

2003

## The American Rejection of Economic Rights as Human Rights and the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?

Linda M. Keller

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### Recommended Citation

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## ARTICLE

# The American Rejection of Economic Rights as Human Rights & the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?

Linda M. Keller\*

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\* Linda M. Keller is a Visiting Assistant Professor and the Fellow of the Center for the Study of Human Rights at the University of Miami School of Law, where she teaches international human rights law. She wishes to thank Professor Irwin Stotzky for his thoughtful comments on earlier drafts.

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### I. INTRODUCTION

One would think that the condition of the poor today could not be more different than that of French peasants in 1785. Unfortunately, in America today, the working poor struggle to stretch inadequate pay to cover the basic necessities of life such as food and shelter. The plight of the poor in America looks all too similar to years past. It brings to mind President Roosevelt's call for the Congress to act in the face of hunger and unemployment: "We cannot be content, no matter how high [the] general standard of living may be; if some fraction of our people — whether it be one-third or one-fifth or one-tenth — is ill-fed, ill-clothed, ill-housed, and insecure."<sup>1</sup>

Over two centuries ago, Thomas Jefferson described an encounter with a poor woman in France:

Wishing to know the condition of the laboring poor, I entered into conversation with her, which I began by enquiries for the path which would lead me to the mountain: and thence proceeded to enquiries into her vocation, condition and circumstances. She told me she was a day laborer at 8 sous or 4d. sterling the day: that she had two children to maintain, and to pay a rent of 30 livres for her house (which would consume the hire of 75 days), that often she could get no employment and of course was without bread.<sup>2</sup>

Conditions today are strikingly similar. The average minimum-wage, full-time worker in America earns \$6.13 an hour *less* than what he would need to afford the rent on a one-bedroom apartment; the difference is more than the minimum wage itself.<sup>3</sup> A sin-

<sup>1</sup> Franklin D. Roosevelt, Message to the Congress on the State of the Union (Jan. 11, 1944), <http://www.udhr.org/history/1-11-44.htm> (last revised Mar. 3, 2001).

<sup>2</sup> THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 388-89 (Adrienne Koch & William Peden eds., 1944) [hereinafter SELECTED WRITINGS] (Letter from Thomas Jefferson to Reverend James Madison (Oct. 28, 1785)).

<sup>3</sup> Jennifer Loven, *Report Finds Rentals Out of Reach of Many Minimum Wage Workers*, MIAMI HERALD, Oct. 3, 2001, at 4C (figures of "housing wage" calculated based on the Department of Housing and Urban Development's definition of affordable housing at 30% of gross income).

gle parent would have to work over two and one-half full-time minimum wage jobs to afford a decent two-bedroom apartment.<sup>4</sup> Two and a half jobs and barely a roof over the heads of one's family: these figures leave no room for food, let alone childcare or healthcare, just as in France in 1785. While conditions in America in 2002 cannot be equated to eighteenth century France or the Great Depression of Roosevelt's time, far too many people, including children, continue to suffer. It is a disgrace that the richest country in the world has the industrialized world's highest rates of child poverty, hunger and homelessness. It is also a betrayal of the foundations of American democracy. This rejection of economic rights flies in the face of international law and the principles of the Declaration of Independence.

In this article, I will explore the economic dimension of "the Pursuit of Happiness" in the Declaration of Independence and how it undercuts the notion that economic and social rights under international human rights law are somehow "un-American." The United States has long resisted the elevation of minimum economic needs to the status of universal human rights. American politicians have not only largely rejected legally enforceable international human rights agreements in general, but have been particularly antagonistic to the notion that basic human rights include the right to food, shelter or employment. The reluctance of the United States government to embrace economic and social rights stems, in part, from a belief that they are not truly human rights, but rather radical entitlements initially advocated by Soviet bloc countries as a strategy of the Cold War. The minimum needs conception of the pursuit of happiness posits that economic rights are in fact enshrined in a document widely considered part of the sacred foundation of American democracy.<sup>5</sup>

In Part II, I will evaluate the rejection of economic rights in the United States, focusing on the international commitments that have been ignored or undermined. In Part III, I will turn to the Declaration of Independence, specifically, "the Pursuit of Happiness." I will examine the potential sources and contemporary understandings of the phrase. Drawing on eighteenth century political thought, I will

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<sup>4</sup> *Id.*

<sup>5</sup> For an in-depth discussion of the remaking of the Declaration of Independence, see PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* (1998).

assert that its inclusion was not merely a rhetorical flourish, but rather that the pursuit of happiness established an “unalienable right” that includes an economic dimension.

In Part IV, I will argue that the right to pursue happiness entails a concomitant governmental duty. I will explore the scope of the resulting duty, from a narrow obligation to protect individual pursuits from external interference to a heavy, if not impossible, burden of providing happiness. I will contend that between these two extremes lies the most plausible interpretation: the duty to *facilitate* the pursuit of happiness by providing minimum economic means. Although the Declaration of Independence has not been interpreted to be legally enforceable,<sup>6</sup> the principles of the Declaration form the basis for the government and must be followed by it. I will show how this obligation to ensure basic economic rights is also contained in various international instruments, most notably the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. Far from being foreign to American political thought, the duty to facilitate the pursuit of happiness is provided for and must be fulfilled under the principles of the Declaration of Independence.<sup>7</sup>

## II. AMERICAN REJECTION OF ECONOMIC RIGHTS AS HUMAN RIGHTS

Despite initial support for economic rights, the United States government has been reluctant to give minimum economic means the status of a right. United States rates of poverty, homelessness

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<sup>6</sup> See discussion *infra* part IIIB.

<sup>7</sup> This project was first suggested by Bert Lockwood at a Schell Center conference at Yale Law School on incorporating international human rights law into domestic law. Lockwood has advocated for welfare rights under state constitutional provisions to happiness and safety, particularly the right to obtain happiness. See Bert B. Lockwood, Jr., et al., *Litigating State Constitutional Rights to Happiness and Safety: A Strategy for Ensuring the Provision of Basic Needs to the Poor*, 2 WM. & MARY BILL OF RTS. J. 1 (1993); see also MORTIMER J. ADLER, *WE HOLD THESE TRUTHS: UNDERSTANDING THE IDEAS AND IDEALS OF THE CONSTITUTION* (1987) (true democracy requires both political and economic justice); Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1114 (1986) (duty of Congress is to continually move “by the general diffusion of welfare, to give life to a constitutional justice of livelihood, and so to prepare the way for the ‘Pursuit of Happiness’ — thus taking on, as to all the people, both of the tasks allotted to government in the Declaration of Independence: ‘to effect their safety and happiness’”).

and hunger exceed those of other industrialized countries.<sup>8</sup> Yet the United States refuses to recognize that the political rights so cherished by American politicians are meaningless to a child who is hungry, or an adult who is working forty hours a week, but cannot afford to keep a roof over her family. By contrast, economic rights have been embraced by other countries, including those with fewer means than the United States.<sup>9</sup> The United States takes this to mean that economic rights are not really rights at all, but utopian goals for which to strive. To the contrary, in a country with the means to fulfill economic rights, basic needs *must* be met. The Declaration of Independence, whose principles are supposedly enshrined in our government and Constitution, requires that basic needs be met to enable individuals to pursue happiness.

The United States played a pivotal role in drafting the international documents establishing economic, social and cultural rights. The 1948 Universal Declaration of Human Rights<sup>10</sup> was adopted by the United Nations General Assembly largely as a result of United States diplomacy, particularly by Eleanor Roosevelt.<sup>11</sup> The Universal Declaration proclaimed both political and economic rights, but the subsequent drafting of two separate protocols divided rights into two distinct classes: civil and political rights; and economic, so-

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<sup>8</sup> The United States has the highest levels of inequality and child poverty of all industrialized nations. CENTER FOR ECONOMIC & SOCIAL RIGHTS, HUMAN RIGHTS IN THE UNITED STATES, <http://www.cesr.org/PROGRAMS/usprogram.htm> (last visited Jan. 29, 2003); AMERICA NEEDS HUMAN RIGHTS 136 (Anuradha Mittal and Peter Rosset eds., 1999); see also Ritter, J.P., Goldstein, Friedmann and Luciano, JJ., *No Child Left Behind*, CONN. L. TRIB., July 15, 2002, at 19 (discussing United States as a country with shockingly high numbers of homeless children).

<sup>9</sup> In fact, many other countries have included economic, social and cultural rights in their constitutions. See W. Kent Davis, *Answering Justice Ginsburg's Charge That the Constitution is "Skimpy" in Comparison to Our International Neighbors: A Comparison of Fundamental Rights in American and Foreign Law*, 39 SOUTH TEX. L. REV. 951, 968-75 (1998); Ann I. Park, Comment, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195, 1196 n.1 (1987). But see, e.g., Cass R. Sunstein, *The Negative Constitution: Transition in Latin America*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY 367, 372 (Irwin P. Stotzky ed., 1993) (constitutions should not contain positive economic rights).

<sup>10</sup> G.A. Res. 217A, U.N. GAOR, pt. 1, at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

<sup>11</sup> See, e.g., MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

cial, and cultural rights.<sup>12</sup> Although the preambles of the resulting documents, the International Covenant on Civil and Political Rights (ICCPR)<sup>13</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>14</sup> refer to the enjoyment of both classes of rights, many countries have advocated and/or practiced a division of rights. In particular, the United States has ratified the ICCPR but remains the only major industrialized democracy that has not ratified the ICESCR.<sup>15</sup>

By signing the ICESCR, however, the United States “undertook, inter alia, to guarantee ‘the effective exercise’ of economic, social and cultural rights and to consider acceding to the [ICESCR].”<sup>16</sup> Moreover, although the Universal Declaration is not a binding treaty, many scholars agree that it has attained the status of customary international law.<sup>17</sup> Nevertheless, the United States refuses to recognize that “economic, social and cultural rights” are rights.<sup>18</sup> The United States typically deems such “so-called rights” to be a Soviet invention,<sup>19</sup> and instead labels them as mere “goals”

<sup>12</sup> For a discussion of the reasons behind the split, see Linda M. Keller, *The Indivisibility of Economic and Political Rights*, 1 HUM. RTS. & HUM. WELFARE 9 (July 2001), (reviewing AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999)), available at <http://www.du.edu/gsis/hrhw/volumes/2001/1-3/Keller-Sen.pdf>.

<sup>13</sup> Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>14</sup> Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

<sup>15</sup> See Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an “Entirely New Strategy”*, 44 HASTINGS L. J. 79, 80 (1992).

<sup>16</sup> Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT’L. L. 365, 365 (1990) [hereinafter, Alston, *U.S. Ratification*].

<sup>17</sup> Cf. Davis, *supra* note 9, at 977 (Universal Declaration recognized as legally binding in many countries, including United States, at least as to certain norms like the prohibition against torture, summary execution, genocide).

<sup>18</sup> Philip Alston, *Economic and Social Rights*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 137, 148 (Louis Henkin & John Lawrence Hargrove eds., 1994) [hereinafter, Alston, *Economic and Social Rights*]; see also Jeffrey L. Dunoff, *Does Globalization Advance Human Rights?*, 25 BROOK. J. INT’L L. 125, 135-36 (1999).

<sup>19</sup> See Barbara Stark, *Urban Despair and Nietzsche’s “Eternal Return:” From the Municipal Rhetoric of Economic Justice to the International Law of Economic Rights*, 28 VAND. J. TRANSNAT’L L. 185, 220 (1995) (economic rights as socialist propaganda). Interestingly, in his 1976 book, scholar Paul Eidelberg noted that many of the large number of Americans unfamiliar with the substance of the Declaration of Independence “express hostility to its fundamental principles, regarding them as *subversive or suggestive of the teachings of Communism.*” PAUL

or “aspirations.”<sup>20</sup> United States critics of the ICESCR refer to “red rights”<sup>21</sup> and the “Covenant on Uneconomic, Socialist and Collective Rights.”<sup>22</sup> Ideological opponents of the ICESCR “sometimes seem to portray it as an intrinsically un-American enterprise.”<sup>23</sup>

Thus, during the 1979 Senate hearings [on ratification of the ICESCR], it was argued by one witness that the [ICESCR] ‘is largely a document of collectivist inspiration, alien in spirit and philosophy to the principles of a free economy.’ An even more extreme assessment is that the ‘[ICESCR] is a socialist blueprint that encourages open-ended unlimited government meddling of the sort on which dictatorships thrive.’<sup>24</sup>

Philip Alston has pointed out that such an “attempt to discredit these rights demonstrates an ignorance of history in general, as well as of the history of drafting of the relevant provisions of the Universal Declaration of Human Rights. ‘Freedom from want’ was included in the Four Freedoms proclaimed by President Roosevelt and endorsed by the Allies in the Atlantic Charter of 1941.”<sup>25</sup> In his 1941 State of the Union Address, Roosevelt declared the four essential freedoms, including “freedom from want, which, translated in world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants every-

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EIDELBERG, ON THE SILENCE OF THE DECLARATION OF INDEPENDENCE ix (1976) (emphasis added).

<sup>20</sup> Alston, *Economic and Social Rights*, *supra* note 18, at 148 (State Department terminology used for economic “rights” 1981-1993). For a discussion of foreign policy and ICESCR, see Alston, *U.S. Ratification*, *supra* note 16, at 372-77.

<sup>21</sup> Johan D. van der Vyver, *Human Rights in the Twenty-First Century: A Global Challenge*, 8 EMORY INT’L L. REV. 787, 799 (1994) (book review).

<sup>22</sup> Alston, *U.S. Ratification*, *supra* note 16 at 366.

<sup>23</sup> *Id.* at 383.

<sup>24</sup> Alston, *U.S. Ratification*, *supra* note 16, at 383-84 (footnotes omitted).

<sup>25</sup> Alston, *Economic and Social Rights*, *supra* note 18, at 142. In fact, the United States was a proponent not only of economic rights, but also of a strong supervisory enforcement mechanism for economic, social and cultural rights during the drafting stage of the ICESCR. See KITTY ARAMBULO, STRENGTHENING THE SUPERVISION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THEORETICAL AND PROCEDURAL ASPECTS 28 (1999). For further discussion by Alston of the United States origins of economic, social and cultural rights see ALSTON, *U.S. Ratification*, *supra* note 16 at 387-88 (addressing support of economic rights expressed by Harry Truman, Catholic and other churches, and other Western governments).



where in the world.”<sup>26</sup> In his 1944 State of the Union Address, Roosevelt proposed an Economic Bill of Rights, “including many of those economic and social rights which subsequently came to be included in the [Universal Declaration and ICESCR].”<sup>27</sup> He proclaimed:

This Republic had its beginning, and grew to its present strength, under the protection of certain inalienable political rights — among them the right of free speech, free press, free worship, trial by jury, freedom from unreasonable searches and seizures. They were our rights to life and liberty.

As our Nation has grown in size and stature, however, — as our industrial economy expanded — these political rights proved inadequate to assure us equality in pursuit of happiness.

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. “Necessitous men are not freemen.” People who are hungry and out of a job are the stuff of which dictatorships are made.<sup>28</sup>

As Roosevelt explicitly recognized, civil and political rights are an inadequate basis for the pursuit of happiness. Basic economic needs must be met to make the opportunity meaningful for all. This realization was not unique to Roosevelt; it was inherent in the political philosophy of the Founders.

### III. A “MINIMUM NEEDS” CONCEPTION OF THE PURSUIT OF HAPPINESS

The second paragraph of the Declaration states:

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Cre-

<sup>26</sup> 87 CONG. REC. 46-47 (1941).

