

Notre Dame Law School

## NDLScholarship

---

Natural Law Institute Proceedings

Law School Publications

---

1951

### Natural Law Institute Proceedings, 1950, Vol. 4

Edward F. Barrett

*University of Notre Dame College of Law*

John J. Cavanaugh C.S.C.

*University of Notre Dame*

George E. Sokolsky

Thomas J. Brogan

Joseph C. Hutcheson Jr.

*See next page for additional authors*

Follow this and additional works at: [https://scholarship.law.nd.edu/naturallaw\\_proceedings](https://scholarship.law.nd.edu/naturallaw_proceedings)



Part of the [Law Commons](#)

---

#### Recommended Citation

Barrett, Edward F.; Cavanaugh, John J. C.S.C.; Sokolsky, George E.; Brogan, Thomas J.; Hutcheson, Joseph C. Jr.; Morely, Felix; and Ford, John C. S.J., "Natural Law Institute Proceedings, 1950, Vol. 4" (1951). *Natural Law Institute Proceedings*. 4.

[https://scholarship.law.nd.edu/naturallaw\\_proceedings/4](https://scholarship.law.nd.edu/naturallaw_proceedings/4)

This Book is brought to you for free and open access by the Law School Publications at NDLScholarship. It has been accepted for inclusion in Natural Law Institute Proceedings by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

---

## Authors

Edward F. Barrett, John J. Cavanaugh C.S.C., George E. Sokolsky, Thomas J. Brogan, Joseph C. Hutcheson Jr., Felix Morely, and John C. Ford S.J.

**UNIVERSITY OF NOTRE DAME  
NATURAL LAW INSTITUTE  
PROCEEDINGS**

**VOLUME IV**

**Edited by**

**EDWARD F. BARRETT**

**Associate Professor of Law**

**With a Foreword by**

**REVEREND JOHN J. CAVANAUGH, C.S.C.**

**President of the University of Notre Dame**



**COLLEGE OF LAW  
UNIVERSITY OF NOTRE DAME**

*COLLEGE OF LAW*  
*UNIVERSITY OF NOTRE DAME*

**NATURAL LAW INSTITUTE PROCEEDINGS**  
**VOLUME IV**

Copyright, 1951, by  
College of Law, University of Notre Dame,  
Notre Dame, Indiana

**SPONSORS OF THE UNIVERSITY OF NOTRE DAME  
NATURAL LAW INSTITUTE CONVOCATIONS**

**1947**

**NOTRE DAME CLUB OF NEW YORK CITY**

**1948**

**MR. ALVIN A. GOULD, CINCINNATI, OHIO**

**1949**

**MR. ALVIN A. GOULD, CINCINNATI, OHIO**

**1950**

**MR. ALVIN A. GOULD, CINCINNATI, OHIO**



## FOREWORD

Courses in formal legal education were established at Notre Dame more than eighty years ago. Throughout the years, the University's College of Law has insisted that law cannot be divorced from morality. This principle of thought and teaching has enabled us to remain faithful to the Natural Law doctrine which was placed by the American Founding Fathers as the standard of all valid man-made law. Nevertheless, in most American law schools a purely pragmatic or materialistic philosophy of law has long displaced Natural Law jurisprudence and has exerted in our times a powerful influence upon the thinking of jurists, judges, and lawyers. In 1947, the College of Law organized the Natural Law Institute in order to extend the study of Natural Law beyond the limits of the classroom. We are convinced that an American law school today, aside from its responsibility in the training of future lawyers, has also a duty to the legal profession and the public at large. Through the Natural Law Institute, Notre Dame's College of Law is trying to assist in the restoration of the moral foundation upon which American law was originally built.

In four short years, the Institute has made gratifying progress in discharging its main function. It has won recognition as a focal point of Natural Law studies in the United States. Its annual convocations have been attended by legal scholars, judges, and lawyers from this country and abroad. The papers read at these convocations have been published each year by the University

## NATURAL LAW INSTITUTE PROCEEDINGS

Press. A special library of books on Natural Law, the generous gift of Mr. Alvin A. Gould, sponsor of the convocations since 1948, has been opened in the College of Law, and its valuable materials will serve the ends of productive scholarship in the study of Natural Law.

The present volume contains five papers read at the Institute's 1950 convocation. Taken as a whole, they demonstrate that the Natural Law is not a mystical abstraction, the exclusive province of the academic scholar unmindful of the day-to-day problems of the legal practitioner. Nor is the Natural Law the peculiar possession of the lawyer. Legal scholars, jurists, judges, and lawyers alone cannot rescue American law from the unfortunate routine of positivism and materialism. The layman, too, must be made aware of the implications of Natural Law doctrines and his voice must strengthen the demand that morality be given back to law. It is noteworthy, therefore, that two of the five papers included in this volume are the products of non-lawyers.

It should hardly be necessary to point out again that the idea of Natural Law is not uniquely Catholic, nor even Christian. Two of the participants in the 1950 convocation were Protestant in religious affiliation; two were Roman Catholics; one was a Jew. Yet their papers show a common agreement founded on reason that in Natural Law philosophy alone can we find a solid defense of the assertion that certain "fundamental" rights are inherent in man's nature and hence beyond destructive attack by hostile human authority.

We Americans are accustomed to speak with easy assurance about our precious "fundamental" rights. But to call a right fundamental is not to answer the question

## FOREWORD

*why* it is fundamental. And that is precisely the question which a troubled generation is asking urgently of those who make, interpret, and apply our laws. A justice of the United States Supreme Court has remarked that in interpreting our Bill of Rights today, the purely positive precedents set by the cases of other years are often found unreliable because of changing conditions. If that be so, then we are necessarily driven back to first principles. In the American Declaration of Independence, the first principles regarding human rights were enunciated in the light of the Natural Law philosophy. Before the State existed, God created man. Out of the relationship of creature and Creator arose certain rights. It is because of this relationship that our rights are "inalienable"; and being thus inalienable they are fundamental, as we say today. Such first principles of the origin of human rights ought to function as standards to evaluate those human laws which necessarily must be made to regulate the exercise of fundamental rights. The papers in the present volume, discussing such rights, exemplify the modern vitality of a return to the first principles of Natural Law.

The writer therefore feels warranted in repeating here what he wrote as a foreword to the first volume of the Natural Law Institute Proceedings four years ago:

The Natural Law is not an ideal, it is a reality. It is not a product of men's minds; it is a product of God's will. It is as real and as binding as the statutes in the U. S. Code. It is not a mere ideal toward which all statutes and court decisions and systems of law should tend. The actuality is that

NATURAL LAW INSTITUTE PROCEEDINGS

any statute or court decision or system of law which does not conform to natural law simply has no valid binding force; it is inherently vitiated. It lacks an element required for essential validity.

REVEREND JOHN J. CAVANAUGH, C.S.C.

*President of the University  
of Notre Dame*

## C O N T E N T S

### *Foreword*

	PAGE
Reverend John J. Cavanaugh, c.s.c. <i>Editor's Introduction</i> .....	1
<i>The Source of Human Rights</i> George E. Sokolsky .....	7
<i>The Natural Law and the Right to Liberty</i> Hon. Thomas J. Brogan .....	24
<i>The Natural Law and the Right to Property</i> Hon. Joseph C. Hutcheson, Jr. ....	45
<i>The Natural Law and the Right to Self-Expression</i> Felix Morley .....	77
<i>The Natural Law and the Right to Pursue Happiness</i> Reverend John C. Ford, S.J. ....	103



## INTRODUCTION

The Natural Law is as old as Man himself. Ages ago Chinese thinkers and Hebrew prophets, Greek philosophers and Roman jurists caught the vision of a Supreme Law transcending and therefore necessarily informing the laws men make for men. From that Law resulted certain basic human rights. These rights the State was morally competent to implement and protect but not to impair or destroy. Nor could the State's commands be the sole criteria of right and wrong, for, independent of the State there existed an objective standard, rationally ascertainable, by which the final value of all human laws can and must be tested.

What thus was seen so long ago "as in a glass darkly," Christianity brought into clearer focus, for Jesus Christ came indeed "not to destroy but to fulfill." In the beginning God created all things. As a Supremely Intelligent Creator, He acted in accordance with a Divine Plan. Christian philosophers termed that Plan—the Eternal Law. Man, endowed by his Creator with an intellect, free will and an immortal soul, can discover through his own reason, unaided by direct Divine Revelation, the primary dictates of the Eternal Law. These dictates and what may be rationally inferred from them constitute the Natural Law. Human or Positive Law then performs its proper function when it conforms to Natural Law, expressing it and supplementing it. Man, moreover, since he is the creature of God, owes certain

primary duties to his Creator. The rights correlative to the full discharge of these duties are truly "unalienable." Man himself cannot voluntarily surrender them. No human power can take them from him.

The world's history and literature for twenty-five hundred years demonstrate the universality and vitality of the appeal to Natural Law. Sophocles' *Antigone* invoked the Natural Law as did England's martyred Chancellor-Saint, Thomas More, twenty centuries later, when each stood condemned by man-made statute. In the seventeenth century English Protestant lawyers bred in the same common law tradition as More, made the Natural Law the basis of their restatement of English Constitutionalism. In the same century the Dutch Protestant, Grotius, erected the superstructure of modern International Law on the Natural Law foundations already solidly laid by the Spanish Catholic scholars — Vitoria, the Dominican, and Suarez, the Jesuit.

