magnify and, if possible, enlarge our points of agreement. If we can do this, we will not "blast the confidence we have inspired of proof that a government of reason is better than a government of force."⁵² On the contrary, we will justify and increase it.

*Joseph C. Hutcheson, Jr.**

⁵² *Ibid.*

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