<sup>27</sup> Asbjorn Eide, *Economic, Social and Cultural Rights as Human Rights, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 21, 29 (Asbjorn Eide et al. eds., 1995).

<sup>28</sup> 90 CONG. REC. 57 (1944). For a discussion of the implementation of the freedom from want in the context of the right to work during the New Deal and beyond, see William P. Quigley, *The Right to Work and Earn a Living Wage: A Proposed Constitutional Amendment*, 2 N.Y. CITY L. REV. 139 (1998).

ator with certain unalienable Rights; that among these are Life, Liberty, and the Pursuit of Happiness. That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles and organizing its Powers in such Form, as to Them shall seem most likely to effect their Safety and Happiness.<sup>29</sup>

#### A. *Jefferson's Declaration of Independence*

While the phrase "pursuit of happiness" is central to American culture and frequently invoked, its meaning has never been satisfactorily ascertained. "In asserting the right to pursue happiness or to pursue and obtain happiness and safety, the eighteenth-century men asserted an absolute they failed to define. This was natural. . . . For them the common sense of the matter was sufficient. . . ."<sup>30</sup> While it may be impossible to definitively determine any one definition of "pursuit of happiness" held by all the signers of the Declaration,<sup>31</sup> it is possible to ascertain the probable parameters of the term. Drawing on other uses of the phrase and contemporary sources of the meaning of happiness, I argue that a plausible interpretation of pursuit of happiness includes an economic dimension.

As recent scholarship has emphasized, Thomas Jefferson was not the sole author of the Declaration of Independence,<sup>32</sup> nor were

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<sup>29</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) reprinted in ALLEN JAYNE, *JEFFERSON'S DECLARATION OF INDEPENDENCE: ORIGINS, PHILOSOPHY AND THEOLOGY*, app. at 178 (1998) (text is "The First Printing of the Declaration of Independence, as inserted in the Rough Journal of Congress[.]").

<sup>30</sup> HOWARD MUMFORD JONES, *THE PURSUIT OF HAPPINESS* 99 (1953).

<sup>31</sup> See, e.g., *id.* at 15 ("by no means easy" to ascertain meaning of pursuit of happiness); JEAN M. YARBROUGH, *AMERICAN VIRTUES: THOMAS JEFFERSON ON THE CHARACTER OF A FREE PEOPLE* 14 (1998) ("Jefferson never systematically explores what he means by happiness in general or the pursuit of happiness in particular").

<sup>32</sup> See, e.g., MAIER, *supra* note 5, at 98 (discussing Committee of Five charged with drafting the declaration in addition to role of whole Congress as editors).

its ideas original to him.<sup>33</sup> Nevertheless, “[i]n the end, the draft Declaration of Independence submitted to Congress by the Committee of Five was so much the work of Thomas Jefferson that it can justly be called ‘Jefferson’s draft.’”<sup>34</sup> While other passages were substantively changed prior to adoption by Congress, the pursuit of happiness language was not significantly altered.<sup>35</sup> Therefore, it is possible to use Jefferson as a proxy for the Congress and more broadly, the people, given that the Declaration was meant to embody the sentiments of the public.<sup>36</sup> Jefferson later explained the purpose of his draft:

Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, &c.<sup>37</sup>

The sources upon which Jefferson drew are a subject of much controversy.<sup>38</sup> Nonetheless, most commentators agree that Jefferson was influenced by the writings of contemporaries such as fellow Virginian George Mason and Pennsylvanian James Wilson, as well as political philosophers like John Locke and assorted “moral

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<sup>33</sup> See, e.g., JAYNE, *supra* note 29, at 1 (Jefferson not originator of ideas or ideals).

<sup>34</sup> MAIER, *supra* note 5, at 105.

<sup>35</sup> The following changes were made: “inherent and inalienable rights” was changed to “certain inalienable rights” by Congress; “inalienable” became “unalienable” in the printed version. MAIER, *supra* note 5, app. C. at 236.

<sup>36</sup> *But cf.* Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 HASTINGS CONST. L. Q. 1, 8-9 (1997) (state constitutions based “happiness” provisions on Virginia Declaration, not Declaration of Independence, so proper source to explore is George Mason, not Thomas Jefferson). Mason’s sources, like Jefferson’s, include Aristotle, Locke, Hutcheson, Burlamaqui and Wilson. *Id.* at 11-16.

<sup>37</sup> Letter from Thomas Jefferson to Henry Lee (May 8, 1825), in 10 THE WRITINGS OF THOMAS JEFFERSON 1816-1826 343 (Paul Leicester Ford ed., 1899).

<sup>38</sup> Compare GARRY WILLS, INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE (1978), with Ronald Hamowy, *Jefferson and the Scottish Enlightenment: A Critique of Garry Wills’s Inventing America: Jefferson’s Declaration of Independence*, 16 WM. & MARY Q. 503 (1979).

sense" theorists.<sup>39</sup> As illustrated above, Jefferson himself rejected any claim on originality of concept and credited various sources for the Declaration.<sup>40</sup>

*B. The Substantive Meaning of Pursuit of Happiness*

Happiness was one of the most central concepts in eighteenth-century thought. "The notion was generally accepted by Americans of the revolutionary period, and there is no record of any question raised in regard to it in the convention which voted on the *Declaration*."<sup>41</sup> Illustrating the prevalence of happiness, one author refers to the widespread belief as "the religion of happiness."<sup>42</sup> Discussions of happiness in philosophy, novels, plays, poems and treatises mark a generation "obsessed" with happiness.<sup>43</sup> The frequent presence of happiness in literature of the period illustrates "just how widespread was this preoccupation with happiness, and although the precise phrase itself has not been found, the idea that temporal happiness is something to be actively sought after appears in innumerable variations."<sup>44</sup> References to the pursuit of happiness "appeared with sufficient frequency in earlier European writings that Jefferson almost certainly encountered it"<sup>45</sup> prior to drafting the Declaration. "In fact, references to happiness as a political goal are

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<sup>39</sup> While several other sources are plausible, a survey of the literature finds that commentators agree at least that Jefferson was aware of the writings of these men and, to varying degrees, agree on their influence on Jefferson. See discussion *infra*. For a review of the literature on the political theory of the Declaration, divided into Lockean orthodox and revisionary interpretations, see JAYNE, *supra* note 29, at 1-6.

<sup>40</sup> This is not to say that Jefferson shied away from taking credit for the Declaration. To the contrary, it is the first thing he wished to be included in his epitaph ("Here was buried Thomas Jefferson Author of the Declaration of American Independence[,] of the Statute of Virginia for religious freedom & Father of the University of Virginia"). See MAIER, *supra* note 5, at 186.

<sup>41</sup> CHARLES MAURICE WILTSE, *THE JEFFERSONIAN TRADITION IN AMERICAN DEMOCRACY* 70 (1935).

<sup>42</sup> HENRY STEELE COMMAGER, *JEFFERSON, NATIONALISM AND THE ENLIGHTENMENT* 93 (1975); see also Herbert Lawrence Ganter, *Jefferson's 'Pursuit of Happiness' and Some Forgotten Men (Second Installment)*, 16 WM. & MARY Q. 558, 584 n. 81 (1936) (discussing "several famous books which are related to the happiness doctrine").

<sup>43</sup> COMMAGER, *supra* note 42, at 94.

<sup>44</sup> Ganter, *supra* note 42, at 577-82 (giving examples from Alexander Pope, Bolingbroke, Francis Hutcheson, and Lord Kames).

<sup>45</sup> MAIER, *supra* note 5, at 134.

everywhere in American political writings as well, as anyone can see who bothers to look.”<sup>46</sup>

According to Jefferson, “the only orthodox object of the institution of government is to secure the greatest degree of happiness possible to the general mass of those associated under it.”<sup>47</sup> The Declaration enshrines this view by stating that governments are created in order to secure rights including that of pursuing happiness.<sup>48</sup> It was a common belief in the eighteenth century that man fell short of achieving happiness because government, religion, society and other institutions of civilization worked to prevent it.<sup>49</sup> The government envisioned in the Declaration, by contrast, would further the right to pursue happiness.

Given the contemporary emphasis on happiness and happiness’ status as an end of government, it seems clear that “happiness was not for Jefferson merely some kind of pleasant sensation.”<sup>50</sup> “When Jefferson spoke of pursuing happiness, he had nothing vague or private in mind. He meant a public happiness that is measurable; which is, indeed, the test and justification of any government.”<sup>51</sup> Moreover, happiness was “not merely a moral but a legal right.”<sup>52</sup> In eighteenth-century America, happiness was considered “the will of nature and of God. Clearly, it is a duty of government and a right of man.”<sup>53</sup> The meaning of happiness in eighteenth-century colonial and European culture, unlike today, was profound. That profound meaning must be recaptured. American politicians must once again focus on happiness as a fundamental aim of government, particularly as it relates to the basic needs of the people.

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<sup>46</sup> *Id.*

<sup>47</sup> Letter from Thomas Jefferson to Francis A Venaderkemp (Mar. 22, 1812), in *THE POLITICAL WRITINGS OF THOMAS JEFFERSON* 58 (Edward Dumbauld ed., 1955).

<sup>48</sup> *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776), reprinted in JAYNE, *supra* note 29.

<sup>49</sup> COMMAGER, *supra* note 42, at 96.

<sup>50</sup> WALTER BERNS, *TAKING THE CONSTITUTION SERIOUSLY* 41 (1987).

<sup>51</sup> WILLS, *supra* note 38, at 164.

<sup>52</sup> COMMAGER, *supra* note 42, at 110.

<sup>53</sup> *Id.* at 107.

*C. Sources & Prior Uses of Happiness*

## 1. Classical Influences

Jefferson was well versed in classical philosophy, as were his contemporaries, and the Declaration built on that foundation of knowledge.<sup>54</sup> Indeed, Jefferson specifically referred to Aristotle as one of the sources of the Declaration.<sup>55</sup> In classical Greek philosophy, happiness was a central tenet of both Platonic and Aristotelian philosophy. According to Plato, happiness is commensurate with justice — a state where all four components of the soul are working in harmony.<sup>56</sup> Plato's parallels of a just man and a just city indicate that happiness is both a private and a public notion. Public happiness consists in the greatest happiness for the whole city, rather than incredible happiness for one group. Private happiness is the province of the just man.<sup>57</sup> In Aristotle's conception, a proper view of happiness consists in rational desires controlling and organizing non-rational desires. To oversimplify, happiness is the golden mean: moderation.<sup>58</sup>

Aristotelian happiness is “a core concept in defining both human perfection and the goal of community.”<sup>59</sup> “The end (goal) of the best constitution is happiness, defined as ‘the perfect [or complete] activity and employment of virtue.’ . . . Aristotle's theory of government also entails the concept of mutual, rather than solely individual, advantage.”<sup>60</sup> This connection between the goal of government and virtue was echoed by many of Jefferson's contemporaries. For example, Adam Smith wrote: “All constitutions of government . . . are valued only in proportion as they tend to promote the happiness of those who live under them. This is their sole

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<sup>54</sup> Cf. Grodin, *supra* note 36, at 11 (discussing “well-read and thoughtful” leaders of American revolution and strands of classical and enlightenment thought relevant to happiness). Jefferson apparently owned a copy of William Ellis' English translation of Aristotle's *Politics*, published in 1776. See Ganter, *supra* note 42, at 584 n. 81.

<sup>55</sup> See Letter from Thomas Jefferson to Henry Lee, *supra* note 37.

<sup>56</sup> PLATO, *THE REPUBLIC*, 427e (trans. by G.M.A. Grube, 1974) (“I think our city . . . is completely good. . . . Clearly, then, it is wise, courageous, moderate, and just.”).

<sup>57</sup> See *id.* at 420b.

<sup>58</sup> See TERENCE IRWIN, *CLASSICAL THOUGHT* 135-37 (1989). Although Jefferson criticized Plato, he adopted Aristotle's happiness as a public good, with temporary desires being restrained by virtue. See discussion *infra* Part IID2.

<sup>59</sup> Grodin, *supra* note 36, at 11.

<sup>60</sup> *Id.* at 11-12 (alterations in original).

use and end.”<sup>61</sup> Smith drew from Cicero and Epicures to conclude that “virtue alone is sufficient to secure happiness.”<sup>62</sup>

## 2. Eighteenth Century Political Philosophy

Jefferson’s contemporaries not only discussed happiness as a philosophical concept, but also incorporated it into political documents. “In writing in the Declaration that the pursuit of happiness is a natural right. . . Jefferson was stating a central tenet of eighteenth-century political philosophy.”<sup>63</sup> John Adams, in his 1776 *Thoughts on Government*, wrote that the “happiness of society is the end of government, as . . . happiness of the individual is the end of man.”<sup>64</sup> Like Aristotle and Smith, Adams connected happiness and virtue.

The happiness of the people was the purpose of government, [Adams] wrote, and therefore that form of government was best which produced the greatest amount of happiness for the largest number. And since ‘all sober inquirers after truth’ agreed that happiness derived from virtue, that form of government with virtue at its foundation was more likely than any other to promote the general happiness.<sup>65</sup>

George Mason’s draft of the Virginia Declaration of Rights was obviously a document with which Jefferson would have been familiar. Indeed, this document is considered a primary source of influence<sup>66</sup> and is thought to be one of the few materials Jefferson did refer to while drafting the Declaration.<sup>67</sup> The first clause of the Virginia Declaration of Rights provides:

<sup>61</sup> Ganter, *supra* note 42, at 575 (quoting ADAM SMITH, *The Effect of Utility, in THEORY OF MORAL SENTIMENTS*, pt. IV, ch. 1, at 266 (Henry G. Bohn ed., 1853)). Smith’s book was published in 1776. *Id.* at 584 n.81.

<sup>62</sup> *Id.* at 577 n.73 (quoting SMITH, *supra* note 61, pt. VII, § 2, at 451).

<sup>63</sup> SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 53 (1995).

<sup>64</sup> *Id.* at 54.

<sup>65</sup> DAVID MCCULLOUGH, *JOHN ADAMS* 102 (2001).

<sup>66</sup> Hamowy, *supra* note 38, at 518 n.57.

<sup>67</sup> MAIER, *supra* note 5, at 125-26 (Jefferson referred to the Virginia Declaration and his own draft Constitution for Virginia). *But see* JAYNE, *supra* note 29, at 132 (“Indeed the fact that [Jefferson] did not include ‘obtaining happiness’ as a right indicates that he was not influenced by Mason’s Virginia Declaration of Rights when drafting the Declaration of Independence.”).

1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and *pursuing and obtaining happiness* and safety.<sup>68</sup>

As the similar wording of the two declarations indicates, Jefferson was almost certainly influenced by Mason's use of happiness. There are obvious differences between the two declarations with respect to the right to property and the "obtaining" of happiness. The significance, if any, of Jefferson's replacement of property with pursuit of happiness and the omission of "obtaining" will be discussed subsequent to the survey of possible sources.