In the United States the Natural Law became part of the authentic fabric of American Constitutionalism when Thomas Jefferson wove Natural Law principles into the American Declaration of Independence. Succeeding generations of American law students began their studies with the Natural Law until it was driven from the curricula of most American law schools by Pragmatism, Materialism and Secularism. Jurisprudence was then confined to the study of the history of man-made laws alone or to the analysis of their purely positive content. Such a Jurisprudence had logically no reply when in our time the Totalitarian States assaulted the basic dignity of the human personality. *Their* Jurisprudence too, was a Pragmatic Jurisprudence divorced

from Natural Law. At Nuremberg, Man, appalled at the brutal conclusions to which amoral Jurisprudence had led, demanded that Law be restored to its moral foundations. How else could the indictment of the vanquished enemy be consistently maintained?

Today Man again faces the threat of the Omnipotent and Omnipotent State in which human rights and duties have no higher source than the State's own positive *fiat* and hence must give way if they block the paths the State wills to follow. To meet the ominous challenge of this "Absolute" of the State, Man today has desperate need of an "Absolute" of his own. Can that need be met by the reinvigoration of the Natural Law doctrine in which the thinkers of the ages found an "Absolute" for Man arising out of his essential nature as the child of God and destined for an End beyond the State?

To this question the Natural Law Institute of the College of Law of the University of Notre Dame has been humbly dedicated. What the College of Law itself has been doing for decades in its regular courses the Institute seeks to do on a wider scale — to investigate the historical development of Natural Law doctrines, to study their true relation to Positive Law, to restate them in the light of current problems and thus to assist in the restoration of Natural Law to the position of eminence once universally accorded it by American statesmen, jurists and lawyers.

The 1947 sessions of the Institute were devoted to an exposition of the broad philosophical implications of Natural Law doctrines. In 1948 the theme was their historical development through the ages. In 1949 four

distinguished scholars discussed the relations between Natural Law and Common Law, Constitutional Law, Canon Law and International Law.

The papers read at the 1950 Convocation of the Institute and reprinted in this volume were concerned with certain "rights" which we Americans call "fundamental,"—the right to liberty, the right to property, the right to freedom of expression and the right to pursue happiness. Does the Natural Law as the source of human rights offer a true and solid explanation of what men really mean when they call such rights "fundamental"? This was the central theme of the 1950 sessions.

The Editor of the Proceedings wishes to express deep appreciation to the Reverend John J. Cavanaugh, c.s.c., President of the University of Notre Dame, to Clarence E. Manion, Dean of the College of Law, to Mr. Alvin A. Gould, sponsor of the 1950 Convocation, to Mr. Robert J. Boyd, Student Chairman, to the faculty and students of the College of Law and to all who assisted in so many ways to make the Convocation a success.

EDWARD F. BARRETT,  
*Associate Professor of Law,*  
*University of Notre Dame,*  
*Editor.*

## THE SOURCE OF HUMAN RIGHTS

*George E. Sokolsky*

(Columnist, author, lecturer; LL.D., University of Notre Dame, 1946; Editor, Russian Daily News, Petrograd, 1917; Assistant Editor, North China Star, Tientsin, China, 1918; Editor, Far Eastern Review, 1927-1930; Author of *Outlines of Universal History*; *Tinder Box of Asia*; *Labor's Fight for Power*; *We Jews*; *The American Way of Life*. Contributor to New York Herald-Tribune, 1935-40; columnist, New York Sun and other newspapers since 1940).



## THE SOURCE OF HUMAN RIGHTS

**W**HEN Dean Manion proposed that I should be present today to discuss so broad a topic as has been assigned to me, "The Source of Human Rights," my secretary, who joins my wife in impeding my peregrinations in space and thought, asked:

"What will you do among all those philosophers and theologians?"

In effect, she posed the problem of my butting into your business which is to discover the truth.

But are human rights not also my business? Are they not everyone's business? Each day, my little missive of 700 words or thereabout goes to some 20,000,000 readers, who are at liberty to look at it, to reject it, or even to read it. The responsibility inherent in the task of speaking to so many is surely to try to discover what the truth may be and even what the source of the truth may be.

There are, of course, those who always know precisely what the truth is and forecast it as though they were prophets. Not being Israelites, the gift of prophecy is not in them and only too often they substitute bias, prejudice and even bigotry for truth. Not being restrained by the wisdom of the ages, which always counsels caution, they rush speedily in all directions until they meet themselves moving from left to right.

Our task today is to commune with each other in the hope that out of our labors may come some insight into

the meaning of that divine intelligence which must guide us or we are lost. Perhaps we shall only see the light through a keyhole; perhaps the door will be opened full and wide to us. Whichever it may be, let us approach our problem in the spirit of search and in due humility. For we cannot be sure that we know the path, although we are certain of the goal we seek.

I am not of your communion and therefore I must approach our problem from my own position. It is a glorious day in our land when a Roman Catholic university invites me, a Jew, to speak to you on a subject so dear and close to your hearts and minds. It is symbolic of our country that in these days when intellectual and spiritual darkness fills so much of the earth — and makes it a void — children of God of differing faiths gather under this roof to investigate His revealed words and to seek a common conclusion as to His immediate guidance for our nation and our times.

Recognizing fully my unfitness and lack of preparation for such a task, I nevertheless accepted the invitation, not as a scholar but as a journalist; not as a man of letters but as a reporter; not as a Christian but as a Jew.

## I

The problem posed before us is obviously the meaning of the first two paragraphs of the Declaration of Independence, of July 4, 1776, which announced the creation of a new nation upon our soil. These paragraphs, as you well know, read:

“When in the course of human events, it becomes necessary for one people to dissolve the political bands

which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

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

We speak in the inspiration of those words, and if we apply them to these days, we never depart from the original concept of our nation.

## II

Others will speak on life, liberty and happiness. My task is to deal with "the laws of nature and of nature's God."

It must seem curious that the revolutionists of 1776 wrote such a declaration at all. Why did they go to all the trouble of basing their claims for independence upon a philosophy of life? Why did they not shriek:

"Down with the king!"

"Hang King George III!"

"No taxation without representation."

"Murder the tax collectors!"

"All power to the workers and peasants!"

"Kill the priests!"

Similar slogans have been the battle cries of revolutions from Spartacus to Lenin. The masses have been aroused by politicians to change rulers, or to substitute

one class for another, or to redistribute wealth or to divide property, in times of revolution. How different, for instance, was this American revolution from the French revolution, or from the 1848 revolutions in Europe, or from the Russian or Chinese or Turkish revolutions in our century!

Compare, for instance, these two paragraphs from the Declaration of Independence with the Communist Manifesto of Marx and Engels in 1848, where it is said:

"The history of all hitherto existing society is the history of class struggles.

"Freeman and slave, patrician and plebeian, lord and serf, guild-master and journeyman, in a word, oppressor and oppressed, stood in constant opposition to one another, carried on an uninterrupted, now hidden, now open fight, a fight that each time ended, either in a revolutionary reconstitution of society at large, or in the common ruin of the contending classes."

Or consider these paragraphs in the Manifesto:

". . . Let the ruling classes tremble at a Communist revolution. The proletarians have nothing to lose but their chains. They have a world to win.

"Working men of all countries, unite!"

First, then, we need to grasp and understand the philosophic calm of our historical ancestors, who could, when men were already dying for a cause, sit down to write a document which did not exhort to violence but rather to an appraisal of man's place in the cosmos, to an understanding of his relationship to nature's law and nature's God. It is impossible, in view of what they wrote and what they placed first and uppermost in their statement, to doubt that theirs was a world of

noble ideas — they fought for what in these days of rather twisted language, we call an ideology. They related themselves to natural law — to the law of God, revealed to all mankind, to all who would listen to the word and who would be guided by it.

This we cannot doubt or deny, for it is there for all to see in the first fifty words of the Declaration of Independence. We need not quarrel over whether Jefferson and Franklin were Deists and not Christians; these words relate them to the vast body of human beings, no matter how divergent their paths seem to be, who walk in the same direction toward the same goal. Perhaps Alexander Hamilton best expressed the thought of all when he wrote:

“The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written as with a sunbeam, in the whole volume of human nature, by the hand of divinity itself and can never be erased or obscured by mortal power.”

Or, when arguing for a political conclusion, Hamilton wrote:

“ . . . Of this nature are the maxims in geometry, that ‘The whole is greater than its part; two things equal to the same are equal to one another; two straight lines cannot enclose a space; and all right angles are equal to each other.’ Of the same nature are these other maxims in ethics and politics, that there cannot be an effect without a cause; that the means ought to be proportioned to the end; that every power ought to be commensurate with its object; that there ought to be no limitation of a power destined to effect a purpose which is itself incapable of limitation. And there are

other truths in the two latter sciences which, if they cannot pretend to rank in the class of axioms, are yet such direct inferences from them, and so obvious in themselves, and so agreeable to the natural and unsophisticated dictates of common-sense, that they challenge the assent of a sound and unbiased mind, with a degree of force and conviction almost equally irresistible."

Then he said:

" . . . The infinite divisibility of matter, or, in other words, the infinite divisibility of a finite thing, extending even to the minutest atom, is a point agreed among geometricians, though not less incomprehensible to common-sense than any of those mysteries in religion, against which the batteries of infidelity have been so industriously leveled."

