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Judson A. Crane

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Since the time of Plato philosophers have been engaged in the quest for basic principles of jurisprudence.[1] While it does not as yet appear that formulae of legal norms of universal and eternal validity can be stated[2] and accepted, it is nevertheless a fact that the quest continues and the questers are hopeful of success.[3] That there is a belief, however widespread, in the reality of something called natural law does not prove its existence.[4] But the belief in natural law and in natural rights exists and is a significant operating force in the course of legal and political thought.

As situations recur we find similar reactions and expressions of commentators. Last December a Disappointed American sent to a newspaper a letter telling of his intention to commit suicide. The letter was published together with replies by two clergymen. One of them, a parish priest, in telling why suicide was the wrong way out paraphrased three reasons of St. Thomas Aquinas,[5] who in turn got one of his reasons from Socrates and another from Aristotle.[6] Attacks on New Deal legislation remind one of Cicero's comment,—"What of the many deadly, the many pestilential laws which nations put in force? These no more deserve to be called laws than the rules a band of robbers might pass in their assembly. For if ignorant and unskillful men have prescribed deadly poisons instead of healing drugs, these cannot possibly be called physician's prescriptions; neither

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1 6 ENCYCLOPEDIA OF SOCIAL SCIENCES, 284, Natural Law; HALL, READINGS IN JURISPRUDENCE, Chapter 1; BEROLZHEIMER, THE WORLD'S LEGAL PHILOSOPHIES, Chapter 2; RITCHIE, NATURAL RIGHTS, Chapter 2; O. W. Holmes, *Natural Law*, 32 HARV. L. REV. 40.

2 GAREIS, INTRODUCTION TO THE SCIENCE OF LAW, 19.

3 HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS.

4 KORKUNOV, THEORY OF LAW, 134-138. Compare the struggles of Galileo with the accepted Aristotelian theories of astronomy narrated in ZSOLT DE HARSANYI, THE STAR-GAZER.

5 PITTSBURGH SUN-TELEGRAPH, December 19, 1939, pp. 17, 24.

6 RITCHIE, NATURAL RIGHTS, 126.

in a nation can a statute of any sort be called a law, even though the nation in spite of its being a ruinous regulation has accepted it." [7]

The reader of today's newspapers can observe the present operation of natural law through the revival of natural rights formulae which were embodied in the eighteenth century state constitutions and in the Declaration of Independence. As typical statements we may consider some of the provisions of the Pennsylvania Constitution, which are identical, save for insignificant verbal changes, with the first Constitution adopted at the instance of Benjamin Franklin and his associates in revolt in 1776.[8]

"Art. 1, Sec. 1. All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.

"Sec. 2. All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety, and happiness. For the advancement of those ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they think proper.

"Sec. 3. All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience and no preference shall ever be given by law to any religious establishment or modes of worship.

"Sec. 7. The printing press shall be free to every person who may undertake to examine the proceedings of the legis-

7 De Legibus. Bk. II, Chapter 5, Hall's Readings in Jurisprudence 22.

8 Thomas Paine, Rights of Man, Part II, Chapter 4; Bernard Fay, Franklin, 397.

lature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject being responsible for the abuse of that liberty."

The sources of the ideas expressed in Art. 1, Sec. 1, were doubtless various. The colonists were familiar with Locke's Treatise on Government in defense of the seventeenth century English Revolution, the Principles of the Law of Nature of Bourlamaqui, the writings of Rousseau, and the Commentaries of Blackstone at the beginning of which were set forth the Englishman's natural and inalienable rights to liberty, security, and property.[9] The Declaration of Independence and the Bill of Rights clauses in the early constitutions were war slogans as well as statements of restraints on the governments which they proposed to establish to maintain an individualistic state of society in pioneer communities.

In their operation they have required a considerable amount of legislative and judicial interpretation. At the outset one is struck with the possible inconsistency between equality and liberty.[10] Equality was not apparently intended for women, Indians, and negroes.[11] Indians have to this day been the wards of the Federal Government. Only recently were women granted the right to vote. They are subjected to regulation as to their occupations and hours of labor.[12] In Pennsylvania the emancipation of negro slaves was commenced in 1780 with an act of assembly which freed the children thereafter born of slaves on reaching the age of 28, but left existing slaves unaffected.[13] In 1867 the Supreme Court upheld a "Jim Crow Car" practice of a railroad as being in accordance with natural law and the Will of Divine

9 1 BL. COMMS. Chapter 1.

10 Ivor Brown, *The War and the British Middle Class*, HARPER'S MAGAZINE, March 1940, 350, 352.

11 Dana, *The Declaration of Independence*, 13 HARV. L. REV. 319.

12 43 PS 101-133.

13 1 SMITH'S LAWS (Pa.) 492.