James Wilson's essay, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament* [hereinafter, *Considerations*], is an even earlier example of happiness as a political doctrine. Parts of the essay are found in Jefferson's *Commonplace Book*<sup>69</sup> and Wilson is considered one of the most influential proponents of the moral sense school.<sup>70</sup> Written in 1774, Wilson's essay concluded that the "happiness of the society is the first law of every government."<sup>71</sup> He further stated that those who give consent to be governed do so "with a view to ensure and to increase [my emphasis] the happiness of the governed above what they could enjoy in an independent and unconnected state of nature."<sup>72</sup> He established the happiness of the colonies as the benchmark for legitimacy of parliamentary control. To support his proposition, Wilson cites Jean-Jacques Burlamaqui.<sup>73</sup>

### 3. Moral Sense Theorists

Moral sense theorists such as Burlamaqui posit that morality is ruled by a faculty similar to the five senses of the body. This sense, without innate knowledge, makes "a determination of our minds to

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<sup>68</sup> GERBER, *supra* note 63, at 90-91 (emphasis added).

<sup>69</sup> MORTON GABRIEL WHITE, *THE PHILOSOPHY OF THE AMERICAN REVOLUTION* 252 (1978).

<sup>70</sup> See Grodin, *supra* note 36, at 15.

<sup>71</sup> *Id.*

<sup>72</sup> WHITE, *supra* note 69 at 252 (alteration in original).

<sup>73</sup> See *id.* at 251. Although Burlamaqui was Swiss, he is associated with the moral sense theory of the Scottish Enlightenment. *Id.*



receive amiable or disagreeable ideas of actions, when they occur to our observation, antecedent to any opinions of advantage or loss to redound to ourselves from them.”<sup>74</sup> There is much debate over the influence of moral sense theory, also referred to as the Scottish Enlightenment, on the Declaration. This is particularly so in terms of comparing it to Locke’s influence. Morton White, in his influential book *The Philosophy of the American Revolution*, contends that the doctrine of moral sense must be considered given the references to moral sense in the writings of Jefferson, Wilson and Adams.<sup>75</sup> White argues that the Declaration accepts a hybrid doctrine of moral sense and Lockean reason put forth by Burlemaqui.<sup>76</sup> Other scholars argue that while there are references to moral sense theory in the writings of Jefferson and others, the Declaration relies solely on Locke.<sup>77</sup> While it is unclear how long Jefferson subscribed to moral sense theory,<sup>78</sup> it is reasonably certain that the writings of the moral sense school are sources of Jefferson’s conception of happiness.

a. Jean-Jacques Burlemaqui

Burlemaqui attempted to reconcile moral sense with rationalism, a synthesis that was probably attractive to Jefferson.<sup>79</sup> According to Burlemaqui, moral sense indicates or intimates certain moral principles, but it is the task of Lockean reason to confirm or establish those principles.<sup>80</sup> Burlemaqui perceived reason as verifying what the moral sense first calls to attention; “one gives the first notice, the other verifies and proves it.”<sup>81</sup>

According to White, Burlemaqui may have provided the substructure for the right to pursue happiness.<sup>82</sup> Burlemaqui posits that if one has a duty, a right must follow.<sup>83</sup> Thus if God gave man the desire for happiness, he must pursue happiness, and therefore must have the right to such pursuit.<sup>84</sup> Similarly, since God made life a

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<sup>74</sup> *Id.* at 102.

<sup>75</sup> *Id.* at 97.

<sup>76</sup> *See id.* at 100.

<sup>77</sup> *See* GERBER, *supra* note 63, at 49-50.

<sup>78</sup> *Cf.* WHITE, *supra* note 69, at 114-127.

<sup>79</sup> *See id.* at 107.

<sup>80</sup> *Id.* at 100.

<sup>81</sup> *Id.* at 112. (quoting Jean-Jacques Burlemaqui, *Principles of Natural Law*).

<sup>82</sup> *Id.* at 163.

<sup>83</sup> *Id.* at 165.

<sup>84</sup> *Id.*

part of the essence of man, preservation of life must be an end of man, for God does nothing in vain.<sup>85</sup> Thus, God wills that man preserve his life.<sup>86</sup> If God wills it, then man has a *duty* to preserve life.<sup>87</sup> Given this duty to preserve life, man must have the *right* to preserve life.<sup>88</sup> Therefore, “we have arrived at Jefferson’s belief that the right to preserve life is ‘derived’ from the *creation* of man.”<sup>89</sup> The desire to pursue happiness is also part of the created essence of man, according to Burlemaqui.<sup>90</sup> “To make a long story less long, we state only the conclusion: since God made the *desire* for happiness a part of man’s essence, man has a duty and a right to *pursue* happiness.”<sup>91</sup> In other words, “[a] human *creature* of God is also one who has been given the essential desire for happiness, and from this Jefferson may derive the *self-regarding* duty and right to pursue one’s happiness.”<sup>92</sup> Thus, Burlemaqui may have provided the reasoning for Jefferson’s right to pursue happiness.

White’s theory of a strong connection between Burlemaqui and Jefferson has been criticized, however. According to Allen Jayne, there is “little evidence to support White’s opinion that Jefferson was influenced by Jean-Jacques Burlemaqui when he wrote the Declaration.”<sup>93</sup> There is no evidence indicating that Jefferson read or recommended Burlemaqui’s books. Moreover, according to Jayne, Jefferson rejected Burlemaqui’s conception of rights as duties derived from the nature of man and God; by contrast, Jefferson conceived rights as part of man’s inner nature.<sup>94</sup>

While there is no direct evidence Jefferson relied on Burlemaqui’s argument as elucidated above, it does provide a cogent explanation for the derivation of the rights to life and to pursue happiness from the Creator. Also, it is not improbable that Jefferson was aware of Burlemaqui’s argument; if nothing more, Jefferson was likely aware of the Burlemaquian background of Wilson’s argument in *Considerations*. Moreover, Jefferson — along with Wilson, Mason and Adams — had a “long familiarity” with Scottish

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 166.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 167.

<sup>93</sup> JAYNE, *supra* note 29, at 73-74.

<sup>94</sup> *Id.* at 73, 127.

Enlightenment philosophers.<sup>95</sup> As discussed below, Jayne agrees that Jefferson was influenced by other moral sense theorists such as Lord Kames, who in turn was influenced by Francis Hutcheson.<sup>96</sup>

b. Francis Hutcheson

Another philosopher of the moral sense school, Hutcheson believed that happiness was necessarily derived from providing happiness to others. In order to achieve private happiness, one should take publicly useful actions.<sup>97</sup> Hutcheson believed, as Jefferson did, that “the general happiness is the supreme end of all political union.”<sup>98</sup> Despite this similarity, the influence of Hutcheson on Jefferson has been called into question, largely in response to Garry Wills’ almost exclusive reliance on Hutcheson as Jefferson’s source.<sup>99</sup> In his critique of Wills’ argument, for instance, Ronald Hamowy asks:

What evidence is adduced that Jefferson had the Scottish philosophers, specifically Hutcheson, in mind when writing the Declaration? There is none. Indeed, Hutcheson, who among the Scots comes closest in his views to those expressed in the Declaration, is not once quoted, cited, referred to, or recommended, in any connection, in any of Jefferson’s writings.<sup>100</sup>

On the other hand, Hamowy recognizes that “[t]here is no reason to doubt Wills’ contention that Jefferson was closely acquainted with the Scottish moral philosophers. In fact, it would be surprising if he were not.”<sup>101</sup> While Wills may go too far in relying on Hutcheson to the extent that he appears to deny the influence of all else, Jefferson was aware of the works of the Scottish Enlightenment. Jefferson agreed with the elevation of happiness to an end of government central to the Scottish philosophers as well as seminal English works. There is no need, nor any reason, to choose between

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<sup>95</sup> McCULLOUGH, *supra* note 65, at 121.

<sup>96</sup> JAYNE, *supra* note 29, at 66.

<sup>97</sup> WILLS, *supra* note 38, at 252.

<sup>98</sup> *Id.* at 252.

<sup>99</sup> *See id.*

<sup>100</sup> Hamowy, *supra* note 38, at 514.

<sup>101</sup> *Id.* at 505.

Lockean and Scottish influences. Indeed, Hutcheson himself was influenced by Locke.<sup>102</sup>

c. Lord Kames

Henry Home, Lord Kames, was also influenced by Locke. Jefferson admired Kames and copied some of Kames' writings into his *Commonplace Book*.<sup>103</sup> Like Hutcheson and Burlemaqui, Kames believed in the moral sense; he also linked the moral sense to rational judgment.<sup>104</sup> According to Jayne, Jefferson could have drawn his belief in rational judgment from either Kames or Locke.<sup>105</sup> Both believed that morality could be increased by using rational judgment to maximize happiness.<sup>106</sup>

It is clear that Jefferson was influenced by the moral sense school, whether embodied in the writings of Burlemaqui, Hutcheson, Kames or some combination thereof. Some have argued, however, that Jefferson did not subscribe to moral sense theory *in the Declaration*. For example, Scott Douglas Gerber concedes that moral sense theory is found in the writings of Jefferson, as well as Adams and Wilson.<sup>107</sup> "In the Declaration, however, all reference to moral sense is omitted. What this suggests is that the Declaration relies solely upon Locke's theory of knowledge [regarding self-evident truths]."<sup>108</sup> Similarly, Garrett Ward Sheldon asserts that Jefferson's belief in the moral sense antedates the Declaration.<sup>109</sup> Sheldon specifically criticizes Wills: "the brilliant flaw in his argument is that the moral sense philosophy appeared not in Jefferson's revolutionary writings, but in his post-revolutionary political philosophy. . . ."<sup>110</sup>

These criticisms fail to acknowledge other evidence of Jefferson's early belief in the moral sense. Jefferson's 1771 letter to Robert Skipwith recommends moral sense theorists such as Lord

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<sup>102</sup> GERBER, *supra* note 63, at 27 n.\* (discussing Hamowy on Wills).

<sup>103</sup> JEAN M. YARBROUGH, *AMERICAN VIRTUES: THOMAS JEFFERSON ON THE CHARACTER OF A FREE PEOPLE* 4 (1998).

<sup>104</sup> JAYNE, *supra* note 29, at 134-35.

<sup>105</sup> *Id.* at 135.

<sup>106</sup> *Id.*

<sup>107</sup> GERBER, *supra* note 63, at 50.

<sup>108</sup> *Id.*

<sup>109</sup> See GARRETT WARD SHELDON, *THE POLITICAL PHILOSOPHY OF THOMAS JEFFERSON* 53-60 (1991).

<sup>110</sup> *Id.* at 155.

Kames.<sup>111</sup> In his autobiography, Jefferson cites William Small as an influence; Small, who taught at William & Mary in 1770, was a product of the Scottish Enlightenment.<sup>112</sup> “Thus, it is likely that Jefferson was already familiar with moral sense philosophy when he wrote the Declaration.”<sup>113</sup> Jefferson therefore probably drew from the moral sense school in forming his belief in happiness as an end in government and as a right linked to virtue and public life.

#### 4. John Locke

Jefferson’s interpretation of happiness was also likely influenced by Locke. Although Jefferson apparently rejected the Lockean notion of rational judgment as the province of a few, there is no doubt that Locke’s political theory made an impact on Jefferson. The Lockean roots of American political thought, and Jefferson’s writings, are well known. The phrasing and conceptions contained in the Declaration are clearly linked to Locke’s *Second Treatise*.<sup>114</sup> Writing on the sources for the Declaration, Jefferson himself referred to Locke.<sup>115</sup> Moreover, “at least during the first half of the eighteenth century — the Lockean perspective on government and revolution was so commonplace that little if any intellectual dispute surrounded it.”<sup>116</sup>

The Declaration made “commonsense moral arguments understandable to virtually everyone” and was drafted to reflect the common sense of the people.<sup>117</sup> Jefferson believed that minimal reason, accessible to most people, could discern right from wrong. He therefore did not embrace the Lockean belief that only a few could comprehend the necessary complex “rational demonstrations.”<sup>118</sup> This aspect, however, is the only Lockean principle rejected in the Declaration.<sup>119</sup> In fact, the Lockean influence on the Declaration was so strong that “fellow Virginian Richard Henry Lee had said

<sup>111</sup> YARBROUGH, *supra* note 103, at 17.

<sup>112</sup> JAYNE, *supra* note 29, at 19.

<sup>113</sup> YARBROUGH, *supra* note 103, at 18.

<sup>114</sup> See, e.g., Hamowy, *supra* note 38, at 507-08 (textual parallels between the Declaration and the *Second Treatise*).

<sup>115</sup> See Letter from Thomas Jefferson to Henry Lee, *supra* note 37 and accompanying text.

<sup>116</sup> Hamowy, *supra* note 38, at 505.

<sup>117</sup> JAYNE, *supra* note 29, at 76.

<sup>118</sup> *Id.*

<sup>119</sup> *C.f. id.* at 77. The omission of property will be discussed below.

that it had 'been copied from Locke's treatise on government.'<sup>120</sup> Scholars have debated the impact of Locke on the Declaration, with some "widely exaggerating" and others "unjustifiably trivializing" Locke's influence.<sup>121</sup> "The evidence from Jefferson's own writings, however, is that Locke was among the more influential authors whom Jefferson read."<sup>122</sup> In particular, the Declaration was "substantially influenced by John Locke's *Second Treatise*."<sup>123</sup> Many passages from the Declaration are "strikingly similar" if not identical to parts of the *Second Treatise*, and the same themes resonate in both pieces.<sup>124</sup>

Despite the strong Lockean influence, the use of the phrase "the Pursuit of Happiness" was a change from Locke's traditional triumvirate of life, liberty and property. By replacing property with pursuit of happiness, it is unlikely that Jefferson intended to repudiate property rights. "On the contrary, he believed in them so strongly as facilitators both of republican virtue and of the individual pursuit of happiness that he wanted their widest practical distribution."<sup>125</sup> Therefore, as discussed below, the absence of property does not represent a rejection of Locke.<sup>126</sup>

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<sup>120</sup> JAY FLIEGELMAN, *DECLARING INDEPENDENCE: JEFFERSON, NATURAL LANGUAGE & THE CULTURE OF PERFORMANCE* 164 (1993).

<sup>121</sup> DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 21 (1994).

<sup>122</sup> *Id.*

<sup>123</sup> SHELDON, *supra* note 109, at 42.

<sup>124</sup> GERBER, *supra* note 63, at 30-31; *see also* JAYNE, *supra* note 29, at 45. Jayne discusses many of the parallels in a level of detail beyond the scope of this article. *See* JAYNE, *supra* note 29, at 41-61.

<sup>125</sup> JAMES MACGREGOR BURNS & STEWART BURNS, *A PEOPLE'S CHARTER: THE PURSUIT OF RIGHTS IN AMERICA* 89 (1991).

<sup>126</sup> To the contrary, Jefferson was simply condensing the same sentiments. *See* STEPHEN E. LUCAS, *THE STYLISTIC ARTISTRY OF THE DECLARATION OF INDEPENDENCE* 4, [http://www.archives.gov/exhibit\\_hall/charters\\_of\\_freedom/declaration/declaration\\_style.html](http://www.archives.gov/exhibit_hall/charters_of_freedom/declaration/declaration_style.html) (last visited Jan. 30, 2003) ("The preamble. . .capsulizes in five sentences—202 words— what it took John Locke thousands of words to explain in his *Second Treatise of Government*."), *derived from* Stephen E. Lucas, "Justifying America: The Declaration of Independence as a Rhetorical Document," in *AMERICAN RHETORIC: CONTEXT AND CRITICISM* (Thomas Benson ed., 1989); *see also* *A Crusade Against Ignorance: Letter to George Wythe, August 13, 1786*, in *LETTERS: THOMAS JEFFERSON 1743-1826* 858 (1993), available at <http://etext.lib.virginia.edu/etcbin/toccernew2?id=jefLett.sgm&images/modeng&data=texts/english/modeng/parsed&tag=public&part=47&division=div1> ("I think the beauty of a motto is to condense much matter in as few words as possible. The word omitted will be supplied by every reader.").