It could not have been thought otherwise in the American colonies, for those who came to them from Europe, foreswore material comfort to associate themselves with a life devoted to God, as they, in their day, understood such a life. Although in 1776, they had been on this continent more than a century and a half, they had not yet been conquered by the world of things, nor had their spirit been subdued by comforts and securities. They still sought God's guidance and resting their political case, not upon the laws of parliament or the laws of nations, but upon the laws of God, they were able to think in terms of the value of human life, the essence of human liberty which is free will, the power to choose between good and evil, and happiness which is only attainable in the pursuit of the good and orderly life.

## III

We, in our day, are purse-proud in our vast discoveries. We know so much. We know that the greatest physical power is lodged in the small, unseeable atom. We know how to explode what we cannot see, hear or feel. We can measure and weigh these imperceptible objects and we can contain them, convey them and use them. We have discovered how to transmute that which has one form and character into something altogether different. We do not quite understand what we are doing, but we do them and the results are as anticipated in the calculations. It is a notable achievement and you here at Notre Dame have contributed your share to the attainment of unbelievable goals—much of it, of course, on faith, in which realm the scientist is not very remote from the theologian.

But what does all this tell us about living? We have discovered how things live through the natural sciences, but we have not found the good life by that process. In fact, during this century when science has moved so rapidly that from Darwin to Einstein, more progress has been made than during the remaining seven or eight thousand years of written history, we have not even budged in the extremely important fields of morals and ethics.

Matthew Arnold caught the error of a science without moral direction when he said:

" . . . Culture is then properly described not as having its origin in curiosity, but as having its origin in the love of perfection; it is a study of perfection. It moves by the force, not merely or primarily of the scientific

passion for pure knowledge, but also of the moral and social passion for doing good. As, in the first view of it, we took for its worthy motto Montesquieu's words: 'To render an intelligent being yet more intelligent!' so, in the second view of it, there is no better motto which it can have than these words of Bishop Wilson: 'To make reason and the will of God prevail!'

From Darwin to Einstein, we have gathered together billions of facts; yet the relations of man to man, of son to father, of brother to brother, of neighbor to neighbor, of citizen to state, of nation to nation, still stand upon the great thought and revelation of such minds as Hammurabi, Moses, Jesus, Plato, Aristotle, Confucius, Gotama, Maimonides, Thomas Aquinas.

How does it happen that little Palestine and Syria and Greece understood so much and we so little? Is it possible or believable that in the realm of human relations all that needs to be known has forever been known?

That is, indeed, a curious question. Yet, this also is curious: That when we move away, in any civilization, from certain basic precepts of living, long ago enunciated, that civilization withers on the vine, and often dies. Why is it that nearly all peoples, of whatever state of development, even savages, approach one aphorism in much the same language? The question is, what is the fundamental relationship of man to man? And no matter how that is pondered, the answer comes out the same. Let me give you a few examples:

" . . . In the Indian Mahabharata . . . , it is said: —'Let no man do to another that which would be repugnant to himself; this is the sum of righteousness; the

rest is according to inclination. In refusing, in bestowing, in regard to pleasure and to pain, to what is agreeable, a man obtains the proper rule by regarding the case as like his own.'

"Similar words are ascribed to Confucius. When Tsze-Kung asked if there is any one word which may serve as a rule of practice for all one's life, the master answered, 'Is not reciprocity such a word? What you do not want done to yourself, do not do to others.' And in another utterance Confucius showed that the rule had for him not only a negative, but a positive form. He said that, in the way of the superior man, there are four things to none of which he himself had as yet attained; to serve his father as he would require his son to serve him, to serve his prince as he would require his minister to serve him, to serve his elder brother as he would require his younger brother to serve him, and to set the example in behaving to a friend as he would require the friend to behave to him.'"

". . . Love of man was considered by Hillel as the kernel of the entire Jewish teaching. When a heathen who wished to become a Jew asked him for a summary of the Jewish religion in the most concise terms, Hillel said: 'What is hateful to thee, do not unto thy fellow man: This is the whole law; the rest is mere commentary . . .'"

And all this culminates perhaps in these three statements of the case, in a crescendo of simplicity and affirmation:

"Jesus said . . . Thou shalt love the Lord Thy God with all thy heart, and with all thy soul, and with all thy mind.

"This is the first and great commandment.

"And the second is like unto it, Thou shalt love thy neighbour as thyself.

"On these two commandments hang all the law and the prophets."

This we call the Golden Rule.

It is universal, unchangeable, eternal. It is reasonable and full of logic. From it there can be no plausible deviation. It is complete.

But its universality is what is so amazing. We speak of races as savage, wild, uneducated, uncivilized. Yet, they discovered this rule of life, even as they discovered mother-love and the stars and the periodicity of life. As man began to think and believe, this rule of life came to him and with it, gradually, other rules which were finally incorporated in what my ancestors called the Ten Commandments. This is the essence of revealed truth.

#### IV

Millions of laws have been written by rulers and legislators based upon the Ten Commandments; and then they had to write millions of other laws providing penalties for their infraction. Somehow the spirit of man is never bound by the laws that man makes, the imagination always playing upon the prospects, and even joys, of evasion. It is like the income tax which everyone calculates from the premise of deductions which often are euphemisms for evasions or avoidances.

Capital punishment is still imposed for murder as it used to be for theft, but men murder and steal without fear of punishments, trusting that their own ingenuity

or their lawyer's wiles will save them. Adultery has ceased to be a crime; it has rather become a source of great pride, particularly when noted and amply advertised by some of my colleagues. As for bearing false witness, it happens in the best of places and has even become the most used weapon of statecraft.

Your bishops recently said:

"In recent decades, striking advances have been made in meeting the child's physical, emotional and social needs; but his moral and religious needs have not been met with the same solicitude and understanding. As a result, many of our children today betray confusion and insecurity because these un-met needs are fundamental to the harmonious development of their whole nature."

But why limit this judgment to the child, for is he not father of the man? The child, who factually provides the generations that must succeed us upon this soil, has suddenly become a national problem. We emphasize juvenile delinquents, but how many mothers have wept bitter tears over their daughters in our colleges who have taken Kinsey's book as their bible and how many fathers have wondered at the products of an amoral education which brings forth their sons as grown men but not as gentlemen in the sense that they know right from wrong absolutely?

And so we come to the crux of this problem which is that the family system, the hard core of the American civilization, as it has been of every great civilization, has collapsed. Too many divorces, too many broken homes, too much comparative morality, too great uncertainty — these have so confused both parents and children that they are at a loss to understand the proprieties of

human relations. They literally know not what they do.

This uncertainty in the husband-wife and the parent-child relationship appears in almost all phases of our social lives. We literally do not know what we are doing. We act without direction. We move without guidance. We possess the charts, but we either read them as though they were of strange and even dead languages or we preserve them as curiosities. We do not live by them.

Even many who assume that they are devoted to the laws of life only too often separate thought from action; that is, they do not apply what they believe to be true to their private and public lives. It is possible, not only possible but almost usual, to encounter a devout politician who has perhaps studied philosophy at a Catholic university, yet who does what other politicians do who are neither devout nor knowledgeable.

With such, devotion has become routine; prayer mere ritual: education a duty performed. They have not learned to apply the laws of life to life itself. They engage in corruption; they practise fraud and deceit; they abandon truth because they are able to separate what they call the practical from the impractical, which is as much an error of commission as it is of terminology.

For what can be more practical in every day application than the guidance of God, as expressed in Natural Law, the abandonment of which produces chaos and confusion. A politician may find some personal advantage in the deception of the electorate, but the truth will out. The author of confusion is soon enough identified. If alive, he is defeated by his deceptions; if

dead, he becomes an object of historic vilification. The Korean war is a proof of that axiom.

## V

For truth is eternal and unchangeable and is applicable to all times, places and circumstances. Truth is the law of nature and of nature's God and is immutable and everlasting.

Is this too broad an assertion?

Let us think in terms of historic transactions, made by practical men to achieve some immediate purpose, but based upon deceit not only of those who were parties to the transactions but of the peoples they represented.

Munich, Teheran, Yalta, Potsdam — these are but a few of the conferences which since 1938 have brought upon mankind war and tyranny and death. We are today reaping the thorns and thistles sown at these meetings from which the law of God was always absent. Who can say that what was done at Teheran in November 1943 can be justified by the blood and death of December 1950? Who can say that the rape of Poland and the abandonment of China — both denials of the sworn word — will pass into history as forgotten sins?

Yet, those practical men did not fear the consequences of their own positiveness. They risked greatly because they risked nothing that was important to them — namely the truth. And to the world, their retreat from principle has brought nothing but tears and mourning throughout the world.

The test of their system came with the arrest of Archbishop Stepinac, not because he is a Roman cleric

nor even because he is a man of religion, of any religion. The test came because no government, no major nation protested the impropriety of his trial and imprisonment as a violation of truth. So practical had we all become that nothing really mattered except the avoidance of responsibility. So the betrayal of Poland, of China, of Czechoslovakia, of Hungary set the stage for the slaughter of our sons in Korea. Nations, like men, cannot betray the law of God, without suffering the consequences of their errors. For an historical error sets a course which only a moral response can alter.