Providence, despite an act of the legislature which was too late to affect the instant case.[14] In 1935 it appeared necessary to enact an Equal Rights Act forbidding discrimination in places of public accomodation, such as inns, schools and places of amusement.[15]

The indefeasible right of enjoying and defending life is, of course, subject to some qualifications, the extent of which is not a matter of complete agreement among the moralists. Is war ever justifiable, and if so when? Is capital punishment justifiable? Under what circumstances may one take life in defense of self or of another or to prevent crimes to property interests? In some communities the "Unwritten Law" of private vengeance is administered by trial juries. In Texas, to judge from recent newspaper reports of the action of a grand jury, in refusing to indict, it is not improper for a young woman to publicly defend her right of privacy as against annoyances by a former lover, using effectively two guns with soft nosed bullets. That lynch law is accepted in some sections would appear from the movement to have the matter dealt with by Act of Congress, and the resistance thereto by many members of Congress. If one owns one's own life has one a right under any circumstances to commit suicide? What of the commander of the Graf Spee? What of the criminal about to be apprehended for a capital offense who saves the community the trouble and costs of a trial?

How far is one entitled to the affirmative action of the community in aid of his pursuit of happiness? Is the government under a duty of providing work for the unemployed? Should the courts provide a remedy for invasion of the interest in privacy? [16] Should the courts provide a remedy against annoyance from the high pressure bill col-

14 West Chester & Phila. R. R. Co. v. Miles, 55 Pa. 209 (1867).

15 18 PS 1211.

16 Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931); Mau v. Rio Grande Oil, Inc., 28 F. Supp. 845 (1939).

lector? [17] Does one's interest in the disposal of the body of a deceased relative justify an informal cremation in the basement furnace? [18] No doubt everyone can arrive at an answer to these problems, but it is difficult to do so by a process of deduction from basic principles without regard to the current mores of the community, and it is difficult to secure universal agreement as to the answers.

Freedom of religious worship in Pennsylvania dates back to an early statute enacted shortly after the settlement by the Penns.[19] Where the line is to be drawn between personal liberty and the exercise of the police power in the interests of public safety is not clear. There is a current conflict over the enforcement of public school regulations requiring salutes of the flag as against children brought up to regard such conduct as idolatrous. Lower courts in Pennsylvania have stood by the school boards.[20] The Federal District Court,[21] and the Third Circuit Court of Appeals have sustained "Jehovah's Witnesses." [22] If the case reaches the Supreme Court it is likely that the Bill of Rights Committee of the American Bar Association will intervene as *amicus curiae*,[23] despite differences among the House of Delegates.

Free communication of thoughts and ideas has been somewhat hampered by ordinances regulating the distribution of handbills,[23a] which may now be considered unconstitutional.[23b]

The most controversial problem today is that of limitations on the inherent and indefeasible right of acquiring, possess-

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17 Clark v. Associated Retail Credit Men, 105 F. (2d) 62 (App. D. C. 1939) Borda, *One's Right to Enjoy Mental Peace and Tranquility*, 28 GEORGETOWN L J. 55, 65.

18 State v. Bradbury, 9 A. (2d) 657 (Maine, 1939).

19 1 SMITH'S LAWS (Pa.) 24.

20 2 U. OF PITTS. L. REV. 206.

21 Gobitis v. Minersville School District, 21 Fed. Supp. 581, 24 Fed. Supp. 271 (1938).

22 Minersville School District v. Gobitis, 108 F. (2d) 683 (1939).

23 26 AMER. BAR ASSN. J. 104, 120.

23a Phila. v. Brabender, 201 Pa. 574, 31 A. 374 (1902).

23b Schneider v. New Jersey, 60 S. Ct. 146 (1939).

ing, and protecting property. The judicial and popular concepts prevailing at the end of the eighteenth century are illustrated by the charge to the jury of Judge Patterson of the Federal Circuit Court in *Van Horne's Lessee v. Corrance,*[24] a case involving the effect of certain acts of the legislature on land titles. After reading certain sections of the Bill of Rights, the judge continued:

"From these passages it is evident that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent and unalienable rights of man. Men have a sense of property: Property is necessary for their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society. (note concept of pre-political rights) No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact, and by the state constitution of Pennsylvania was made a fundamental law . . . . The legislature, therefore, had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace, and happiness of mankind; it is contrary to the principles of social alliance in every free government; and lastly, it is contrary to the letter and spirit of the Constitution."