Given the strong support for a Lockean influence on Jefferson's thought, it is unfortunate that Locke's conception of happiness is not very well developed. Locke described happiness as "sensible pleasure."<sup>127</sup> Locke also equated happiness with the desire to avoid pain and to seek pleasure.<sup>128</sup> There is no one path to happiness, but rather a "diversity" in each individual's right to pursue happiness.<sup>129</sup> In *An Essay Concerning Human Understanding*, Locke describes happiness as the utmost pleasure and the "great end" of all, as all men desire happiness and devote themselves to its pursuit.<sup>130</sup> Happiness is "elusive" because no man can entirely rid himself of the "uneasiness" of mind stemming from the lack of some good; there are "multiple uneasinesses" because men do not desire the same goods equally; hence, the use of the term "pursuit."<sup>131</sup> Moreover, changed circumstances influence pleasure and pain, thus putting happiness in "a state of flux" and leaving men "in constant search for different pleasures in their 'pursuit of happiness.'"<sup>132</sup> Locke believed that one could control the will to force a focus on remote good, rather than immediate pleasure, which might be detrimental to long-term happiness.<sup>133</sup> Thus, Lockean happiness was more than simply fulfilling one's desires; what exactly that entailed is less clear but it seems that Jefferson could have drawn on both Locke and the moral sense theorists to arrive at a right to happiness, which involves constant striving and virtuous restraint.

#### D. Possible Interpretations of Happiness

Like Locke, Jefferson believed that happiness depends on the individual and his place.<sup>134</sup> In his *Notes on the State of Virginia*, Jefferson discusses public education as a means to teach individuals to work out their own greatest happiness.<sup>135</sup> Thus, it seems that Jefferson agrees with Locke that there is no one path or bundle of goods that will provide all men with happiness. But the vast majority of Jefferson's references to happiness are in private correspondence

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<sup>127</sup> WILLS, *supra* note 38, at 250.

<sup>128</sup> YARBROUGH, *supra* note 103, at 4.

<sup>129</sup> JONES, *supra* note 30, at 95.

<sup>130</sup> JAYNE, *supra* note 29, at 129-30.

<sup>131</sup> *See id.* at 130-31.

<sup>132</sup> *Id.* at 132.

<sup>133</sup> *See id.* at 132-33.

<sup>134</sup> *See* MAYER, *supra* note 121.

<sup>135</sup> JAYNE, *supra* note 29, at 132.

where the meaning of happiness is treated casually.<sup>136</sup> By examining Jefferson's political philosophy, however, some parameters of happiness emerge: it includes property and it is inextricably intertwined with virtue.

### 1. Property as Part of the Pursuit of Happiness

The substitution of pursuit of happiness for property can be explained in terms of the inalienability and importance of the rights. "In practice, pursuit of happiness will be the pursuit of property, for even though property is less valuable than life or liberty, it serves as a guard for them."<sup>137</sup> Life, liberty and pursuit of happiness in the Declaration are the natural rights "for the sake of which Americans established a Constitution."<sup>138</sup> Property, by contrast, is not a natural or inalienable right.

Property is not a natural right because "exclusive and stable ownership" is impossible in early, primitive societies.<sup>139</sup> "In the earliest societies, property, whether 'fixed or movable,' belongs to an individual only as long as he is in direct possession or occupancy and, it would seem, is able to defend his position."<sup>140</sup> Private property with secure, exclusive ownership "comes into existence only with the emergence of agriculture, which comes relatively 'late in the progress of society' and, far from being the natural or original condition, is the 'gift of social law.'"<sup>141</sup> Property is, nevertheless, grounded in "natural wants" and "needs."<sup>142</sup> It is an important right, but it does not fit in with the other "inalienable" natural rights listed in the Declaration.<sup>143</sup>

"The inherent right to pursue happiness probably also included 'the means of acquiring and possessing property,' but not the ownership of specific things since property can be sold and is therefore

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<sup>136</sup> See YARBROUGH, *supra* note 103, at 15.

<sup>137</sup> Harvey C. Mansfield, Jr., *Responsibility versus Self-Expression*, in OLD RIGHTS AND NEW 96, 98 (Robert A. Licht ed., 1993).

<sup>138</sup> *Id.*

<sup>139</sup> YARBROUGH, *supra* note 103, at 89-90; see also MAYER, *supra* note 121, at 80 (property as derived from "secondary natural law," not inherent right as in Declaration); JAYNE, *supra* note 29, at 120 (property of movable goods and land is not part of oneself and can be alienated).

<sup>140</sup> YARBROUGH, *supra* note 103, at 89.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*



alienable.”<sup>144</sup> The right to property may be incorporated through the inalienable right to pursue happiness because it is crucial to implementing the pursuit of happiness.<sup>145</sup> The possession of income-producing property may be the tool with which to realize both the right to the pursuit of happiness and the right to life.<sup>146</sup> Such property may encompass more than land, reaching to items such as durable goods and the like.<sup>147</sup> Because Jefferson thought of a farming society with limited population and low immigration as an ideal,<sup>148</sup> it is likely that he considered property, particularly land, to be part of happiness.

“Moreover, ‘the pursuit of happiness’ was considered by both Locke and the Founders to be synonymous with ‘property,’ when property is conceived in a broad sense, rather than simply as the ownership of material goods. According to Locke, ‘Property . . . must be understood . . . to mean that property which men have in their persons as well as goods.’”<sup>149</sup> For example, a man has property in his person “in the faculties that he can employ to make the earth more productive.”<sup>150</sup>

Thus, the right to property may simply be subsumed under the pursuit of happiness. This is not to say that happiness is equivalent to property. As the separation of the two concepts in Mason’s declaration and in Locke’s writing shows, property is not the same thing as happiness. It may be, however, that the right to property is justified by its service to the pursuit of happiness.<sup>151</sup> Similarly, based on Mason’s wording, the right to property might be brought in under *liberty*, not happiness.<sup>152</sup> Regardless of the means, it appears that the right to property was incorporated into the Declaration. If the right to property were part of liberty and/or happiness, there would be no need to explicitly refer to it, particularly when it does not stand alone as a natural or inalienable right.

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<sup>144</sup> MAIER, *supra* note 5.

<sup>145</sup> MORTIMER J. ADLER, *WE HOLD THESE TRUTHS: UNDERSTANDING THE IDEAS AND IDEALS OF THE CONSTITUTION* 152 (1987).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 91.

<sup>148</sup> BURNS & BURNS, *supra* note 125, at 164.

<sup>149</sup> GERBER, *supra* note 63, at 28 (footnote omitted).

<sup>150</sup> ADRIENNE KOCH, *JEFFERSON & MADISON: THE GREAT COLLABORATION* 79 (1964).

<sup>151</sup> *See id.* at 78-79.

<sup>152</sup> *See supra* text accompanying note 67-68.

In addition, the language of the Declaration (i.e., the replacing of property with pursuit of happiness) can be explained in part as a rhetorical strategy. At the most basic level, the substitution reads more appealingly.<sup>153</sup> The pursuit of happiness is a phrase that many individuals would find comfortable and attractive, more so than the “uninspiring and legalistic” property.<sup>154</sup> Pursuit of happiness sounds like a loftier goal than property. Though perhaps the assessment is clouded by hindsight, the phrasing simply *sounds* better when read aloud; the intonation of ending with happiness rather than property seems to close on a more uplifting note. The change may have also been made in order to give the colonists a stronger moral case against the British.<sup>155</sup>

By replacing property with happiness in the ancient trinity, by making not merely the security of possessions but the larger quality of people’s lives, the effect of government on their happiness, the ‘hard political test of any reign’s very legitimacy,’ Jefferson transformed the American case against British rule into a deeply moral cause.<sup>156</sup>

While Jefferson most likely took these stylistic and strategic considerations into account, it is probable that the replacement had a more profound meaning as well. Given Jefferson’s belief in property rights, it is unlikely that he meant to downgrade or exclude them altogether. Hence, the conception of happiness as encompassing property rights seems the most plausible. The pursuit of happiness therefore has an economic dimension in that it includes property rights, providing the first part of a meaningful conception of pursuit of happiness.

## 2. Psychological v. Ethical Views

The second part of happiness involves virtue or the “ethical” interpretation of happiness. Scholar Mortimer Adler has categorized happiness into the modern psychological view and the ethical view.<sup>157</sup> An individual has attained happiness under the psychologi-

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<sup>153</sup> GERBER, *supra* note 63, at 45.

<sup>154</sup> KOCH, *supra* note 150, at 80.

<sup>155</sup> BURNS & BURNS, *supra* note 125, at 42.

<sup>156</sup> *Id.*

<sup>157</sup> ADLER, *supra* note 145, at 52. This exploration of the meaning of happiness and its implications for economic rights owes a debt to Adler’s discussion of

cal view when he has reached a state of satisfaction or contentment by fulfilling desires.<sup>158</sup> In the ethical conception, happiness is more than mere satisfaction; it encompasses the enrichment of an individual's life by cumulative possession of goods that a morally virtuous person ought to desire.<sup>159</sup> "[T]his pursuit of happiness, which goes beyond the happiness invoked by Wilson in his *Considerations*, can only be subjective and is never attained once and for all."<sup>160</sup> The ethical conception posits that a whole life well-lived fosters a feeling of contentment. Far from being a pleasant sensation, happiness in the ethical conception is imbued with a normative element. By contrast, the modern psychological conception conceives of happiness as a feeling of contentment or satisfaction achieved by fulfilling desires, regardless of ethical considerations.<sup>161</sup>

The modern psychological view may be reflected in Ronald Hamowy's interpretation of happiness, although he does not refer to it as such. Hamowy has put forth a theory that he deems to be the only one consistent with Jefferson's views of individual autonomy and with the structure and language of the Declaration. According to Hamowy, Jefferson meant the following:

[M]en may act as they choose in their search for ease, comfort, felicity, and grace, either by owning property or not, by accumulating wealth or distributing it, by opting for material success or asceticism, in a word, by determining the path to their own earthly and heavenly salvation as they alone see fit.<sup>162</sup>

In the last clause, Hamowy seems to imply that one may do whatever one wants to achieve happiness, regardless of its effects

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the Declaration and his argument for moving from political to economic rights; I argue, however, that economic rights were inherent in the Declaration while Adler maintains that the Founders had no conception of economic rights. *See id.* at 132-133 (18th century statesmen as well as 19th century descendants "were blind to the existence of economic rights in the inventory of inalienable human rights").

<sup>158</sup> *Id.* at 52.

<sup>159</sup> *Id.* The ethical view encompasses the psychological view when the satisfaction of desires involve those desires that a person does and *ought* to desire. *Id.* at 53.

<sup>160</sup> DICK HOWARD, *THE BIRTH OF AMERICAN POLITICAL THOUGHT, 1763-1787* 64 (1989).

<sup>161</sup> ADLER, *supra* note 145, at 53.

<sup>162</sup> Hamowy, *supra* note 38, at 519.

on others. Given Jefferson's belief in government and legal rules,<sup>163</sup> this overstates the latitude that man has to act in society. If happiness were doing whatever one pleases, the pursuit of happiness would conflict with others' rights.<sup>164</sup>

Specifically, an individual's pursuit of personal contentment might compete with others' rights to pursue happiness, life, and liberty (and property as subsumed thereunder). For example, an individual's happiness under the psychological conception may include the fulfillment of wants such as the desire for tyrannical power, which would infringe on others' rights. Competing rights such as these mean that happiness could never be secured for all. As a result, it would be impossible for any government to ensure happiness for all where happiness is personal satisfaction.<sup>165</sup>

If Jefferson had held the psychological conception of happiness, he could not have thought it possible for a government to aid its pursuit by individuals whose wants bring them into conflict with the rights of others. By contrast, under the ethical conception, the desires to be fulfilled include only those desired by a *morally virtuous* person<sup>166</sup> and would not involve a conflict of rights. According to Adler, "[t]his confirms the reasoning that led us to the conclusion that Jefferson held the ethical rather than the psychological conception of happiness when he asserted our natural right to pursue it and our natural right to obtain whatever real goods we need in order to make good lives for ourselves."<sup>167</sup>

Adler also contends that Jefferson held an ethical conception of happiness as evidenced by his omission of the term "obtain" from the Declaration. Unlike the Declaration of Independence, Mason's Virginia Declaration refers to inherent rights including the right to "pursuing and obtaining happiness."<sup>168</sup> As Adler explains:

A just government can aid and abet our *pursuit* of happiness — our effort to make morally good lives for ourselves — but it cannot help us to obtain happiness,

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<sup>163</sup> *Id.*

<sup>164</sup> If Hamowy's reference to heavenly salvation imputes a religious dimension, and therefore a moral component to men's actions in pursuing happiness, then the ethical conception might more accurately represent Hamowy's interpretation.

<sup>165</sup> ADLER, *supra* note 145, at 56.

<sup>166</sup> *See id.* at 52-54.

<sup>167</sup> *Id.* at 56.

<sup>168</sup> *Virginia Declaration of Rights*, in GERBER, *supra* note 63, at 58-60.

since that depends in part on our possession of moral virtue. Hence Jefferson's retention of 'pursuit' and his elimination of 'obtain' indicate his espousal of the ethical, not the psychological, conception of happiness.<sup>169</sup>

This link between virtue and happiness was widely accepted in the eighteenth century.<sup>170</sup> "It was not only 18th century Englishmen and Americans who equated happiness with 'a knowledge of moral duties,' but the entire Western tradition beginning with the ancient Greek and Roman moralists" — sources found in Jefferson's commonplace books.<sup>171</sup> To Jefferson, "true happiness depends on virtue and virtue means, above all, the social virtues that bind us to one another."<sup>172</sup> Although differing talents and circumstances mean that there are various paths to happiness, the "universal component" of happiness remains virtue, doing good to others.<sup>173</sup>

"[M]orality was an essential ingredient in Jefferson's idea of happiness."<sup>174</sup> Jefferson connected happiness with virtue in many of his other writings,<sup>175</sup> as did his contemporaries. For example, John Adams linked virtue with "human happiness" in his *Thoughts on Government*.<sup>176</sup> In *Notes on the State of Virginia*, Jefferson referred to the pursuit of happiness and to freedom in all just pursuits. "Jefferson was emphasizing that freedom was license to do not anything at all in order to attain one's 'greatest happiness' but only what was consistent with the moral sense of justice."<sup>177</sup> Thus, "Jefferson also maintained that morality was conducive to the general happiness in that if most persons were moral in their behavior toward others, few would suffer the miseries of having their natural rights transgressed, and most would thereby be able to enjoy happiness derived

<sup>169</sup> ADLER, *supra* note 145, at 54.

<sup>170</sup> YARBROUGH, *supra* note 103, at 15-16.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 23.

<sup>173</sup> *Id.* at 26.

<sup>174</sup> JAYNE, *supra* note 29, at 136.

<sup>175</sup> *Id.* (citing Opinion on Treaty, 28 April 1793 ["All the tranquility, the happiness and security of mankind rest on justice or the obligation to respect the rights of others"]; letter to Amos J. Cook, 21 Jan. 1816 ["And if the Wise be the happy man, as these sages say, he must be virtuous too; for, without virtue, happiness cannot be"]).

<sup>176</sup> PAPERS OF JOHN ADAMS 87 (Robert J. Taylor ed., 1979).