## VI

And so I come to the end of this discourse, but I am still faced by the problem of bringing it together into a statement of the relationship of man to the law of life.

Were man inanimate, he could, like the mountain, suffer erosion. The mountain possesses no will. It cannot move to a climate where it can control wind and weather. Its status is determined by its environment.

Man is not only an animate creature, but he possesses personality and will and conscience. He is close to God, for he is a moral creature who can know right from wrong and can do what is right and wrong. Even more, he possesses that fierce check-valve, conscience, which fights him at every turn. He is capable of cleansing himself and of contrition. He can start anew and build anew. He possesses such qualities as hope, ambition, humility. He can cultivate the gentle nature of charity and compassion. He may be mean, petty, unfor-

giving, vindictive. He may grow into a glorious creature so capable of love that even his enemies are beloved, for is not God the father of the foe as of the friend?

Such a creature of mind and spirit requires guidance, lest his very qualities consume him. The brilliant may be evil. The competent may be thieves. The strong may be murderers. The genius may be an adulterer. Guidance alone can save man from the excesses of his own nature.

But what guidance? Whose guidance? Shall I listen to the creature who like myself is blindly seeking the answer and who experiments with this or that? Shall I say that out of laboratory or clinic will come my answer? Whom can I trust? Whose formula has been tested? Who can lead me forward to the good life? Whose wisdom can lead our beloved country back to its very sound foundations which so many have experimentally deserted?

And there is the answer in the Declaration of Independence: To nature's law and nature's God, to the Natural Law. Natural — because it is the rule of the cosmos, eternal and constant: Law — because it is the total history of man, the application of all human experience, everywhere and at all times. God's law — because it was revealed by Him to man as a guide to life, to all men on whatever level of development.

This is our chart. This is our guide. This is the beam upon which we can soar to safety, to a sure and happy landing.



# THE NATURAL LAW AND THE RIGHT TO LIBERTY

*Hon. Thomas J. Brogan*

(St. Francis Xavier College, A.B., 1909; Fordham University, LL.B., 1912; member of the bar of the State of New Jersey; Corporation Counsel, Jersey City, 1921-1932; Justice, Supreme Court of New Jersey, 1932-1933; Chief Justice of New Jersey, 1933.)

## THE NATURAL LAW AND THE RIGHT TO LIBERTY

THE subject assigned to me for discussion is one of first importance. It is said that Lord Acton spent almost all his adult life preparing for the great task of writing a thesis on Liberty; that he wrote much in preparing for the task, but died before realizing that ambition. I am happy to discuss the subject assigned me and it is not modesty on my part that prompts me to say that my indifferent scholarship will not permit me to speak as a philosopher. Happily, there are those on our program who properly and preeminently can lay claim to that distinction. It is my hope none the less that what I have to say will appeal to the average mind and will be considered sound and reasonable.

My thesis is "The Natural Law and the Right to Liberty." In discussing any subject, it is first necessary to define the terms. Law is an ordinance of reason given by him who has charge of the community and promulgated. Natural Law is also described by St. Thomas Aquinas as "the participation in the eternal law by rational creatures." The average man thinks of Natural Law as that law which is graven on the tablets of the heart. It is moral law, prescribed by our rational nature, independent of the Ten Commandments, independent of the pronouncements, dogmas or teachings of any particular church, and independent of any ruler or government, constitution or statute. It exists in our very nature, so that rationally we know

there is a right and a wrong; an objective good and evil; and that in the exercise of the mind perceiving good and evil, we are impelled to do good and avoid evil.

The Natural Law postulates the existence of a personal God, an *ens a se*, and that we are rational creatures created by God, in His own image and likeness, with free will and a yearning for happiness which we believe will only be satisfied by a return to God Who is infinitely perfect. That is the only rational meaning that can be given to the universe.

It follows then that we are the creatures of God. Every creature has an end, a purpose, and God guides all creatures to their appointed ends by their natures, their principles of operation. This definite plan is the eternal law. It is likewise so in the physical world, where we observe the sublime order of the universe — the succession of the seasons, the movement of the earth, the position of the sun, moon, stars and other planets.

No one denies that such physical natural laws govern the universe in its magnificently precise order. There is no unrestrained freedom. So compelling is the order in the universe through its physical laws that the mind of man, unaided, reverently realizes that there is a Guiding Hand, that there is a First Cause — God.

Man, too, in the plan of his Creator has his end and destiny which must be worked out by his reason and his will. His intellect and will apprehend the true and the good, and by his nature man seeks after what is good. Good is to be done, and the contrary or evil is to be avoided.

The materialists reject the idea of Natural Law as a

pious code of the Christian and other religions. History refutes this attitude. The ancients: Xenophon, Plato, Sophocles, Demosthenes, Cicero, recognized a standard of good and evil antecedent to positive law. In our own country when it emerged from a colonial state into an independent nation, the founding fathers, Washington, Jefferson, Madison, Hamilton, James Wilson, Otis, and the rest, grounded their political philosophy in the Natural Law.

Their primary principle of law and liberty begins with the reverent recognition of God as its source. The second paragraph of the Declaration of Independence is an unequivocal acknowledgment of Natural Law principles:

“We hold these truths to be self evident, that all men are created equal; they are endowed by their Creator 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 abolish it and to institute new government, laying its foundations on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness.”

This passage contains the substance of our philosophy of government. In it we are called the children of God, our Creator, who gave us those inalienable rights, among them liberty. It bespeaks our human dignity,

an endowment from our Creator, and it enshrines the whole idea of the freedom of man.

Those rights, while three-fold, are really in union, one with the others, to live and be free, to pursue and attain everlasting happiness.

Within the last few years, the indictments tried at Nuremberg were based on spiritual realities in law beyond any positive law then in existence. The first count of the indictment charged in effect a common plan or conspiracy for a period of years prior to May 8, 1945 and the commission of overt criminal acts against humanity, crimes against peace, carrying out of ruthless wars, deportation of men and women for slave labor, enslavement, inhuman acts, etc. The international agreements then in existence which denounced aggressive war, did no more than state an opinion about these evils. The point is that there was no definite law, i.e. positive statute, as we know it, which made these acts criminal, unless these acts violated the principles of Natural Law. The charge at the Nuremberg trials was really that the defendants violated human rights and the indictment and prosecution proceeded upon the theory that the things done were evil in themselves, and contrary to the laws of humanity and the conscience of mankind.

Those who deny the Natural Law usually proceed on the theory that morality and legality are the same. That which is legal is moral. This doctrine is open to grave objections. If morality and legality be one and the same, then that which is considered evil in itself, murder or any heinous crime, *could* be made lawful by statute. Murder does not cease to be murder just be-

cause it has the approval of a dictator or a totalitarian state. Reason revolts at the idea of murder being virtuous and approved, or love and respect for parents being evil and forbidden. If it be said that no such absurd laws will come into being — we may ask, why should they not, unless they are at variance with the universal conviction of mankind about right and wrong?

It is not my purpose to include in this paper proof of the Natural Law. That has been ably done in previous years. This is the fourth Meeting of the Natural Law Institute at Notre Dame and these conferences have resulted in a most remarkable revival of interest in the study and consideration of Natural Law and its implications in recent years. It has brought to your academic halls many outstanding scholars and legal philosophers. In this great movement Notre Dame has taken the lead. The work published in these proceedings was of the high calibre one has grown to expect of Notre Dame.

To continue with our thesis: Liberty, according to the scholastics, means the absence of internal necessity toward one course of action; that the power and exercise of choice is left to the free will to act in one way or to act in another, when all the elements for proper determination are present. This is human liberty. It does not and cannot mean absence of obligation to others. Right and obligation are obviously correlative. Natural Law imposes obligations that are moral, and civil authority by positive law imposes civil obligations. In both fields man is free physically to reject them. He may defy God, violate the moral law, just as he may disobey the laws and ordinances of the community and the State. Under an alleged liberty, men have recourse

to license, i.e., the absence of all restraint, which claims the right to do anything and everything one desires. This, of course, is not freedom but chaos or even slavery. Bossuet describes it thus "Where everybody does what he likes, nobody does what he likes; where there is no master, everybody is master; where everyone is master, then everyone is a slave."

The right of liberty is a natural right and it resides in the person, because he is a person. It is his self-determination with regard to fulfilling his natural final goal without interference. The purpose and end of man indispensably require that man be free and that freedom arises from his right to work out his destiny. That is the heart of the matter. His importance as a person is dominant. As a person he possesses intelligence and a free will to fulfill his destiny. These make up the spiritual side of his nature — his soul. It follows then that for the fulfillment of his destiny, man must be free and it is the duty of the State to secure and protect that freedom to enable the person to achieve his destiny. Liberty is not an end but a means to an end — a return to God. For man is not only mere flesh, blood and bone but spirit or soul, and the soul is immortal.

Any civilization worthy of the name rests in God, the immortal soul, liberty and conscience. The State is constructed to secure these natural rights, man's human liberty, freedom of religion, freedom of conscience, freedom from regulation except that imposed by the law of God or the law of the State grounded in the law of God.

Law, in the juridical sense, is a binding rule of conduct. The Natural Law binds in the moral sense. But

such submission to the Natural Law or higher law is enslavement according to the materialist, while its rejection is liberty. On the contrary it is manifest that out of the Natural Law man is conscious of his own right to liberty—to fulfill his end unhindered by society or the State. Further, if he has no such natural rights but only those prescribed by the State, then indeed is he slave to the State or the ruling majority.