Natural law ideas played a large part in the development of the common law of the American states, in the early nineteenth century.[25] As the civil war approached and abolition of slavery was discussed, natural law was relied on both to attack and to defend the institution.[26] With the end of the war, the settlement of the West, the industrial expansion, the growth of big business left our people little time to contemplate natural law concepts. At the turn of the century the college student of political science was learning from such books as W. W. Willoughby's NATURE OF THE STATE, that all rights were created and conferred by organized society. The lawyers were reading James C. Carter's LAW, ITS ORIGIN, GROWTH AND FUNCTION, and learning to put their faith ex-

24 2 Dall. 304, 310 (1795).
25 POUND, THE FORMATIVE ERA OF AMERICAN LAW, Chapter 1.
26 WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW, 228, 241.

clusively in the orderly judicial development of the Common Law. In the meantime the common man was beginning to feel the occasional hardships of the free enterprise system. Labor organizations were beginning to become active and powerful. Legislatures, responsive to popular demands, were beginning to regulate business. In the courts there developed a series of conflicts between the constitutional rights of property and freedom of contract[27] with the growing scope of the police power.

In the field of labor relations labor organizations were legalized with the abolishment of the old conspiracy laws. But the privilege to strike to secure a closed shop was at first denied. A Pennsylvania Court in an injunction proceeding said:

"The right to the free use of his hands is the workman's property as much as the rich man's right to the undisturbed income from his factory, houses, and lands; by his work he earns present subsistence for himself and his family, his savings may result in accumulations which will make him as rich in houses and lands as his employer. This right of acquiring property is an inherent indefeasible right of the workman, to exercise it he must have the unrestricted privilege of working for such employer as he chooses at such wages as he chooses to accept. This is one of the rights guaranteed him by our "Declaration of Rights;" it is a right of which the legislature cannot deprive him, one which the law of no trades union can deprive him, one which it is the bounden duty of the courts to protect. The one most concerned in jealously maintaining this freedom is the workman himself." [28]

In *Coppage v. Kansas*[29] the Supreme Court voided the Kansas statute outlawing the "Yellow Dog Contract," on grounds of freedom of contract. By Pitney, J.,

"The principle is fundamental and vital. Included in the right of personal liberty and the right of private property — partaking of the

27 WRIGHT, op. cit, 302-306. See the delicately ironic comment of THORSTEIN VERBLEN, THE THEORY OF BUSINESS ENTERPRISE, quoted in Hall's Readings on Jurisprudence, p. 306. More briefly, — "But the enemies of the future are always the nicest people." CHRISTOPHER MORLEY, KITTY FOYLE, p. 46.

28 Erdman v. Mitchell, 207 Pa. 79, 56 A. 327 (1903). Compare William Draper Lewis, *The Closed Market, The Union Shop and The Common Law,* 18 HARV. L. REV. 444, with RESTATEMENT, TORTS, § 788.

29 236 U. S. 1, 35 S. Ct. 240, 59 L. ed. 441 (1915).

nature of each — is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. And since it is self-evident that unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune which are the necessary result of the exercise of these rights."

Such decisions have become outmoded by the recent labor legislation sustained by the Supreme Court.[30]

Workmen's Compensation Acts were at first viewed with judicial distaste. In *Ives v. South Buffalo R. R.*,[31] a New York Act was held unconstitutional. By Cullen, J.,

"It is the physical law of nature, not of government, that imposes upon one meeting with an injury the suffering occasioned thereby. Human law cannot change that. All it can do is to require pecuniary indemnity to the party injured, and I know of no principle on which one can be compelled to indemnify another for loss unless it is based upon contractual obligation or fault."

In New York this resulted in an amendment to the Constitution.[32] In many other states the scheme of compensation was ostensibly contractual.

In Pennsylvania the schedule of compensation must not be so liberal as to hamper the *sine qua non* of business enterprise, the making of profits. In *Rich Hill Coal Co. v. Bashore*,[33] amendments substantially increasing the scale of benefits were held unconstitutional. By Maxey, J.,

"It is equally true that if the rates of compensation which the legislature order employers to pay injured employees prevents any return or a reasonable return on the property invested, the result is confiscation — a situation intolerable in a constitutional government. Laws should conserve property, not destroy it. The tragic experience of the

30 Thomas Reed Powell, *Some Aspects of American Constitutional Law*, 53 HARV. L. REV. 529, 541.

31 201 N. Y. 271, 94 N. E. 431 (1911).

32 Art. I, Sec. 19 (1913).

33 334 Pa. 182, 7 A. (2d) 302 (1939).

peoples of other countries today clearly demonstrates that the step from a government's arbitrary taking of property to its arbitrary taking of life and liberty is a short one. In republics like ours the protection of life, liberty *and* property are the specific subjects of constitutional and judicial protection."

The next session of the legislature made material reduction in the rates.[34] It might seem that if the industry of a particular state cannot stand adequate compensation schedules without insecurity for capital investment, the matter might be appropriate so far as interstate commerce is concerned, for federal legislation, as in the matters of wages and hours.