<sup>177</sup> JAYNE, *supra* note 29, at 135.

from exercising those rights unimpeded by the moral transgressions of others.”<sup>178</sup>

This necessary element of moral virtue in happiness is beyond the control of the government. Moral virtue is exclusively within an individual’s power, no matter how just a government might be. “But although we need it as an indispensable condition for success in leading a morally good life, it is an interior perfection that is almost wholly within our power to attain in some measure or degree.”<sup>179</sup> If Jefferson had subscribed to the psychological view, asserts Adler, he would have had no reason to drop obtain; it makes perfect sense for a person to have a right to those things which bring him to a state of contentment. “But when happiness is conceived ethically as a whole life well-lived, then it cannot be enjoyed or attained at any moment during the course of one’s life.”<sup>180</sup>

For Jefferson, “to ‘pursue one’s happiness’ includes acquiring and possessing property and living in accordance with God’s moral law. Jefferson wanted a phrase that embodied more than the word property, so he chose the phrase ‘pursuit of Happiness’ which embodies the former along with a richer meaning.”<sup>181</sup> This richer meaning, encompassing virtue, has implications for the governmental duties related to the pursuit of happiness. The ethical view of happiness implies a governmental duty to facilitate, rather than provide, happiness. The Declaration’s right to pursue happiness, therefore, provides a strong moral argument for requiring the government to ensure the basic necessities for the pursuit of happiness.

#### IV. GOVERNMENTAL DUTIES

The possible governmental duties lie on a spectrum from “the duty to protect” the pursuit of happiness to “the duty to provide” happiness. The government may have a duty to *protect* the pursuit of happiness in that it must prevent others from interfering with an individual’s pursuit of happiness. On the other hand, the government may have an affirmative duty to ensure that all individuals

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<sup>178</sup> *Id.*

<sup>179</sup> ADLER, *supra* note 145, at 57.

<sup>180</sup> *Id.* at 54.

<sup>181</sup> Timothy R. Tompkins, *Pirate Ships, Pontiacs, and Prostitutes: The Innocent Owner’s Alienable Right of Property under Bennis v. Michigan*, 9 REGENT U. L. REV. 285, 310 (1997).

attain the goal of happiness. Even if the government is not charged with the duty to *provide* happiness for all, it may be required to assist the people so that all have a meaningful opportunity to pursue happiness. Specifically, the government must ensure the minimum needs essential to pursue happiness.

#### A. Possible Governmental Duties

Governmental action would vary widely at either end of the spectrum. Interpreting the Declaration to entitle each individual to happiness is vastly different from an interpretation that deems the duty of government to be merely the protection of individual quests from undue interference by others. In the first conception, governments would be obliged to furnish individuals with material conditions and goods, including tangible property such as land in such varieties and such amounts as necessary to make them happy. At the other extreme, the government would be responsible for setting up a system of laws which would protect individuals in their pursuit of happiness. Presumably, this responsibility would not entail more than the exercise of ordinary police powers and the protection of civil rights connected to the pursuit of happiness. However, according to the intermediate conception of governmental duties, the government would be responsible for both protection of the pursuit of happiness and the provision of basic necessities. The intermediate conception requires governments to facilitate the pursuit of happiness. Merely stopping interference in the pursuit of happiness is insufficient. In order for there to be equality in the pursuit of happiness<sup>182</sup> — for the pursuit to be meaningful — the government must ensure the basic necessities of life.

##### 1. Duty to Provide

According to Arthur Schlesinger, the pursuit of happiness entails a legal right to attain happiness based on the language and the political theory of the time. “[I]f the common supposition [that there is only a right to try to obtain happiness] is mistaken, it follows that the historic manifesto proclaimed the *practicing* rather than the *quest* of happiness as a basic right equally with life and

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<sup>182</sup> “[T]hese political rights proved inadequate to assure us equality in the pursuit of happiness. . . .” 90 CONG. REC. 57 (1944); see also *supra* text accompanying note 28 (FDR’s economic bill of rights).

liberty.”<sup>183</sup> First, Schlesinger relies on the following definition of pursuit. Since the sixteenth-century, pursuit is said to have had two meanings: the conventional interpretation of seeking (“pursuing, chasing”) and the “action of engaging in something, as a profession, business, recreation, etc. . . .”<sup>184</sup> According to Schlesinger, the latter meaning was intended in the Declaration, i.e., the pursuit of happiness means the actual practicing of happiness. He claims that the concept appears in “patriot writings” only in the sense of actual practicing, citing James Otis, Josiah Quincy, James Wilson and John Adams.<sup>185</sup>

Adams, for example, wrote that, “‘the happiness of society is the end of government.’”<sup>186</sup> Adams apparently found no fault with Jefferson’s version of pursuit of happiness, although it is known that he did with other passages.<sup>187</sup> In Schlesinger’s view, these two facts combine to yield the conclusion that Jefferson believed in a right to attain happiness. Schlesinger also asserts “none of these spokesmen of the American cause thought of happiness as something a people were entitled to simply strive for but as something that was theirs by natural right.”<sup>188</sup>

Indeed, Mason’s Virginia Declaration of Rights proclaimed that all men have certain inherent rights including “pursuing and obtaining happiness”<sup>189</sup> but the Declaration does not contain “and obtaining.” According to Schlesinger, “doubtless [Jefferson] deemed the added words sheer excess baggage.”<sup>190</sup> Rather than holding that the omission of the term means that Jefferson explicitly rejected the “practicing” interpretation of happiness, Schlesinger contends the move was purely rhetorical. He supports this conclusion by looking to the other use of happiness in the Declaration. In his view, “to effect their safety and happiness” clearly indicates the practicing of happiness, not a mere quest. Under Schlesinger’s interpretation, the government would have a duty to provide happiness to everyone, so that they could practice it as is their right.

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<sup>183</sup> Arthur M. Schlesinger, *The Lost Meaning of ‘The Pursuit of Happiness,’* 21 WM. & MARY Q. 325, 325 (1964).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 326.

<sup>186</sup> *Id.* (quoting John Adams, *Thoughts on Government* (1976)).

<sup>187</sup> *Id.* at 327.

<sup>188</sup> *Id.* at 326.

<sup>189</sup> *Virginia Declaration of Rights*, in GERBER, *supra* note 63, at 90-91.

<sup>190</sup> Schlesinger, *supra* note 183, at 326-27.



Although the inclusion of the phrase “effect their safety and happiness” seems to support Schlesinger’s reading of the pursuit of happiness, it must be understood in context. In the Declaration, the phrase follows the assertion of a right to revolution and refers to the type of government that the people should then attempt to establish.<sup>191</sup> The Declaration states that the people should choose the government “most likely” to effect happiness; it does not follow that the government must effect happiness for each individual.<sup>192</sup> While it is possible that Jefferson omitted “and obtaining” because it was redundant, it does not necessarily follow that Jefferson believed in a right to *obtain* happiness. As Schlesinger states, “Why he determined upon his own more concise rendering we do not know. . . .”<sup>193</sup> It is therefore an overstatement to conclude that Jefferson “doubtless” thought the words to be needlessly repetitive.<sup>194</sup> Moreover, Schlesinger’s interpretation requires that happiness be a static entity, something the government could give and people could obtain. As discussed above, Jefferson’s happiness is an individualistic and ever-changing notion; it depends on the person and his or her circumstances. Therefore, it is not likely that Jefferson would embrace Schlesinger’s definition of “practicing happiness.” In addition, virtue is not an object that the government could provide. While material goods and conditions may assist in the pursuit of happiness, virtue must come from inside.

Nevertheless, one can reject Schlesinger’s practicing happiness theory without rejecting the possibility of any governmental duty regarding happiness. The right to practice happiness would require that the government provide happiness; if one lacks happiness, one cannot practice it. The right to *seek* happiness, on the other hand, may imply a governmental duty to protect one’s pursuit of happi-

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<sup>191</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), *reprinted in* JAYNE, *supra* note 29.

<sup>192</sup> See MAIER, *supra* note 5.

<sup>193</sup> Schlesinger, *supra* note 183, at 317.

<sup>194</sup> Other scholars have criticized Schlesinger’s reasoning. Jayne, for instance, argues that “obtaining” was inconsistent with Locke’s (and Jefferson’s) belief that happiness is dependant on changing circumstances and therefore there is no right to obtain it; the use of the phrase “most likely” is tentative and thus consistent with the “elusive nature” of happiness put forth by Locke and Jefferson via the word “pursuit.” JAYNE, *supra* note 29, at 132. *But cf.* Yarbrough, *supra* note 103, at 202 n.66 (“practice” fits well with Jefferson’s political theory because it is the practice of — and not merely the search after — objects such as conscience, health, occupation that produces happiness).

ness. That is, the omission of “and obtaining” from the Declaration may indicate that the government has only a minimum duty to protect. “What its absence indicates is that the emphasis is on opportunity, not result, an emphasis that was also seen in the Declaration’s definition of equality.”<sup>195</sup> In other words, as all men are created equal, all men are given the right to try to achieve happiness; no assurance of remaining equal or obtaining happiness is given.

## 2. Duty to Protect

The right to the pursuit of happiness may yield only a governmental duty to protect the quest for happiness from the interference of others. According to White, “in the final version of the Declaration the purpose of government must be understood merely as that of *making secure rights which have been given by God*, which means making them secure against invasion.”<sup>196</sup> In an earlier draft of the Declaration, the purpose of government was stated as “to secure these ends.” In the final version, “ends” was changed to “rights.”<sup>197</sup> If life, liberty and pursuit of happiness were ends, a more powerful argument might be made for equating the pursuit of happiness with the practicing of happiness. The use of the term rights, however, indicates a duty to guard rather than attain. White concludes that “rights” implies a dilution of the purpose of government from “abettor of men in active attainment” to a “protector.”<sup>198</sup>

Because there is no contemporary record of the Congress, it is not clear who suggested this change. It is possible that the initial draft intentionally referred to life, liberty and pursuit of happiness as ends because the drafter(s) did believe in a governmental duty of providing happiness for all and that the wording was changed at the insistence of others. This is pure speculation, however. Even pursuit

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<sup>195</sup> GERBER, *supra* note 63, at 55.

<sup>196</sup> WHITE, *supra* note 69, at 250.

<sup>197</sup> “That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles and organizing its Powers in such Form, as to Them shall seem most likely to effect their Safety and Happiness.” THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776), *reprinted in* JAYNE, *supra* note 29, at 175 app.; *see also* WHITE, *supra* note 69, at 249-50.

<sup>198</sup> WHITE, *supra* note 69, at 251-52.

of happiness as an eventual end of government does not automatically lead to a governmental obligation to immediately provide happiness. Moreover, although the phrase "to secure these rights" was changed, the term "these ends" appears in the same sentence. Thus, ends and rights were used interchangeably here. Regardless, the government does have a duty to secure the pursuit of happiness against invasion by others. It is not clear, however, that the government's duty ends here, as White contends.

Some scholars have argued that Jefferson would never have subscribed to a big government, welfare state obliged to help provide happiness. Under this interpretation of Jefferson's political philosophy, Jefferson believed government is only obliged to protect the pursuit of happiness. Government ought to restrain aggression, compel contributions helpful to society as a whole, and require individuals to submit to an impartial arbiter when conflicts arise.<sup>199</sup> "Although the right to pursue happiness entails moral obligations to others. . . it does not fundamentally alter the limited role" of government.<sup>200</sup> By contrast, some argue that the right to pursue happiness "is the right to be in a situation where that pursuit has some reasonable and continually refreshed chance of moving toward its goal. The duty of government to *secure* this right is a duty to *act* affirmatively."<sup>201</sup>

### 3. Duty to Facilitate

The government's role with regard to natural rights is uncertain, particularly with regard to the right to pursue happiness.<sup>202</sup> Nevertheless, the middle ground between the two extremes of the practice of happiness and the protected quest for happiness seems to be the most satisfactory understanding of the phrase. In the intermediate conception, the government is not obliged to attain happiness for individuals, but it must do more than simply police interference with an individual's quest. In order to ensure that the

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<sup>199</sup> YARBROUGH, *supra* note 103, at 22.

<sup>200</sup> *Id.* at 22-23.

<sup>201</sup> CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* 131-132 (1997). The same argument made against Schlesinger's use of "secure" can be made here, i.e., the Declaration refers to a form of government "most likely" to secure, it does not impose an absolute duty. Black's basis for an affirmative duty, however, is broader than mere reliance on the use of the term "secure," as will be discussed below. *Id.*

<sup>202</sup> *C.f.* WHITE, *supra* note 69, at 256.

right to pursue happiness is meaningful and enjoyed by all, the government must provide minimum needs. "Both the plain and ordinary meaning of happiness and its common usage in the eighteenth century indicate that the notion of happiness cannot be entirely separated from material well-being. Access to the minimal necessities of life, such as shelter or basic medical care, is thus an indispensable prerequisite to the notion of happiness."<sup>203</sup>

The intermediate view is most consistent with the interpretation of happiness as a right founded on virtue. Under the ethical view, a government would be unable to provide happiness because it is impossible to bestow moral virtue on another person. Thus, to speak of a right to obtain happiness that implies an affirmative duty to provide on the part of the government is nonsensical.<sup>204</sup> Happiness is not a static state to be achieved, but a way of life.<sup>205</sup> In the ethical conception, happiness involves being morally just, a quality no government can provide. A just government whose goals include the pursuit of happiness, however, must facilitate happiness.<sup>206</sup> With regard to individuals, the government does not (and under the ethical conception, cannot) provide happiness. But according to the ethical view, it must establish the conditions under which its citizens have a meaningful chance to be happy.<sup>207</sup> In particular, there are minimum needs that must be met in order to pursue happiness, for instance, food, shelter and clothing.<sup>208</sup> Thus the government must provide the conditions to enable individuals to pursue happiness, even though it is not obligated to bestow happiness.

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<sup>203</sup> Lockwood, *supra* note 7, at 15 (footnotes omitted).

<sup>204</sup> ADLER, *supra* note 145, at 54.

<sup>205</sup> Herbert Lawrence Ganter also believes that happiness cannot be obtained but involves the internal cultivation of the mind. According to Ganter, the phrase "pursuit of happiness" has been interpreted "too myopically, and with too unbalanced an emphasis, for most of the stress seems to have been laid on the kinetic aspect of the metaphorical use of 'pursuit' as a mere physical motion, rather than on the more Jeffersonian approximation, *that true contentment arises from intellectual and spiritual excursions.*" Herbert Lawrence Ganter, *Jefferson's 'Pursuit of Happiness' and Some Forgotten Men (First Installment)*, 16 WM. & MARY Q. 442, 442 (1936) (emphasis added).

<sup>206</sup> ADLER, *supra* note 145, at 57-58.

<sup>207</sup> *Id.* at 54-55.

<sup>208</sup> See Lockwood, *supra* note 7, at 8 ("pursuing and obtaining happiness" encompasses a right to basic subsistence, i.e., "a guarantee of state protection against the deprivation of the food, clothing, shelter, and medical care minimally necessary for a decent life").