Is there a conflict between law and freedom? Where does the Legislature derive its power to bind the members of the community? Liberty is positive in itself because man must be free to work out the ends of his existence and the right so to do must be his, anterior to the will of the State of any group or individual. Since he must respect the same right equally in others his right of liberty must not be abused or unrestrained.

What then is the relationship of the State to our right of liberty? We all believe, indeed we know, that man is a social and political animal. He is a person, an individual, but he is a social being as well. It is natural that we live in society, be it village, town or city. To place man in "a state of nature" as do Hobbes and Rousseau, in disregard of man's natural desire to live in civil society, is to close our eyes to reason, history and man's inclination. Man develops with his fellows in a civil society regulated by law for the common good. Man, always and everywhere, lives in a society. This is an imperative of his nature. It was necessarily so, beginning with the family. He is naturally fit for society through intelligence and speech and inclination—solitude is abhorrent to him. The State is a natural society. Law is necessary to an ordered society. The end of the

State is the common good of the people. The State arises from the act and the consent of the people. Someone must preside over this society, drawing its endeavors towards the common good and this authority, like society itself, has its source in nature and God is its author.

To state it another way: man, as such, singly has no right to make a regulation for another man, since both are equal. But man's nature impels him to live in society and as a social being to prevent as far as possible the conflict of wills among the members of society. To accomplish this, laws and government are required. Without law and government such society would be a mere aggregation of persons. The very living together in a community implies, presupposes regulations controlling the actions of the members of the community and this, of course, is Law and Government. It follows that man is not only a social being by nature but a political being as well. Civil Society is impossible without law and government. It follows that civil authority is natural to man. It is manifest that since God is the Creator and since man by his nature is social and political, then civil society and civil authority are natural institutions. The "form" of government requires the consent of the members of the community or state — as does the selection of those who shall administer its affairs and exercise the powers of government. The members of the community may change the form of government. But this must be done in a lawful manner. Man is not free to resort to anarchy, which means the destruction of society. For since man is by nature social, that which would destroy society is contrary to the

Natural Law, which ordains order and obedience to lawful civil authority.

The point we make is that civil authority derives from God; that in a legitimate civil society man has civil liberty which he enjoys as his very own by the exercise of human liberty; that man enters the social political order under the dictates of the Natural Law. It is not by a social contract as Rousseau would have it — which may or may not be entered into by man — or by conventional agreement to live in civil society by the device of having all individuals pool their rights by assigning or alienating them to the community that juridical society results. No one can in any lawful sense alienate all his rights, else he would no longer be answerable for his acts. Manifestly, it would not be possible for man to discharge his duties to God or his fellow man if his rights were turned over to civil society or the State. Civil society as such being natural to man, his formation of political society is lasting, not revocable at his whim. If it were otherwise, there would be no permanency or real stability to civil society. Since no man or group of men, without more, has control over another man as a matter of right — consequently the power of the State to govern the persons making up the community must come from the Creator, Himself. Otherwise, whence would come the power or punishment for violation of law? If the individual or the group, as such, does not have the right, how then can it be bestowed by them on what they call the State? For as we have seen, the State does not assemble a multitude of men in a given place and thenceforth rule over them. Rather is it “an organic and organizing

unity" of people who have the right to be heard on the duties imposed upon them by the political society which they by consent have constructed for the common good.

Regardless of the many reasons that man has for banding together in a community to live harmoniously under a ruling power, it had to be based on a consent to a lawful and social bond. If men were to have their liberty regulated or curtailed for the common welfare, it had to be for a moral reason — for the free acts of the individual are moral. It is only by consent of this kind that the power of sovereignty juridically arises.

From the early days of our republic this concept of the State was clearly recognized. Justice Wilson in *Chisholm v. Georgia*, expressed it thus:

"By a state I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an artificial person. It has its affairs and its interests: It has its rules: It has its rights: And it has its obligations. It may acquire property distinct from that of its members: It may be bound by contracts; and for damages arising from the breach of those contracts. In all our contemplations, however, concerning this feigned and artificial person, we should never forget, that, in truth and nature, those who think and speak, and act, are *men*."

Man cannot develop, as he is impelled to do, in family life, as such. He realizes that in civil society his desire for the opportunity of development economically and socially, with safety for his family and himself can

be satisfied and that in society, he has obligations as well as rights and these arise out of the civic bond. Thus by consent men are bound together in a social union which we call the State. Thus bound there is conceded to that legal entity or juridical person all the power necessary to accomplish the common welfare. That which had been a multitude of people has become a juridical body with jurisdiction to arrange a form of government which when accomplished is juridically the state, and the people select the governing body with power to administer the affairs of the community for the common good. In our student days, it was summed up as follows:

“Civil society is necessary to human nature; civil power is necessary to civil society; civil power is nothing without civil obedience; civil obedience is necessary to human nature; God commands whatever is necessary to human nature; God commands obedience to civil power; God commissions the civil power to rule.”<sup>1</sup>

Hence it follows that all public powers and authority must proceed from God.

The enumeration in the Declaration of our rights to life, liberty and happiness; that we are endowed by our Creator with these rights, and that they are inalienable, is a reiteration of a philosophy based on the Natural Law which gave impetus to Western civilization.

At the dawn of the Christian era we have a graphic and appalling illustration of the conflict between the totalitarian state and the individual who asserted his

---

<sup>1</sup> Joseph Rickaby, S.J., *Moral Philosophy*, page 318.

right of freedom. In the first three centuries historians tell us that more than eleven million people were put to death for refusing to forswear Christianity and worship the gods as prescribed by the emperors of Rome. They were put to death in truly barbaric fashion because they asserted their right to worship God according to the dictates of their own conscience.

In the passing centuries resistance on the principle that all men are created in the image of their Maker advanced the idea of democracy and as Western civilization developed, the dignity and freedom of the human person was emphasized more and more in civil government; that by his very nature, man had the right to be respected; that as a child of God, he has the right to accomplish and fulfill his destiny and therefore he must have all those things which are necessary to its fulfillment. They must be his by his very nature.

It follows that the State must recognize this right to freedom in the person and protect it and insure it to him and this by the nature of the person which is God-given. This is the highest duty and function of the State, to safeguard and forever defend the person's natural right to liberty.

The world is sick today, almost unto death, and for the reason that during the Nineteenth Century and earlier in many places the liberty of man has been whittled away and the dignity and inviolability of the person have been outraged. This is a result of pragmatic, materialistic, atheistic philosophy that started in Central Europe and spread to the East. Totalitarianism is its legitimate offspring. Do not believe that totalitarianism is a regime — it is a doctrine, a false philosophy, a dia-

bolical religion. The world has taken to itself the things that are God's and in many places has deprived man of liberty. Rulers have made the world the "city of man" and rejected the "City of God." This is secular religion, a worship of the State by communism, fascism and nazism, in turn. They are all secular in essence. They all rest on the supremacy of the State and a rejection of the inviolability and freedom of the person. As we have seen, man was not made for the State. The dictators have made this world their kingdom; the dignity, right and freedom of man are liquidated; he has neither soul nor mind; no freedom, because his behaviour is deterministic; and of course, no God. This philosophy enshrines these ideas. The doctrine is terroristic and despotic, without morality or justice; destructive of all ideas of dignity and freedom and the inviolability of human personality; blasphemous and atheistic; the despair of that civilization which came to us from Athens, Rome and Jerusalem — which, today, is face to face with an appalling crisis.

We, in America, are part of that European or Western civilization and we are not immune as we know too well from the disease that is eating into the vitals of nations in Europe and in the Far East. The basis of our democracy is the dignity of the person and his inalienable right to liberty. Our government was established for the express purpose of protecting these rights, and our Constitution and Bill of Rights give eloquent demonstration of that fact. In a word, the Declaration of the Founding Fathers and our Constitution and Bill of Rights established a jurisprudence in this Country based on Natural Law.

The Magna Charta wrested from King John in England early in the Thirteenth Century, was hailed as a great bill of rights. Yet it *bestowed* nothing on the English people — it merely *recognized* their rights, chiefly the freedom of the free men. And yet as late as the Seventeenth Century, men were executed in England for challenging the “divine right of kings.”

The very purpose of democracy is the protection of the personal liberty of the citizen and this is its chief merit and it will hold its life only so long as the people believe in the moral point of view, for the doctrine of human liberty is a moral doctrine, a natural law doctrine, and freedom begins and ends with God, Himself.

Today, in our own country, many reject the philosophy of the Founding Fathers that liberty inheres in man by his very nature. With them a contrary philosophy prevails; that law and morals are and should be entirely separated. This view is supported by certain professors in our law schools and by some judges in our courts. They adopt and defend the doctrine of expediency, which is the pragmatist view; or that of the so-called realist, based on the theory of force or domination as the basis for law. With this premise it follows that rights and duties are a matter of prescription at the hands of the State and accepted because of fear or a threat of force; that government may control the lives of its citizens from the cradle to the grave, and if need be, “prevent the continuance of the unfit,” as a very eminent jurist once put it.<sup>2</sup> Nazi-Germany adopted that view and millions of innocent persons, a minority group of men, women and

---

<sup>2</sup> Shriver, *Holmes Book Notices*, uncollected letters and papers (1938) 181.

children were murdered because they were not useful to the State — to the complete horror of mankind. Euthanasia — a nice term to describe cold-blooded murder — is advocated in many quarters by persons whom we have no reason to believe are other than sincere, and defendants have been put on their trial, not so long ago, for practicing it. Not since the earliest centuries as we now reckon time has the world been more callous of the rights of fellow human beings, more cruel in its treatment of weaker nations and minority groups than it has been in this Twentieth Century.