Liability without fault existed under the early common law. Then in the last four hundred years there developed the theory that liability should depend on fault exclusively, with certain exceptions such as *respondeat superior* and extra-hazardous enterprises.[35] Now we tend to regard liability without fault as contrary to the law of nature. For reasons of public policy we have gotten away from it so far as workmen's compensation is concerned. But in new situations the idea persists. In *Summit Hotel v. National Broadcasting Company*[36] the defendant was held not to be liable in an action of slander for the defamatory remark—not in the script—interjected by a radio comedian interviewing the winner of a golf tournament on a sponsored program. The court said, "A rule imposing liability without fault . . . is manifestly unjust, unfair, and contrary to every principle of morals." The conclusion has not been so clearly manifest to many who have expressed their comments.[37]

Today it would appear to be the attitude of business that we are faced with the alternatives of collectivism along the lines of the totalitarian states or a return substantially to the individualism of the founding fathers who knew not in-

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34 June 21, 1939, P. L. 520.

35 Jeremiah Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235, 238.

36 336 Pa. 182, 8 A. (2d) 302 (1939).

37 6 U. OF PITTS. L. REV. 81; 88 U. OF PA. L. REV. 122. But see 44 DICK. L. REV. 52; 53 HARV. L. REV. 143; 14 TEMP. L. Q. 137.

dustrial corporations or committees on industrial organization, and needed no work relief programs, having plenty of free land for the underprivileged and maladjusted. Wendall L. Wilkie in an address before the 44th Congress of American Industry, December 8, 1939, pleaded for free industry and stated the issue as individual vs. state. December 11, 1939, this Congress produced resolutions which included this analysis of the situation:

"The achievements of American industry command the admiration of the civilized world. These achievements derive from a system of free enterprise founded on the bedrock of a constitutional government designed to protect the individual in his right to life, liberty, and the pursuit of happiness. The essence of this system is the right of citizens to pursue their individual likes and interests, including the right to acquire, own and use property, all within the restraints of good citizenship. Individual effort is encouraged by the incentive of competition and the opportunities for advancement or profit . . . . In contrast to the American system of free enterprise stands planned economy, the system employed in every totalitarian state. Political dictatorship on which this alien system is based, is repellent to Americans, because it destroys personal liberty, religious freedom, and individual initiative." [38]

The theological approach is recalled in the recent speech by a well-known newspaper proprietor.

"Democracy is the child of religion. Our form of government was set up by men and women of intense religious convictions who sought freedom to worship according to their own consciences. The faith that every human being, as a child of God, has inalienable rights that no earthly power may invade, is the foundation stone of our democracy. Our constitution is the highest expression of this religious conviction of the sacredness of human life. The challenge to uphold democratic institutions is for all who want to defend our Bill of Rights, freedom of worship, of speech, of the press, and the right of the individual to follow his own way of life without the tyrannical imposition of governmental formulas." [39]

Roscoe Pound in a recent address has pointed out the historical connection between liberty and property rights,

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[38] U. S. News, Dec. 11, 1939.

[39] From addresses by Frank Gannett before W. C. T. U., Sept. 29, 1939, and B'nai B'rith, March 20, 1938.

and the danger to liberty and law which may result from restraints on the use of property by arbitrary acts of administrative boards.[40]

These quotations have been presented for the purpose of showing that natural law in terms of natural rights has played a part in legal and popular thought and does today. It seems probable that a Gallup Poll would show a great majority of our electorate in favor of the Bill of Rights,—with individual freedom of interpretation. While this is not a satisfactory exemplification of natural law as viewed by some of its adherents,[41] it is nevertheless a fact of current significance. Another evident fact is that few lawyers give any thought to jurisprudence. It may be that the law schools are at fault. It is to be hoped that the revival of interest in natural law will result in readings in jurisprudence, if not in formal courses, being made a part of the curricula of American Law Schools. It seems reasonable that law students should give some thought to the end of law and the criteria of good law in the light of the world's legal philosophies. Whether or not it will ever be proven that there are any immutable basic principles of law, some weight should be given to the fact that in democratic societies certain individual interests, such as are incorporated in the Bill of Rights have for more than a century been regarded as of paramount importance.[42]

Judson A. Crane.

University of Pittsburgh, School of Law.

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40 *The Law of Property and Recent Juristic Thought*, 25 AMER. BAR ASSN. J. 993.

41 WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW, Chapter 9, HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS, Chapter 8; Brown, *Natural Law and the Law-Making Function in American Jurisprudence*, 15 NOTRE DAME LAWY. 9.

42 For modern Statements of Natural Law in terms of Natural Rights see 1 PLANIOL TRAITE ELEMENTAIRE DE DROIT CIVIL, Sec. 6; Pope Pius XI, *Encyclical Atheistic Communism* (1937) §§ 27, 28.