“The ‘pursuit of happiness’ must mean something. What it means is that all individuals who are unable to fend for themselves must be furnished with the material conditions indispensable to the *pursuit* of happiness, facilitating but not ensuring its attainment.”<sup>209</sup> The right to pursue happiness, then, implies that “human beings have a natural right to work for happiness with a reasonable chance of getting it.”<sup>210</sup> The pursuit of happiness depends to some extent on circumstances beyond an individual’s control. For instance, without health and a minimum standard of living, it is not only impossible for a man to attain happiness, it is impossible that he can effectively *strive* for happiness.<sup>211</sup> A malnourished child or a society afflicted with high infant mortality is not enjoying a right to pursuit of happiness.<sup>212</sup>

Thus, the right to pursue happiness does not require the government to provide happiness, “[b]ut the assistance of others — including the government — is nevertheless sometimes required, because without the minimum necessities of life an individual is forced to struggle for daily survival and, therefore, has no opportunity to pursue his or her happiness.”<sup>213</sup> “What organized societies and instituted governments can do is provide human beings with the external conditions indispensable to the *pursuit* of happiness, facilitating but not ensuring its attainment. The right to pursue happiness is, therefore, a right to these indispensable external conditions. . . .”<sup>214</sup> These indispensable external conditions may encompass a broad range of rights. In short, they include “a right to a decent livelihood,” and the “comforts and conveniences of life that are accessory to a successful pursuit of happiness.”<sup>215</sup> They in-

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<sup>209</sup> GERBER, *supra* note 63, at 193. See also ADLER, *supra* note 145, at 58 (government and society can provide external conditions for the pursuit of happiness, facilitating but not ensuring its attainment).

<sup>210</sup> George Anastoplo, *The Constitution at Two Hundred: Explorations*, 22 TEX. TECH. L. REV. 967, 989 (1992).

<sup>211</sup> GERBER, *supra* note 63, at 194.

<sup>212</sup> BLACK, *supra* note 201, at 137.

<sup>213</sup> GERBER, *supra* note 63, at 193.

<sup>214</sup> MORTIMER J. ADLER & WILLIAM GORMAN, *THE AMERICAN TESTAMENT* 40 (1975).

<sup>215</sup> ADLER, *supra* note 145, at 149. Adler provides an extensive list of economic necessities: a decent supply of means of subsistence; living and working conditions conducive to health; medical care; and time and access to opportunities for leisure and continuous education. *Id.* According to Adler, however, such rights were not recognized at the time of the Declaration or the Constitution; indeed, they were not recognized until the twentieth century. *Id.* at 122, 132-33. I argue, by

clude the right “to basic education, health care, food, housing, and clothing, for without these things an individual is denied an opportunity to pursue a good and happy life.”<sup>216</sup>

The pursuit of happiness does not, however, require equality in material goods. “Although the political philosophy of the American Founding does not envision an egalitarian welfare state — indeed, the Declaration’s concepts of ‘equality’ and ‘liberty’ forbid it — that philosophy does require some public assistance programs so that every individual has an opportunity to pursue his or her happiness.”<sup>217</sup> The pursuit of happiness as used in the Declaration encompasses these minimum rights because the right to pursue happiness — an end and fundamental purpose of government — would be meaningless without basic economic rights.

Moreover, the moral dimension of pursuit of happiness indicates that virtue and happiness are intertwined. If a person lacks basic needs like food and shelter, she likely cannot pursue happiness. At the least, failure to provide conditions for pursuit of happiness would discourage individuals from adopting a virtuous pursuit of happiness, and likely encourage immoral and fleeting grabs at that which provides short-term satisfaction. The internal cultivation of the mind toward virtue, based on intellectual and spiritual pursuits, is often beyond the reach of those preoccupied with the scramble to scrape together sufficient food and shelter. The gentleman farmer — or today’s multimillionaire — has ample time to read the classics to understand virtue and the public good, along with the luxury of acting accordingly without threatening his lifestyle. Such a notion is absurd to one who is simply trying to survive. Without fortunate circumstances or the help of the government, the virtuous pursuit of happiness is difficult if not impossible to achieve. While many of the poor may be virtuous, they cannot be said to have a meaningful opportunity to pursue happiness if they are preoccupied with trying to stay alive.

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contrast, that such rights were recognized by eighteenth-century political philosophers such as Jefferson but that the implementation of such rights looked very different than today because of the economic and social circumstances of early America.

<sup>216</sup> GERBER, *supra* note 63, at 194. These rights rise to level of constitutional rights when the Constitution is interpreted “in accordance with the natural- rights political philosophy of the Declaration of Independence.” *Id.*

<sup>217</sup> *Id.* at 194.

Furthermore, a proper understanding of happiness includes a right to property, as discussed above. Property such as land facilitates the pursuit of happiness by providing food and shelter.<sup>218</sup> Jefferson believed that property should be regulated without violating “the natural right to the means of subsistence.”<sup>219</sup> “To improve one’s material conditions as a result of one’s own individual efforts was a further extension of the natural right to property.”<sup>220</sup> Land seemed in limitless supply when the Declaration was drafted.<sup>221</sup> Any industrious<sup>222</sup> (free white) man had access to land sufficient to provide minimal subsistence. “Land was abundant and available to anyone to settle, hunt and farm. Poor persons who could not make a living in settled communities had the option of moving to the frontier as long as they were capable of physical labor.”<sup>223</sup> Moreover, in an agricultural society “with a vast, unsettled western frontier, paid work presumably was available to everyone who wanted it.”<sup>224</sup>

In order to avoid concentrations of land and other property that would alter these unlimited opportunities, Jefferson supported

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<sup>218</sup> Property was a component of happiness, along with liberty and education. Happiness included “milk for the children, and meat on the table, a well-built house and a well-filled barn, freedom from the tyranny of the state, the superstition of the church, the authority of the military, and the malaise of ignorance.” COMMAGER, *supra* note 42, at 89. As discussed below, the need for public education to create good citizens is similar to the need for government intervention where basic subsistence is inaccessible.

<sup>219</sup> KOCH, *supra* note 150, at 79.

<sup>220</sup> *Id.*

<sup>221</sup> Jefferson described America as providing property to anyone: “The political institutions of America, its various soils and climates, open a certain resource to the unfortunate and to the enterprising of every country and insured to them the acquisition and free possession of property.” Thomas Jefferson, *Declaration on Taking Up Arms, 1775*, Papers 1:199, available at <http://etext.virginia.edu/jefferson/quotations/jeff1550.htm> (Thomas Jefferson on Politics & Government: Property Rights).

<sup>222</sup> Despite his “generally sunny view of human nature” Jefferson recognized that some men would not take advantage of the opportunities available in America; some were poor because they lacked “character and will.” YARBROUGH, *supra* note 103, at 69 (discussing bill for support of poor including provisions for workhouses and compulsory labor). Nonetheless, he apparently expected the vast majority of men to embrace agrarian virtue in the near future, while recognizing the need to adapt to manufacturing and urban life. *Id.* at 70-77.

<sup>223</sup> See Lockwood, *supra* note 7, at 16.

<sup>224</sup> *Moore v. Ganim*, 233 Conn. 557, 636 (Peters, C.J., concurring) (“A right to governmental support is even more important today than it was 350 years ago, when our forebears recognized the right”).

economic reforms. For example, he advocated the abolition of primogeniture and entail to redistribute property.<sup>225</sup> As Jefferson described it, “America has ‘no paupers; the old and crippled among us, who possess nothing and have no families to take care of them, being too few to notice . . .’” — in other words, a property-owning middle class republic.<sup>226</sup> Unlike in the Old World, there was no grinding poverty or vast disparities based on rigid social or economic inequalities. Rather, any disparities among the people in America resulted from differences in effort and talent; even the rich in America are “of moderate wealth.”<sup>227</sup>

Jefferson compared the situation in France with that in America, commenting on the concentration of land among the few in France and the vast numbers of poor who cannot find work.<sup>228</sup>

Whenever there are in any country uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labor and live on. If for the encouragement of industry we allow it to be appropriated, we must take care that other employment be provided to those excluded from the appropriation. If we do not, the fundamental right to labour the earth returns to the unemployed. It is too soon yet in our country to say that every man who cannot find employment, but who can find uncultivated land, shall be at liberty to cultivate it, paying a modest rent. But it is not too soon to provide by every possible means that as few as possible shall be without a little portion of land. The small landholders are the most precious part of a state.<sup>229</sup>

The distribution of wealth in America today is far different from the moderation Jefferson perceived. In 1997, one percent of Americans owned 40% of the country’s wealth. Disparities are increasing, and education is no longer a mitigating factor; for instance, one-

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<sup>225</sup> SHELDON, *supra* note 109, at 74.

<sup>226</sup> YARBROUGH, *supra* note 103, at 98 (quoting Jefferson’s letter to Thomas Cooper, Sept. 10, 1814).

<sup>227</sup> *Id.*

<sup>228</sup> SELECTED WRITINGS, *supra* note 2, at 388-89 (Letter from Thomas Jefferson to Reverend James Madison (Oct. 28, 1785)).

<sup>229</sup> *Id.* at 390.



third of the poor in New York have some college or a college degree.<sup>230</sup>

Jefferson believed that farmers — landowners — were the best citizens because they would have the ability to cultivate wisdom and virtue. The landowner's economic independence would inculcate public virtue and qualify him for political participation.<sup>231</sup> This explains why suffrage was limited to landowners: only those with property had the time and education to properly exercise political rights.<sup>232</sup> Jefferson wished to create public education to cultivate worthy citizens so that “the people could select able governors and representatives of a just and happy state.”<sup>233</sup> Men who labored long hours in terrible conditions were not qualified to participate in government; similarly, Americans could not pursue happiness unless they had access to the means of sustenance. Land initially provided that means of sustenance, but when agrarian society proved inadequate for economic independence, the government would have to step in to ensure access to the pursuit of happiness.

Jefferson recognized that manufacturing and cities were inevitable. He eventually adapted his agrarian ideal in order to secure economic independence for the country. Land was no longer the only means toward virtue, but rather land *or* a “satisfactory situation” in terms of wages and labor for those working in services or manufacturing.<sup>234</sup> The changed circumstances meant that man was less likely to be able to ensure the basic necessities through hard work, leading to a need for governmental help in order to pursue happiness. At one time, hard work on fertile land would provide food, and the ample wilderness would provide the means for shelter. But when a society of many farmers adapted to an urban, manufacturing-focused economy, there would be no such open access to food and shelter. The situation of laborers was more precarious, based on availability of jobs. Long hours and low pay in terrible conditions often failed to provide the basic necessities of life even when employment could be found. “If, in the future and through no fault of their own, large numbers of Americans fail to find employ-

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<sup>230</sup> *The News Hour with Jim Lehrer* (PBS television broadcast, July 17, 2002), available at [www.pbs.org/newshour/bb/economy/july-dec02/democracy\\_7-17.html](http://www.pbs.org/newshour/bb/economy/july-dec02/democracy_7-17.html) (last visited Jan. 30, 2003).

<sup>231</sup> SHELDON, *supra* note 109, at 76.

<sup>232</sup> ADLER, *supra* note 145, at 152.

<sup>233</sup> SHELDON, *supra* note 109, at 62, 65.

<sup>234</sup> YARBROUGH, *supra* note 103, at 77.

ment, the government will be obliged to act in order to secure the 'fundamental right' of individuals to labor for a living."<sup>235</sup>

"The possession of a decent material basis for life is an indispensable condition, for almost all people at all times, to the pursuit of happiness. The lack of this basis — the lack we call 'poverty' — is overwhelmingly, in the whole human world, the commonest, the grimmest, the stubbornest obstacle we know to the pursuit of happiness."<sup>236</sup> In Jefferson's time, there was usually a way out of poverty for Americans — plentiful land and hard work. In such circumstances, government aid was less necessary, yet Jefferson recognized that in a new economy, new government help might be required.<sup>237</sup> But the government has not kept pace with the changing economy. Regardless of hard work, a "satisfactory situation" in terms of a living wage is often unavailable today.<sup>238</sup>

Based on Jefferson's conception of happiness as a virtuous endeavor requiring basic necessities, the pursuit of happiness entails that the government facilitate happiness. It cannot provide happiness, for it is impossible for the government to give virtue; but it must do more than merely protect the quest from interference where external barriers impede the pursuit. A just government must secure the right to the pursuit of happiness by ensuring the conditions necessary to a viable quest for a morally good life. A proper reading of the Declaration reveals that basic economic rights are rooted in the foundation of American democracy. In order to fulfill the unalienable rights enshrined in the Declaration of Independence, the United States should at least attempt to provide the conditions necessary to pursue happiness.<sup>239</sup> But the government of the United States today refuses to acknowledge, let alone

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<sup>235</sup> *Id.* at 100.

<sup>236</sup> BLACK, *supra* note 201, at 133.

<sup>237</sup> This is not to say that colonial governments did not provide assistance. "As Professor Ely points out, colonial governments in fact assumed significant responsibility for assuring an adequate standard of living." Barbara Stark, *Deconstructing the Framers' Right to Property: Liberty's Daughters and Economic Rights*, 28 HOFSTRA L. REV. 963, 1039 (2000).

<sup>238</sup> For statistics on the minimum wage and the unaffordability of housing, for example, see *infra* Part IIIC.

<sup>239</sup> Scholars have argued for a range of welfare rights based on the Constitution. For a list of numerous articles on the topic, see Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1133 n.9 (1999).

meet, its obligation to provide all Americans a fair opportunity for happiness.

B. *Enforceability of Duties*

The conception of the pursuit of happiness as a right implies certain governmental duties, yet the Declaration has not been interpreted by the courts to provide legally enforceable rights. Several legal scholars, most notably Charles Black, have argued that the Supreme Court should correct this error.<sup>240</sup> The likelihood of the Court embracing the unalienable rights of the Declaration as legally enforceable rights, however, is slim.<sup>241</sup> Nevertheless, the concept of a governmental obligation derived from the Declaration can be a powerful political and moral assertion. Jefferson himself described the Declaration as “the genuine effusion of the soul of our country at that time.”<sup>242</sup> The true meaning of the pursuit of happiness might have an effect in the political arena, even if unsuccessful as a litigation strategy. Particularly in the context of international human rights, government obligations derived from our founding document may be an effective rhetorical strategy to refute the notion that economic rights are un-American. In the absence of enforcement mechanisms, moral suasion and mobilizing shame play a central role in international human rights.

There are several reasons why the Declaration *should* be taken seriously in the courts as well as in the public arena. First, the Declaration was a “distinctly juristic act — the foundation of all later juristic acts in our territory.”<sup>243</sup> Courts should take the Declaration as seriously as its signers did — men who risked real danger to their lives, fortune and honor by publicly acceding to a treasonous document.<sup>244</sup> Second, the early congresses took the Declaration seriously. In acts admitting ten states to the union, Congress required

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<sup>240</sup> See, e.g., BLACK, *supra* note 201.

<sup>241</sup> Given the long history of the *Slaughterhouse Cases*, wholesale reversal seems unlikely. Nevertheless, one commentator has asserted that the Supreme Court “may be ready” to repudiate the *Slaughterhouse Cases*, at least in the context of state regulations restricting free enterprise. Clint Bolick, *Free to Work: Economic Liberty May Finally Win Judicial Respect*, LEGAL TIMES, April 29, 2002, at 50. See also discussion regarding the *Slaughterhouse Cases* *infra* pp 47-48.

<sup>242</sup> SELECTED WRITINGS, *supra* note 2, at 722 (Letter from Thomas Jefferson to Dr. James Mease (Sept. 26, 1825)).

<sup>243</sup> *Id.* at 6.