Thus in modern legal thought, there are two schools, diametrically opposite one to the other. One recognizes moral or Natural Law as the basis of our jurisprudence. The other has complete contempt for the moral or Natural Law concept. It is in complete accord with the materialistic and pragmatic view, that there is no such thing as objective right or wrong; that there is no moral "ought" in law, only physical force; that man has no inalienable right, only the right given him by the State or dominant group. Of course, it takes little reflection to perceive that there is no such thing as a "right" if it is bestowed by the State. If it is "given," it may be taken away. A "right" natural to man, such as liberty, is our very own, God-given, which we may assert and defend against anyone, even the government itself. The bill of rights in our Constitution does not *grant* these rights, but recognizes them as ours, protects them and enjoins the lawmaking power from infringing or violating them.

More than ever today the present problem is the choice between these two philosophies. I reduce them to two in the conviction that while the Natural Law doctrine is

based in the spiritual and the moral; the other school whether it be of the Realist, the Sociological or Positivist order is fundamentally materialistic. Under the former, man is free, *de jure*; under the latter, he is not *de jure* free and independent but subject to become the prey of force.

Among the disciples of the non-natural law group are those who are denominated "Liberalists." The average citizen I believe envisions a "liberal" as a generous, big-hearted person — be he judge or philosopher or both — who bends backward to give his fellow man the benefit of every possible doubt. But this is not its significance in a political or philosophical sense. Time was, centuries ago, when "Liberalism" had a meaning from which present day liberals have departed. "Liberalism" in the early days was a tradition which characterized early Western culture. The effort of liberalism then was freedom of man and the inviolability of his personality. That was the root of the matter and it was profoundly moral. The Founding Fathers were true liberals. But the liberalism of the Nineteenth Century may be delineated as the late Thomas F. Woodlock characterized it, as "liberalism that had lost its soul." It degenerated into a humanitarianism unrestrained by anything, and it was a failure.

It stressed the doctrine of progress and human perfectibility but in an earthly and material way. Its only objective truth was the truth of positive science. In a humanitarian way it stressed love of neighbor but not love of God. It was concerned about the temporal welfare of men — nothing more. The rights of man were emphasized, not to raise up the under-privileged, but to brush aside the regulations of the State and the moral

principles of the Natural Law. If the truth of positive science was the basis for its thinking, it is clear that man cannot fulfill his destiny with any aid from science; for science tells nothing about the nature of things that most concern us.

Walter Lippmann, in his essay "The Good Society" (October, 1937) characterized it as the degradation of man. He describes the liberalists as iconoclasts who "were too smart to be wise, too rational to be reasonable, too much enchanted with an immature science to hold fast to tested truths. \* \* \* So, in the high realism of intelligence there prevailed a radical disrespect for men and the human ideals of justice, liberty, equality and fraternity were relegated to the limbo of old superstitions along with God, the soul and the moral law. \* \* \* In the fury to explain men rationally, there was explained away their essence, which is their manhood."

Much mischief has resulted from the doctrine of Liberalism from which there is no escape, except by return to God and the moral law and the realization that man is created in the image of God, and that image is in his soul.

The great tragedy of this Twentieth Century arises from a pragmatic philosophy which is wholly at war with Natural Law principles. Miss Barbara Ward calls this sharply to our attention in her book, "Faith for Freedom"<sup>3</sup> pointing out that we of the democratic West in our constant struggle for wealth and power, with scant or no regard for human rights, the inalienable essence, and the well-being of our neighbor, may well have engulfed ourselves. That materialism has crept in and

---

<sup>3</sup> *Atlantic Monthly*, December, 1950.

holds forth in our democratic form of government is undeniable. That concept, however alien it intrinsically is to our democratic form, can flourish within its framework. Our democracy based as it is on Natural Law principles was not intended as a form of government only, but a way of life, idealistic and in harmony with our nature. This idea is admirably expressed by the late Thomas F. Woodlock in his essay on "Democracy":

"Democracy, as a 'way of life' for human society, by its nature is best conducive to the preservation of men's personal liberty and is therefore the most desirable form of government. For its success, however, it demands a high state of civic morality in the people, who must be educated to a relatively high standard of intelligence and, above all, mutual tolerance. In the absence of either it is almost certain to degenerate, and in that process liberty tends to disappear. Forms alone are not sufficient for its preservation; they must be animated by a deep popular faith in principles of liberty itself. These principles, arising as they do from the fact of man's personality, are ultimately religious, for man's personality necessarily implies God, the soul and the moral law."<sup>4</sup>

That such was the philosophy of the Founding Fathers enshrining as it did the liberty of man is indisputably clear from the words of the Farewell Address of our First President:

"This government, the offspring of your own choice, uninfluenced and unawed, adopted upon full inves-

---

<sup>4</sup> Thomas F. Woodlock, *Democracy: Definition and Debate*.

tigation and mature deliberation, completely free in its principles, in the distribution of its powers, united security with energy, and containing within itself a provision for its own amendment, has a just claim to your confidence and support. Respect for its authority, compliance with its laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of true liberty. The basis of our political system is the right of the people to make and to alter their constitution of government. But the Constitution which at any time exists, 'till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all. The very idea of the power and right of the people to establish government, presupposes the duty of every individual to obey the established government." <sup>5</sup>

If we are at the crossroads and must choose between the philosophy of materialism and Natural Law — the choice lies between the materialistic and the spiritual conception of life. If matter is all, then man is the helpless slave of the State or the dominant forces. If the basis of liberty arises from the Natural Law, then God is the Creator of man and the universe, and man has as his very own a human dignity and inviolability which postulate human freedom. This conception compels acceptance on its own intrinsic merits. Liberty demands and requires the Natural Law. Without it, freedom, peace, order and happiness are impossible.

---

<sup>5</sup> Washington's Farewell Address.

## THE NATURAL LAW AND THE RIGHT TO PROPERTY

*Hon. Joseph C. Hutcheson, Jr.*

(LL.B., University of Texas, 1900; Mayor of Houston, Texas, 1917-18; United States District Judge, Southern Dist., Texas, 1918-1930; Judge, United States Court of Appeals for the Fifth Circuit, 1931-1948; Chief Judge since 1948. Member, Council, American Law Institute; Member, American Bar Association, Order of the Coif, Author of *Law as Liberator*, *The Judgment Intuitive*.)



## THE NATURAL LAW AND THE RIGHT TO PROPERTY

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

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

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

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

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

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

Second, I shall be satisfied with these admissions: that

---

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

it is a very important natural right; that the founding fathers and those who came after them profoundly believed that its recognition and just preservation were prime essentials to the pursuit of happiness here; and that, except for the European minded radicals and their fellow travelers, witting and unwitting, the American people as a whole still hold to and act on that belief.

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

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

afford the right,<sup>2</sup> properly and justly impose upon the exercise of it, restrictions and conditions not inconsistent with basic principle.

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

When Dean Manion, singling me out as the particular target for the scoffs and gibes, the slings and arrows of the sophisticated positivists, the skeptical pragmatists, the creeping socialists, the social planners<sup>3</sup> of all shades, dubbed me "knight of Property," he did not soft soap or Tom Sawyer me into whitewashing this fence of his. He merely raised his Macedonian cry, "Come over and help us," and, like-minded with him, touching the natural law in general and the natural rights of men, particularly as they have been recognized, protected, and preserved in our constitutions, federal and state, I have girded my loins, put on my armor of proof, and come this long way to do so.

I know as well as he does that the days of the happy and peaceful wanderings through the pleasant fields of academic speculation about, and historical discussion of,

---

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

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

natural law as the higher moral law, the universal source of all just positive law, which has characterized the first three sessions here, are over, and that the time has now come to begin the fight in earnest.<sup>4</sup>

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

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

Besides, though in a short spell of teaching at Northwestern I did once experience a temporary metempsychosis with the spirit of the judge moving out, the spirit of the teacher moving in,<sup>6</sup> I am not a law teacher. I am, and proud of it, a judge, one of those naive, simple-

---

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

<sup>5</sup> *Job*, 32:8.

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

minded jurists<sup>7</sup> "who possess ideas of honor, patriotism, and rights," and "find their strongest defense of these ideas in terms of some irrefutable, natural world to which the ideas correspond."<sup>8</sup>

Until now the men of little or no faith, pragmatists and positivists, the creeping socialists, the leaping-now men,<sup>9</sup> have paid the project and the goings on here little mind. Particularly has this been true of those politically minded pragmatists<sup>10</sup> and positivists, who, posing as disinterested factual observers of the passing scene, chroniclers of the "pure fact of law" seem really plugging for a naturalistic jurisprudence,<sup>11</sup> with courts

<sup>7</sup> "Occasionally we do not find a jurist who resents the unfavorable comparison of jurisprudence to natural science and who is inclined to charge the critics of the law either with simple ignorance of legal learning or else with some sinister purpose to undermine respect for law. Such jurists believe that the meaning of the Constitution stands like the Rock of Ages. Unscrupulous men may ignore its strict apportionment of rights and duties; ignorant men may never reach an understanding of its beneficent provisions. There it stands, a proper object for study and veneration, but never an instrument to be used according to the needs of the times." ROBINSON, *LAW AND THE LAWYERS* 9-10 (1935).