<sup>244</sup> *Id.* at 7.

that the state constitutions further the principles of the Declaration.<sup>245</sup> Finally, “[t]he Declaration is the root of all political authority among us, of all legitimate exercise of power.”<sup>246</sup>

The Constitution, in other words, is a political document in the noblest sense. It establishes a framework of government through which certain underlying philosophical principles are to be advanced. And those philosophical principles are the natural-rights principles of the Declaration of Independence. To ignore this fact is to ignore the reason we are a nation.<sup>247</sup>

The Constitution must embody the principles of the Declaration in order to be a legitimate exercise of power and to meet the standard implicit in the Declaration for a proper government. Unless the government established by the Constitution secures man’s unalienable rights, including the pursuit of happiness, the people may alter and abolish it for a government more likely to effect their safety and happiness.<sup>248</sup> Thus, “the doctrines of the Declaration should be taken to have the force of *law* — the force *in law* of general commitments from which *particular* law can be derived.”<sup>249</sup> Even if the Declaration is not given the force of law, the same reasons dictate that the Declaration should be taken as a “*basis* for law, as a *nourisher* of law, whether or not it be taken to be law of its own unaided force.”<sup>250</sup> Thus, the right to pursue happiness and particularly eco-

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<sup>245</sup> JONES, *supra* note 30, at 27. For example, the state of Nebraska was admitted provided that its “constitution, when formed, shall be republican, and not repugnant to the Constitution of the United States and the principles of the Declaration of Independence.” *Id.*

<sup>246</sup> BLACK, *supra* note 201, at 9.

<sup>247</sup> GERBER, *supra* note 63, at 15.

<sup>248</sup> MAIER, *supra* note 5, at 192. It should be noted that the Constitution or Bill of Rights does not contain language from the Declaration despite attempts such as Madison’s proposed First Amendment providing for the governmental purpose of “generally pursuing and obtaining happiness and safety.” See JONES, *supra* note 30, at 20-22. Nevertheless, John Marshall stated, “That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been created.” PAUL EIDELBERG, *ON THE SILENCE OF THE DECLARATION OF INDEPENDENCE* 52 (1976).

<sup>249</sup> BLACK, *supra* note 201, at 8.

<sup>250</sup> *Id.*; see also MAIER, *supra* note 5, at 154 (Declaration became “a moral standard by which the day-to-day policies and practices of the nation could be judged”).

conomic rights should be recognized by the courts as well as the executive and legislative branches. The government's legitimacy should be based on furthering the principles of the Declaration, as the eligibility of entering states initially hinged on honoring the Declaration.

Charles Black argues that the government has an affirmative constitutional duty to "ensure, humanly speaking, a decent livelihood by all" through "good faith action, over a wide and not distinctly bounded range."<sup>251</sup> He contends that such an affirmative duty is not unusual. The Constitution requires many duties of the three branches, and implies a duty to commit the necessary resources to carry out those duties — from administering the Census and providing trial by jury to seeing that the laws are faithfully executed.<sup>252</sup> Thus, there is no Constitutional barrier to positive economic rights. Rather, "[t]he problem is much more a matter of political will than deontic logic, and the present situation much more a product of constitutional blindness than interpretivist fidelity."<sup>253</sup> For instance, the requirements of providing attorneys and confinement conditions that are not cruel and unusual punishment dictate action by all three branches (and two levels) of government — including the expenditure of vast sums of money. The labeling of economic rights as illegitimate positive rights, as contrasted with negative rights of the Constitution, creates a false dichotomy.<sup>254</sup> Therefore the Declaration can and should be used to inform the interpretation of the Constitution.

Specifically, Black argues that the unenumerated rights of the Ninth Amendment<sup>255</sup> include the Declaration's inalienable rights.<sup>256</sup> In addition, the privileges and immunities of citizens of

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<sup>251</sup> BLACK, *supra* note 201, at 133, 135.

<sup>252</sup> *Id.* at 134-35; *see also* Lockwood, *supra* note 7, at 9-12 (affirmative nature of right to safety and happiness as well as of civil and political rights).

<sup>253</sup> Jeremy Waldron, Book Note, *Charles L. Black, Jr.'s A New Birth of Freedom*, 29 COLUM. HUM. RTS. L. REV. 765, 782 (1998).

<sup>254</sup> The distinction between positive and negative rights is key to the refusal to consider welfare as a Constitutional right. The Constitution is said to provide only for negative rights, i.e. the right to restrain the State from infringing upon liberties, not positive rights entailing affirmative duties. *See, e.g.*, Hershkoff, *supra* note 239, at 1133-39; *see also* sources cited *supra* note 9.

<sup>255</sup> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

<sup>256</sup> BLACK, *supra* note 201, at 22.

the United States ensured by the Fourteenth Amendment<sup>257</sup> are the very rights named in the Declaration.<sup>258</sup> Black's theory has been criticized as fatally flawed due to its reliance on the Declaration — reliance that flies in the face of over two hundred years of case law refusing to recognize the Declaration as having any governing force.<sup>259</sup> Black, of course, is aware of this case law, and provides a compelling critique, particularly of the Slaughterhouse Cases.<sup>260</sup> Nevertheless, the Supreme Court has not adopted Black's theory,<sup>261</sup> nor used the pursuit of happiness as a basis for elucidating significant "fundamental rights."<sup>262</sup>

Pursuit of happiness has been referred to in fundamental rights cases, but it has not been the legal basis for those decisions. Consider, for example, *Meyer v. Nebraska*:<sup>263</sup>

The case was about parental rights to determine the education of young children, but in setting the framework for analysis of that issue, the Court remarked that among the 'liberties' guaranteed by the Due Process Clause of the Fourteenth Amendment was 'the right of the individual . . . to marry, establish a home and bring up children.' Further, the Court identified marriage as one of 'those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.'<sup>264</sup>

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<sup>257</sup> Section 1 of the Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

<sup>258</sup> BLACK, *supra* note 201, at 52-53.

<sup>259</sup> Stacey Hiller, Book Note, *A New Birth of Freedom*, 7 B. U. PUB. INT. L. J. 369, 375 (1998).

<sup>260</sup> BLACK, *supra* note 201, at 55-85.

<sup>261</sup> See MAIER, *supra* note 5, at 192 (courts have not enforced Declaration).

<sup>262</sup> BLACK, *supra* note 201, at 94-98 (pursuit of happiness rather than substantive due process should embody fundamental rights).

<sup>263</sup> 262 U.S. 390 (1923).

<sup>264</sup> Marc C. Rahdert, *Same-Sex Relationships: A Constitutional Commentary*, 7 TEMP. POL. & CIV. RTS. L. REV. 495, 487-98 (1998) (footnotes omitted).

Nevertheless, the reference to happiness was barely relevant to the holding. Similarly, fundamental rights are generally not seen as connected to economic and social rights, particularly the right to the basic necessities of life.<sup>265</sup>

Perhaps the most famous expression of the connection between the pursuit of happiness and fundamental rights is found in Justice Brandeis' dissenting opinion from *Olmstead v. United States*.<sup>266</sup> Dissenting from the Court's holding that wiretapping is not a form of search and seizure and therefore not a violation of the Fourth or Fifth Amendments, Brandeis wrote:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things.<sup>267</sup>

Despite Brandeis' eloquent reference to the pursuit of happiness, neither the state nor federal governments is required to "secure conditions" facilitating the pursuit of happiness.

Happiness has been connected to the right to pursue employment, but in a narrow way. For example, the *Slaughterhouse Cases* have been interpreted to equate happiness with the right to follow any job.<sup>268</sup> Other cases reach contradictory positions, finding either a "moral right of states to compel citizens to be happy or impel them away from unhappiness" or denouncing states "for interfering with private happiness of individuals."<sup>269</sup> The one common element is that pursuit of happiness is described as freedom to contract or freedom to labor.<sup>270</sup> The pursuit of happiness is thus transformed from an end of a just government so important that government must assist citizens in their pursuit, to a negative duty of the state to

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<sup>265</sup> Davis, *supra* note 9, at 966.

<sup>266</sup> *Olmstead v. United States*, 277 U.S. 438 (1927) (Brandeis, J., dissenting).

<sup>267</sup> *Id.* at 478.

<sup>268</sup> JONES, *supra* note 30, at 39.

<sup>269</sup> *Id.* at 49.

<sup>270</sup> *Id.* Later pursuit of happiness cases also reject any affirmative governmental duty. See *id.* at 71; see also Grodin, *supra* note 36, at 20-33 (discussing cases on state constitutional provisions to happiness and safety, where happiness is seen as economic liberty or privacy).

refrain from interfering in an individual's employment arrangements.

Despite the compelling arguments for enforcing the principles of the Declaration's right to pursue happiness through the Constitution:

[t]he United States Supreme Court has made it clear during the past twenty years that the Federal Constitution does not impose any affirmative duty upon governments to provide indigents with their basic needs, either directly or through the provision of a job. . . . There is thus no federal constitutional right to basic needs even though '[t]he right to basic subsistence is arguably the most fundamental of all human rights,' because '[f]or a person who is starving and without shelter, all other rights appear to pale in comparison.'<sup>271</sup>

“Welfare benefits are not a fundamental right, and neither the State nor Federal Government is under any sort of constitutional obligation to guarantee minimum levels of support.”<sup>272</sup> While state constitutional language about happiness may be said to incorporate the Declaration's pursuit of happiness clause in much the same way that the Federal Constitution builds on the pursuit of happiness, no state government has been required to provide the essentials to pursue happiness.<sup>273</sup> Both the state and federal judiciaries have thus failed in their duty to live up to the principles of the Declaration. But even if the courts' views of the state and federal constitutions

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<sup>271</sup> Lockwood, *supra* note 7, at 4-5 (footnotes omitted).

<sup>272</sup> *Id.* at 4 (quoting *Lavine v. Milne*, 424 U.S. 577, 585 n. 9 (1976)) (footnote omitted).

<sup>273</sup> *See, e.g., Daugherty v. Wallace*, 87 Ohio App. 3d 228 (1993) (affirming trial court decision that Ohio constitutional right to safety and happiness does not impose obligation on state to provide minimum welfare benefits); Lockwood, *supra* note 7, at 2-3; *see also Hershkoff, supra* note 239, at 1136 (discussing reluctance of state courts to recognize state duties corresponding to state constitutional welfare rights). This is not to say that international norms have not been used by state courts to aid in interpreting state constitutional provisions. *See Park, supra* note 9, at 1255-63.



do not change, the other branches of government might respond to a call to honor the true meaning of the Declaration.<sup>274</sup>

“The 1776 Declaration of Independence commits all the governments in our country to ‘securing’ for its people certain human rights, ‘among which are life, liberty, and the pursuit of happiness.’ These are the certified cardinal values of our political morality. It is a separate question whether they are also ‘law,’ available as such.”<sup>275</sup> The United States currently fails to meet the commitment of the Declaration, the public statement of the principles the nation intends to stand for.<sup>276</sup> Regardless of judicial enforcement, the force of the moral argument should be persuasive, particularly in the area of human rights. A consensus exists within much of the international human rights community that the court of public opinion is as, if not more, important than official courts.<sup>277</sup> It should not require a successful lawsuit to force the nation to live up to its “raison d’être.”<sup>278</sup>

The Constitution exists to fulfill the promises made by the Declaration; it provides a legal and political framework through which those promises can be redeemed in history. Thus, if we want to understand the meaning of the Constitution, we must understand the meaning of those promises. The Constitution creates a structure of government; but the Declaration explains the reason that it lives. The Constitution is a body of law; but the promises contained in the Declaration are its soul.<sup>279</sup>

The refusal to guarantee basic needs leaves the United States out of step with the intent of our founders and with contemporary values shared by the international community. For instance, the United States stands alone among industrialized countries in refusing to ratify the International Covenant on Economic, Social and Cultural

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<sup>274</sup> Cf. Sunstein, *supra* note 9, at 367, 372 (constitutions should not contain positive economic rights because they are unenforceable, but governments should provide “decent opportunities and results to all citizens”).

<sup>275</sup> BLACK, *supra* note 201, at 38.

<sup>276</sup> Waldron, *supra* note 253, at 780.

<sup>277</sup> See William Twining, *Constitutions, Constitutionalism and Constitution-Mongering*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* 383, 386 (Irwin P. Stotzky, ed. 1993).

<sup>278</sup> Waldron, *supra* note 253, at 780.

<sup>279</sup> J. M. Balkin, *The Declaration and the Promise of a Democratic Culture*, 4 *WIDENER L. SYMP. J.* 167, 169 (1999).

Rights (ICESCR).<sup>280</sup> The above analysis of the Declaration indicates that the pursuit of happiness — including basic economic rights — is a core principle of our democracy. The government therefore must begin to fully adhere to its duty under the Declaration. The United States can start this process by adopting economic rights such as those embodied in international agreements like the ICESCR.

*C. Duty to Provide Economic Rights Under International Law*

International human rights law supports a variety of economic rights that the United States should embrace and enforce. The United States has accepted these instruments in principle and should adhere to the provisions on basic economic needs along with civil and political protections.<sup>281</sup> Although some preliminary steps have been taken, the government has lacked the political will to adequately provide the essentials for pursuing happiness.

The United States was a strong proponent, if not the moving force, behind the Universal Declaration of Human Rights.<sup>282</sup> The Universal Declaration is widely believed to have achieved the status of customary international law and is therefore binding on the United States.<sup>283</sup> In a recent case, a federal court stated: “While the [Universal Declaration] is not a treaty, it has an effect similar to a treaty. It is a declaration published by the General Assembly of the United Nations ‘as a common standard of achievement for all peoples and all nations.’”<sup>284</sup> The preamble of the Universal Declaration echoes President Roosevelt’s endorsement of the Four Freedoms,<sup>285</sup> referring to the “advent of a world in which human

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<sup>280</sup> Stark, *supra* note 15, at 80.

<sup>281</sup> For a discussion of international norms with regard to Ohio’s constitutional right to pursuing and obtaining happiness, see Lockwood, *supra* note 7, at 20-24.

<sup>282</sup> See GLENDON, *supra* note 11.

<sup>283</sup> See MARTIN ET AL., *INTERNATIONAL HUMAN RIGHTS LAW & PRACTICE: CASES, TREATIES AND MATERIALS* 109 (1997) (“[A] Declaration creates an expectation of adherence. . . . Indeed, several commentators have concluded that the Universal Declaration has become, *in toto*, a part of binding, customary international law.”). *But cf.* Davis, *supra* note 9, at 977 (Universal Declaration is customary law, at least as to prohibition against torture, summary execution, genocide.).

<sup>284</sup> *Beharry v. Reno*, 183 F. Supp. 2d 584, 596 (E.D.N.Y. 2002) (using Universal Declaration and other international documents to interpret Immigration and Naturalization Act).

<sup>285</sup> Franklin D. Roosevelt, *Message to the Congress on the State of the Union* (Jan. 11, 1944), available at <http://www.udhr.org/history/1-11-44.htm> (last visited

beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.”<sup>286</sup> The Universal Declaration sets forth numerous protections of human rights including provisions ensuring minimum needs are met.

Article 22 provides: “Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”<sup>287</sup> Under Article 23, “[e]veryone has the right to work, to free choice of employment, to just and favourable conditions or work and to protection against unemployment.”<sup>288</sup> Everyone is entitled to “just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.”<sup>289</sup> Moreover, the Universal Declaration provides that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”<sup>290</sup>

Although the United States provides for some of these rights, the ideal of a “living wage” has been rejected by the United States.<sup>291</sup> While there is a safety net, it is inadequate. Millions of Americans must rely on private charities for emergency food aid,

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Jan. 30, 2003). Roosevelt also called on Congress to provide for rights similar to those outlined below: right to employment, “right to earn enough to provide adequate food and clothing and recreation,” right to “a decent home,” right to “adequate medical care and the opportunity to achieve and enjoy good health,” and right to “a good education.” *Id.*

<sup>286</sup> Universal Declaration, *supra* note 10, pmb., reprinted in HENKIN et al., HUMAN RIGHTS: DOCUMENTARY SUPPLEMENT 41 (2001).