<sup>8</sup> *Id.* at 309.

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

<sup>10</sup> John R. Commons, in his description of Administration, thus points this out: "On the one side it is 'the pragmatic philosophy' of present day social sciences. . . . It is not mere coincidence that twentieth century philosophies began to call themselves 'pragmatic'—not the individualistic pragmatism of William James, but the social pragmatism of John Dewey [See DEWEY, *LOGIC OF INQUIRY* (1938)]." Commons, *Twentieth Century Economics*, 5 *JOURNAL OF SOCIAL PHILOSOPHY* 32 (1939). "On the other side it is the problem of collective action in control of individual action. Collective action, with its working rules, takes the place of the divine law and natural law that descended from John Locke and the eighteenth century philosophies." *Id.* at 38. Cf. Otto, *The Social Philosophy of John Dewey*, 5 *JOURNAL OF SOCIAL PHILOSOPHY* 42-60 (1939).

<sup>11</sup> See ROBINSON, *LAW AND THE LAWYERS* (1935).

and judges discredited and their independence destroyed,<sup>12</sup> a planned economy and government unlimited in the saddle.

Nearly one hundred years ago Amiel wrote in his *Journal Intime*:<sup>13</sup>

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

Scornful they undoubtedly have been of the simple goings on here. From the lofty perch of their skeptical sophistication,<sup>14</sup> the legal positivists who claim to see

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

<sup>13</sup> 1 AMIEL, JOURNAL INTIME 58-9 (Ward transl. 1923).

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

only "the pure fact of law," existing completely independent of, indeed, entirely apart from moral<sup>15</sup> ideas and principles, have no doubt looked down their noses at what they regard as this twaddle about natural law.<sup>16</sup> They have not, though, felt called upon to come in swinging. Ostentatiously ignoring the so-called poor bumbler who have been babbling here about natural law, the pragmatists,<sup>17</sup> particularly the fellow traveling Pharisees among them, have gone on making broad their phylacteries and enlarging the borders of their garments. Paying tithe of mint, anise and cumin, and making a religion of cynicism, skepticism and unfaith in general, they have omitted the weightier matters of the law, Judgment, Mercy and Faith.

As for me, I will be found no dissembler, sailing under false colors. Like the man called Hi, "I inform you before we embark. You may charge me with murder or want of sense. We are all of us weak at times. But the slightest approach to a false pretense was never among

---

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

<sup>16</sup> Cf. ROBINSON, *LAW AND THE LAWYER* 269-75 (1935).

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

my crimes.”<sup>18</sup> I confess that I am, and proud of it, not a New Dealer but a Jeffersonian, Lincolnian, American, one of those “solemn men” whom the pragmatists, the scientists, the skeptical devotees of facts,<sup>19</sup> so deprecate, “who go about the world preaching that there is something more to be relied upon than facts. . . .”<sup>20</sup> But I am not cast down by this deprecation, for I believe on the authority of men a little more scientific than, at least as learned as, these; that “. . . facts are sterile until there are minds capable of choosing between them, . . . minds which under the bare fact see the soul of the fact”;<sup>21</sup> that “. . . a fact is nothing except in relation to desire . . .”;<sup>22</sup> and that “There is in the human intellect a power of expansion, I might almost call it a power of creation, which is brought into play by the simple brooding upon facts.”<sup>23</sup>

I confess, too, that I am not ashamed to call myself a patriot, a moral being who believes in *honor*, *piety*, and the *other moral virtues*, a *jurist* who believes in *constitutional* rights and the justice which recognizes and protects them, in short a plain and simple man who believes in the good life and that there is more to living than

---

<sup>18</sup> LEWIS CARROLL, *FIT FOURTH, THE HUNTING OF THE SNARK* (1891).

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

<sup>20</sup> *Id.* at 17.

<sup>21</sup> Henri Poincare, as quoted in HUTCHESON, *JUDGMENT INTUITIVE* 23 (1938).

<sup>22</sup> Will Durant, as quoted *id.* at 26.

<sup>23</sup> Tyndall, as quoted *id.* at 25.

mere bodily health.<sup>24</sup> Compare and contrast with this simple profession of faith in moral virtues this questioning: <sup>25</sup>

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

God forbid, I say.

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

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

---

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

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

<sup>25</sup> ROBINSON, *LAW AND THE LAWYERS* 17-8 (1935).

<sup>26</sup> KOHN, *THE TWENTIETH CENTURY* 48 (1949).

tion of morality. In the place of sociology a doctrine of the forms of dominion."

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

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

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

<sup>27</sup> *Mark* 9:24.

<sup>28</sup> KOHN, *THE IDEA OF NATIONALISM* 291 (1944).

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

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

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

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

---

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

Of the natural law in general, it is sufficient to say that I believe with Cicero that it is the principle which lies behind all the order in the world, the universal, the ultimate, principle behind all positive law, the groundwork, the firm foundation, upon which the structures of human society rest. It is the principle of that justice, the search for which is the bond of men in states, the end of government, the end of civil society, that justice which has ever been and ever will be pursued until it be obtained or until liberty is lost in the pursuit.

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

---

<sup>30</sup> *Ibid.*

with definite content as absolute, simply because it is legal, is guilty of an objectively unjust act of will.”<sup>31</sup>

### *The Right to Property*

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

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

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

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

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

<sup>31</sup> STAMMLER, *THE THEORY OF JUSTICE* 26 (1925).

the moral sphere;<sup>32</sup> and that human nature being what it is, for the effective enjoyment of these rights, the compulsive force of municipal or positive law is greatly needed.

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

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

---

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

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

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

When we natural law men speak of rights, including the right to acquire and own property as natural and unalienable, we speak of them as they were in man's natural state. We do not speak of them as they are set down and secured in the municipal law of government organized as ours is on natural law principles and subject to constitutional limitations, the law which is at once the will and consent of the people. We freely recognize the right, indeed the duty, of such a government, to affix conditions to the exercise of natural rights consistent with the declared aims and ends of the society. We recognize its right, too, within constitutional limits, to impose upon the enjoyment and exercise of it, restrictions not inconsistent with the basic right. But this recognition is not at all inconsistent with the belief in natural law rights, or in the bedrock premises and arguments on which that belief rests. These premises are life, liberty, and property, and the natural right to them does not exist because men have made laws. On the contrary, laws exist because life, liberty, and property, and the right to them existed before there were laws, and because men formed themselves into social orders and set up governments in order to make laws wherewith the better to preserve and protect these rights.

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

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

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

To restate: no individual acting separately can morally or lawfully use force to infringe upon or destroy the natural rights of others. The common force is nothing more than the organized combination of the individual forces. It logically follows, therefore, that it may not be so used; and that if it is, individuals have the

natural right to resist that force to the extent, if need be, of throwing off the government altogether and setting up a new and just government in its place.

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

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

---

<sup>33</sup> Cf. BASTIAT, *THE LAW* 1-9 (1950).

indeed the life of a great part of the western world.

Our ancestors, "... men who possessed ideas of honor, patriotism, and rights . . .,"<sup>34</sup> those moral qualities which our fact-devoted pragmatists so scorn, staked their fortunes and their lives on the eternal verities of the natural or moral law, the natural or moral rights which just governments are created to preserve and, therefore, may not abrogate or unjustly impair.

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

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

For centuries it had been the English habit of mind to

---

<sup>34</sup> ROBINSON, *LAW AND THE LAWYERS* 309 (1935).

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

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

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

When, therefore, our forebears, in breaking off from England and in forming a government of their own, wrote and spoke of the "laws of nature and of nature's God" and of the natural rights of man, they were not

dealing with theoretical abstractions. They were dealing with the realities, with words become flesh and dwelling among men. They knew from their reading and from their own experience with unjust governments and governors the nature of governments and of men. They knew they had not bought liberty in fee simple absolute for a price paid down in full, that they had only made a down payment on it and that eternal vigilance was the price they and their posterity must be forever paying.

Knowing that it was the nature of men to learn but to forget, to learn and forget again, they took the greatest pains in the Declaration of Independence, in the constitutions and bills of rights, federal and state, and in the *Federalist Papers*, to tell us so. In these documents of eternal significance and verity, to those of us who as real inheritors revere and cherish our heritage, they wrote down at once their understanding and distrust of the nature of governments and governors, and their abiding faith in natural law and the natural rights of man. Written down at a time when men really believed that "Men who their duties know, but know their rights, and knowing, dare maintain, . . . these constitute a state,"<sup>35</sup> they were testaments to that faith. They were written down by men who thought in first principles, whose minds were steeped in the notions of natural law and the rights of man, the dominant political philosophy of their day. Their hearts were lifted up with the vision of a new freedom on a new earth, and they believed, with the philosophers, in the perfectibility of man, and with

---

<sup>35</sup> Sir William Jones, *What Constitutes a state?* quoted in HUTCHESON, *LAW AS LIBERATOR* 5 (1937).

them, that the human species was capable of an unbounded improvement.