<sup>287</sup> *Id.* at 44 (art. 22).

<sup>288</sup> *Id.* (art. 23 (1)(2)).

<sup>289</sup> *Id.* (art. 23 (3)).

<sup>290</sup> *Id.* (art. 25(1)).

<sup>291</sup> See, e.g., AMERICA NEEDS HUMAN RIGHTS 30 (Anuradha Mittal & Peter Rosset eds., 1999) (discussing inadequacy of minimum wage and relative decline in wages for low-income workers); New York City Welfare Reform and Human Rights Documentation Project, *Hunger is No Accident* 43-44 (2000) [hereinafter Welfare Reform] (discussing supplemental food benefits).

and often must choose between paying for food and paying for heat, rent or medical care.<sup>292</sup> The government's general attitude toward providing greater benefits is hostile, instead exhorting the poor, homeless or hungry to work harder to achieve the rights to which they are entitled under both the Universal Declaration and the Declaration of Independence.

Although the United States has not ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), under international law it should not take any steps that defeat the object of the Covenant because it is a signatory to the treaty.<sup>293</sup> The preamble to the ICESCR recognizes, in accordance with the Universal Declaration, that "the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights."<sup>294</sup>

The ICESCR provides for the right to work including remuneration that provides workers with "fair wages and equal remuneration for work of equal value" and "a decent living for themselves and their families in accordance with the provisions of the present Covenant."<sup>295</sup> It also provides for "rest, leisure and reasonable limitation of working hours and periodic holidays with pay."<sup>296</sup> Under Article 11, the "States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."<sup>297</sup> States, "recognizing the *fundamental right of everyone to be free from hunger*, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed" to

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<sup>292</sup> AMERICA'S SECOND HARVEST, HUNGER IN AMERICA 2001 NATIONAL REPORT 1-2 (2001).

<sup>293</sup> See Alston, *U.S. Ratification*, *supra* note 16. The Bush Administration recently reaffirmed its commitment to this principle in the context of "unsigned" the Statute of the International Criminal Court. See Mark Grossman, Under Secretary for Political Affairs, *American Foreign Policy and the International Criminal Court available at* <http://www.state.gov/p/9949pf.htm> (May 6, 2002) (informing United Nations of intent not to become a party to the statute, "consistent with the Vienna Convention on the Law of Treaties").

<sup>294</sup> *International Covenant on Economic, Social and Cultural Rights*, in HENKIN ET AL., HUMAN RIGHTS: DOCUMENTARY SUPPLEMENT 41, 47 (2001) (pmb1).

<sup>295</sup> *Id.* at 49 (art. 7(a)(i), (ii)).

<sup>296</sup> *Id.* (art. 7(d)).

<sup>297</sup> *Id.* at 50 (art. 11(a1)).

improve distribution and production of food.<sup>298</sup> Finally, states must recognize “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” and take steps to achieve the full realization of this right including “the creation of conditions which would assure to all medical service and medical attention in the event of sickness.”<sup>299</sup>

The United States fails to meet these standards. For example, the United States has rejected the doctrine of equal pay for comparable worth.<sup>300</sup> Millions of citizens of the world’s wealthiest nation cannot afford adequate medical care.<sup>301</sup> Similarly, the number of working poor who cannot afford adequate food or shelter remains too high. 32 million Americans live at or below the federal poverty level, and 33 million are either hungry or at risk of hunger.<sup>302</sup> Of those households receiving emergency food aid from the nation’s largest hunger relief organization, 39% have at least one adult working.<sup>303</sup> Of that 39%, almost half are working full-time (forty

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<sup>298</sup> *Id.* (art. 11(2)) (emphasis added).

<sup>299</sup> *Id.* at 51 (art. 12 (1), (1)(d)).

<sup>300</sup> For a comparison between “equal pay for comparable worth” and the more restrictive United States standard of “equal pay for equal work,” see Ursula R. Kubal, *Comment: U.S. Multinational Corporations Abroad: A Comparative Perspective on Sex Discrimination Law in the United States and the European Union*, 25 N.C. J. INT’L L. & COM. REG. 207, 216-37 (1999); see also Proposed U.S. Reservations, Understandings, and Declarations to the Convention on the Elimination of All Forms of Discrimination Against Women, 140 CONG. REC. S13927-04 (1994) (reservation stating that United States does not accept obligation to enact legislation establishing the doctrine of comparable worth).

<sup>301</sup> The Census Bureau reports that 38.7 million Americans lacked health insurance in 2000, 8.5 million of them children. *More People Have Health Insurance, Census Bureau Reports*, Economics and Statistics Admin., Bureau of Census (Fall 2001), available at <http://www.census.gov/ftp/pub/Press-Release/www/2001/cb01-162.html> (last visited Jan. 30, 2003). Although this represented a decline from 1999, it is likely that numbers have increased along with unemployment. See Robin Toner & Sheryl Gay Stolberg, *Decade After Health Care Crisis, Soaring Costs Bring New Strains*, N. Y. TIMES, Aug. 11, 2002, at A1 (estimated 2 million lost health insurance in 2001 due to layoffs, on top of 39 million at end of 1990s, and numbers expected to continue to increase); T. Shawn Taylor, *Jobless pay is running out for 35,000 here*, CHI. TRIB., June 12, 2002, at C1 (discussing unemployment increases caused by recession).

<sup>302</sup> America’s Second Harvest, *Who’s Hungry: Facts and Figures on Hunger: Hunger in the Era of Welfare Reform*, available at [www.secondharvest.org/whos\\_hungry/whoshungry/hunger\\_welfare.html](http://www.secondharvest.org/whos_hungry/whoshungry/hunger_welfare.html) (last visited Jan. 30, 2003).

<sup>303</sup> America’s Second Harvest, *Who’s Hungry: Facts and Figures on Hunger: A Profile of the Working Poor Served by America’s Second Harvest Food Banks*,

hours or more per week).<sup>304</sup> Affordable housing remains an unrealized dream for millions of American workers. In 2000, 2.7 million Americans worked for the federal minimum wage of \$5.15 (or, in a few states, a slightly higher amount).<sup>305</sup> This figure does not include those with annual salaries at the same level, so 2.7 million understates the extent of minimum wage workers.<sup>306</sup> But “[t]he average U.S. worker must earn at least \$11.28 an hour to afford the rent on a modest one-bedroom apartment, or \$13.78 an hour for two bedrooms.”<sup>307</sup> For a single parent to afford even a one-bedroom apartment, she must work more than two full-time, minimum wage jobs (and find free, safe, reliable childcare along with free food, clothing, utilities and transportation) in order to attain a basic standard of living.

With regard to child poverty, the United States has a 22.4% relative poverty rating, second only to Mexico among the countries of the Organization for Economic Co-Operation and Development.<sup>308</sup> Poor children in the United States are the most likely to remain poor within 10 years, “which challenges common perceptions about mobility and opportunity in the US.”<sup>309</sup> Thus, children born into poverty in the United States more often remain poor and lack a meaningful opportunity to pursue happiness.

Regional treaties also contain provisions relevant to the minimum needs that the United States should ensure. Within the Inter-

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available at [http://www.secondharvest.org/whoshungry/working\\_poor.htm](http://www.secondharvest.org/whoshungry/working_poor.htm) (last visited Jan. 30, 2003).

<sup>304</sup> *Id.*

<sup>305</sup> See Jennifer Loven, *Report Finds A Growing Gap Between Minimum Wage and Cost of Rental Housing*, Associated Press, Oct. 2, 2002 (figures of “housing wage” calculated based on the Department of Housing and Urban Development’s definition of affordable housing at 30% of gross income).

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* See also Jennifer Egan, *The Hidden Lives of Homeless Children*, N.Y. TIMES MAG., March 24, 2002 at 32, 34-35 (between 900,000 and 1.3 million children in America are homeless for a time in a given year). The disparities between supply and demand for affordable housing have been exacerbated in recent decades. “In 1970 there were approximately 300,000 more of what are called extremely-low-income housing units in American than families who needed them; now there are 4.5 million more extremely-low-income families in need of housing than there are units in their range of affordability.” *Id.* at 37.

<sup>308</sup> UNICEF Innocenti Research Centre, *Innocenti Report Card No. 1, A League Table of Child Poverty in Rich Nations* 4 (June 2000) (relative poverty defined as children in households with income below 50% of national median).

<sup>309</sup> *Id.* at 18.

American system, the American Declaration<sup>310</sup> provides that everyone has the right to preservation of health through “sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.”<sup>311</sup> “Likewise every person has the right to an education that will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society.”<sup>312</sup> “Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and the home.”<sup>313</sup> Every person who works has the right to “such remuneration as will, in proportion with his capacity and skill, assure him a standard of living suitable for himself and his family.”<sup>314</sup> Working is the duty of every person “so far as his capacity and possibilities permit.”<sup>315</sup>

The American Declaration sets forth human rights protections binding on the United States. According to the Inter-American Court of Human Rights, the American Declaration is “a source of international obligations”<sup>316</sup> for members of the Organization of American States. “[T]he member states of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter.”<sup>317</sup> The Inter-American Commission on Human Rights agrees with this position.<sup>318</sup> Although the United States has contended that the American Declaration does not establish binding obligations,<sup>319</sup> the Inter-American Commission on Human Rights has applied the

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<sup>310</sup> *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX. O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965), reprinted in HENKIN ET AL., HUMAN RIGHTS: DOCUMENTARY SUPPLEMENT 367 (2001).

<sup>311</sup> *Id.* at 369 (art. XI).

<sup>312</sup> *Id.* (art. XII).

<sup>313</sup> *Id.* (art. XXIII).

<sup>314</sup> *Id.* at 370 (art. XIV).

<sup>315</sup> *Id.* (art. XXXVII).

<sup>316</sup> Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Inter-American Court of Human Rights, Advisory Opinion OC-10/89 of July 14, 1989, Inter-Am. Ct. H. R. (Ser. A) No. 10, at para. 45 (1989).

<sup>317</sup> *Id.* at para. 43.

<sup>318</sup> See Case 9647, Inter-Am. C.H.R. 147, 159 OEA/Ser. L/V/11.71, doc. 9 rev. 1 (1987) (Roach & Pinkerton).

<sup>319</sup> According to the United States, the American Declaration “is not a treaty and is not binding on the United States. The United States Government does not agree with the Commission’s holding in Case No. 2141 (United States) that the Declaration acquired binding force with the adoption of the revised OAS Char-

American Declaration regardless of United States protests.<sup>320</sup> As discussed above, the United States has failed to ensure that the working poor are able to attain a decent standard of living. Additionally, the public educational system frequently fails students by allowing them to graduate without the skills necessary for decent-paying jobs. Moreover, the United States has failed to commit adequate resources to social measures relating to food, clothing, housing and medical care, to the fullest extent of its resources.<sup>321</sup>

The European Social Charter,<sup>322</sup> though in no way binding on the United States, represents the most comprehensive regional document dealing with economic, social and cultural rights.<sup>323</sup> The United States should look to the specific steps proposed for undertaking obligations under the Charter as illustrations of commitments commensurate with its resources. States parties to the Charter agree on policy goals regarding attainment of rights and principles. These rights, enumerated in Part II of the Charter, include the following:

4. All workers have the right to a fair remuneration sufficient for a decent standard of living for themselves and their families.

\* \* \*

11. Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable.

\* \* \*

13. Anyone without adequate resources has the right to social and medical assistance.

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ter. . . . The Declaration was not drafted with the intent to create legal obligations. . . ." *Id.*

<sup>320</sup> See *id.* at 166. The Commission has held, however, that the American Convention cannot impose obligations on the United States since it has not ratified the Convention. *Id.*

<sup>321</sup> See, e.g., New York City Welfare Reform and Human Rights Documentation Project, *supra* note 291, at 50-51 (comparing 1999 budget for all food programs [2.1% of federal budget] to "corporate welfare" [10%] and the military [41%]).

<sup>322</sup> European Social Charter (Revised), Mar. 5, 1996 E.T.S. No. 163, reprinted in HENKIN ET AL., HUMAN RIGHTS: DOCUMENTARY SUPPLEMENT 481 (2001).

<sup>323</sup> The sweeping scope of governmental obligations is recognized in the undertakings provision, which provides that each party consider itself bound to a certain number of enumerated articles and paragraphs of provisions from Part II, where state obligations on various rights are laid out in detail. *Id.*



14. Everyone has the right to benefit from social welfare services.

\* \* \*

30. Everyone has the right to protection against poverty and social exclusion.

31. Everyone has the right to housing.<sup>324</sup>

To ensure effective exercise of the right to a fair remuneration, states undertake “to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living.”<sup>325</sup> Parties undertake “to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition. . . .”<sup>326</sup> With regard to the right to housing, the Charter provides:

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

1. to promote access to housing of an adequate standard;
2. to prevent and reduce homelessness with a view to its gradual elimination;
3. to make the price of housing accessible to those without adequate resources.<sup>327</sup>

While the United States does provide housing support for some, affordable housing remains out of reach for minimum wage workers, as discussed above. Clearly, the minimum wage is insufficient to address housing needs. The Charter shows that, contrary to the United States position, economic rights are not amorphous or indefinable. If the will exists, a government can establish standards for basic economic needs and design programs intended to meet them. That will is lacking in the United States, in part because such needs are not seen as rights. But as shown above, the Declaration of Independence establishes the right to pursue happiness, including

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<sup>324</sup> *Id.* at 482-83.

<sup>325</sup> *Id.* at 485 (art. 4).

<sup>326</sup> *Id.* at 489 (art. 13).

<sup>327</sup> *Id.* at 496 (art. 31).

the right to the basic essentials of life necessary to a meaningful pursuit of happiness.

#### V. CONCLUSION

While it is unlikely that the narrow judicial view of the Declaration of Independence and the rights encompassed under the pursuit of happiness will change, the meaning of the pursuit of happiness can be an effective rhetorical strategy to mobilize shame by showing that economic rights are as American as the stars and stripes or the Declaration of Independence. In the realm of international human rights, where rhetoric and political pressure are often more powerful than any enforcement mechanism, it is helpful to debunk the myth that economic rights are not human rights. Rather than being a communist, cold war-era notion, the idea of economic needs as rights is rooted in the Declaration of Independence. While it may be impossible to provide a precise definition of happiness, it is reasonable to conclude that its pursuit requires certain basic economic conditions. These economic conditions can be delineated, and indeed have been enumerated in documents such as the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.

In 1944, Roosevelt asked the Congress to implement his economic bill of rights, proclaiming, "it is definitely the responsibility of Congress so to do."<sup>328</sup> If the judiciary continues to shirk its responsibility to interpret the Constitution through the lens of the Declaration of Independence, Congress must fulfill the responsibility. The interpretation of pursuit of happiness put forth here restores to American democracy a concept lost in the years since the Declaration of Independence was drafted: basic economic rights are a necessary part of American democracy.

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<sup>328</sup> Franklin D. Roosevelt, Message to the Congress on the State of the Union (Jan. 11, 1944), available at <http://www.udhr.org/history/1-11-44.htm> (last visited Jan. 30, 2003).