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

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

Many of them were lawyers; all were law-minded. Burke’s apostrophe to the American Colonists, in his Speech on Conciliation,<sup>37</sup> was known to them all. They knew that:

Nothing is more certain than the indispensable necessity of government, and that it is equally undeniable that whenever and however it is instituted, the people must cede to it some of their natural rights in order to vest it with requisite powers.

They knew with Montesquieu that the corruption of any form of government generally begins with the corruption of its principle, and they knew that if the spirit of the laws—that government was made for man, not man

---

<sup>36</sup> *Ibid.*

<sup>37</sup> Edmund Burke, as quoted *id.* at 6.

for government—failed, then also would fail the law. They knew that the nature and principle of each government had a strong influence on its laws and that if they could but establish and maintain the government on natural law principles, the laws would appear to flow thence as from their source. They believed with Rousseau, that “It is to law alone that men owe justice and liberty. It is this salutary organ of the will of all which establishes in civil rights, the natural equality between men.”<sup>38</sup> They knew with him, too, that “Obedience to a law which we prescribe to ourselves is liberty,”<sup>39</sup> and that “the passage from the state of nature to the civil state produces a very remarkable change in man, by substituting justice for instinct in his conduct, and giving his actions a basis they formerly lacked.”<sup>40</sup>

They particularly adopted as their own Rousseau’s doctrine that:<sup>41</sup>

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

They agreed with him, too, that it would be entirely:<sup>42</sup>

---

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

<sup>39</sup> As quoted in HUTCHESON *LAW AS LIBERATOR* 83 (1937).

<sup>40</sup> *Id.* at 84.

<sup>41</sup> *Id.* at 83n.

<sup>42</sup> *Id.* at 101.

*. . . possible for the Council of a Democracy to pass unjust decrees and condemn the innocent; but this never happens unless the people is seduced by private interests, which the credit or eloquence of some clever persons substitutes for those of the state; in which case the general will will be one thing, and the result of public deliberation another. [Emphasis supplied.]*

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

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

They knew that life and liberty alone could not give happiness; that a man would be no better than a slave if he could not exercise his natural right to acquire and own property and to retain it free from arbitrary control; and that a government which did not recognize

---

<sup>43</sup> *Id.* at 179.

and preserve this right could not be just. Locke, by whom they were greatly influenced, had put it this way: <sup>44</sup>

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

For the legislative acts against the trust reposed in them when they endeavor to invade the property of the subject, and to make themselves, or any part of the community, master or arbitrary disposer of the lives, liberties, or fortunes of the people.

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

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

Rousseau, strong contender though he was for the authority of society and the sovereignty of the general will, as long as, but only while, the general will remains just—that is, acts in accordance with the principles of natural law—proponent and advocate though he was of the view that a society organized on natural law prin-

---

<sup>44</sup> *Ibid.*

ciples should, in accordance with those principles, have full and adequate power over its members, including their lives and their property, is yet one of the strongest advocates of natural rights,<sup>45</sup> including particularly the right of the individual man to acquire and own property. He declared, as vigorously as Locke did, that the protection of private property is the end of government. In his *Discourse on Political Economy*, he said: <sup>46</sup>

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

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

---

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

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

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

<sup>46</sup> Rousseau, *op. cit. supra* note 38 at 271.

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

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

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

### *Conclusion*

A word or two about the confusion of thought which makes some propound as irrepressible and irreconcilable here a conflict between natural rights and social rights, between property rights and human rights, or, as some put it, between democracy and property,<sup>49</sup> and I am done.

There is, there always will be, until perfect justice

---

<sup>47</sup> As quoted in *Hutcheson, LAW AS LIBERATOR* 181 (1937).

<sup>48</sup> *Ibid.*

<sup>49</sup> See *id.* at 175 *et seq.*

comes, a conflict between the justice and the injustice of opposing claims upon and to property asserted by government acting for and through the majorities which have the power and by private owners acting for themselves. There certainly is a complete, an irreconcilable, opposition between state socialism<sup>50</sup> of any kind and the natural right to acquire and own property, the same complete and irreconcilable opposition that there is between those forms of government and the form which we enjoy.

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

---

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

tween the ownership of property and the principle of democracy.

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

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

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

We exist and are quoted as standing proofs that a government so modeled as to rest continuously on the will of the whole society, is a practicable gov-

---

<sup>51</sup> As quoted in 3 RANDALL, *LIFE OF THOMAS JEFFERSON* 458 (1858).

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

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

---

<sup>52</sup> *Ibid.*



# THE NATURAL LAW AND THE RIGHT TO SELF-EXPRESSION

*Felix Morley*

(Writer, Educator. A.B., Haverford College, 1915; Rhodes scholar, New College, Oxford, 1919-21; Ph.D., Brookings Institution, 1936; D.Litt., George Washington University, 1940; LL.D., Hamilton College, 1941, University of Pennsylvania, 1941; President, Haverford College, 1940-45; President and Editor, *Human Events, Inc.* Pulitzer Prize for editorial writing, 1936. Fellow, Royal Economic Society (Great Britain); member, American Political Science Association; Council, Foreign Relations; Phi Beta Kappa. Author of *Unemployment Relief in Great Britain*; *Our Far Eastern Assignment*; *The Society of Nations*; *The Power in the People.*)



## THE NATURAL LAW AND THE RIGHT TO SELF-EXPRESSION

**T**HIS is the fourth Convocation of the Natural Law Institute at the great University of Notre Dame. In these four annual sessions some 20 papers have been presented, examining the background and various of the manifold aspects of Natural Law. The availability of these essays in permanent form is an enduring testimonial to the spiritual insight, and the deep patriotism, of those who have sponsored this much needed undertaking.

And it is of course appropriate that the connection between the two — between religious and patriotic conviction — has been frequently emphasized at this Institute. It could scarcely be otherwise at an American gathering devoted to examination of the Natural Law. In spite of erosion and decay it still remains true, as de Tocqueville noted of our people in 1831, that "Religion . . . must be regarded as the first of their political institutions." That is the rock on which the Republic stands.

Although this Institute is now so well established, I think it is true that, prior to this morning, no direct consideration had been given to my subject: "The Natural Law and the Right of Self-Expression." I confess to having, for a time, thought this omission somewhat surprising.

If we agree that man receives certain rights direct from God, it would certainly seem that the right of self-expression is basic among them. Man is a social being, distinguished physiologically from the lower animals not merely by his thumb but more especially by the relative facility with which he can communicate his thoughts to his fellows. All this communication, esthetic or utilitarian, spiritual or carnal, uplifting or degrading, is a form of self-expression.

Are we not forced to assume, then, that the ability to communicate, with tongue, or pen, or brush, or chisel, is of itself evidence of the divine in man, since his power of communication so clearly distinguishes him from the beasts of the field? If so, any examination of the Natural Law, which is God's Law, should logically begin with an affirmation of Freedom of Expression. For, without that freedom, none of the other aspects of Natural Law could be given a general emphasis, and it could be called illegal even to preach the word of God. A right is something that can be exercised. If a Right cannot be exercised, it becomes unsubstantial to the point of non-existence.

That argument is certainly plausible. And if it were the whole truth, instead of only a part thereof, you would doubtless have considered the Right to Freedom of Expression at your first Institute, disposing of the subject for better or worse. But Dean Manion wisely decided otherwise. He knows, I am sure, that we have here a disturbing issue, surrounded by booby traps, which it is my difficult assignment to uncover, or at least locate.

In this endeavor I came to realize why all the emi-

nent theologians and jurists who have spoken at this Institute have heretofore dodged the subject. There is, however, one classical type of person who rushes in where angels fear to tread. Obviously it was one of those around whose outstretched neck Dean Manion would eventually throw his noose. He is surrounded by angels. What he needed this morning was a — commentator.

He needed a commentator not so much because the breed is commonly supposed to be fluent in expression — a college president could have filled that bill. But those who write professionally for the papers, or talk over the radio, necessarily learn something of the hazards of unrestricted self-expression. I do not refer merely to the law of libel. Let me recall an incident that will help to illustrate.

In 1938, the evening of October 29 of that year to be exact, a precocious young man named Orson Welles staged a radio skit describing an invasion of this country by superhuman creatures from the planet of Mars. It was, of course, a free-hand dramatization of the fantasy called *The War of the Worlds*, by H. G. Wells — no relation of Orson and indeed written years before the latter was born — in fact written so long ago that I enjoyed it as a boy.

Technically, this radio skit was extremely well done. It started with a program of dance music, supposedly emanating from a New York hotel. Soon this was broken by bulletins, telling of strange disturbances — explosions of incandescent gas — on the planet Mars. More dance music and then more bulletins about Mars, until a culminating report told of the landing of huge

metal cylinders in New Jersey, of the eruption of weird creatures from these interplanetary vessels, of their attack with heat rays and other withering devices. Four times, during the broadcast, the unseen audience was told by an announcer that it was all fictitious. That did not dull the effect. Let me quote a few lines from the description of the public reaction, as told by Frederick Lewis Allen in *Only Yesterday*.

"Terror-stricken people rushed out of their houses and milled about in the streets, not quite sure whether they were being attacked by Martians or by Germans, but sure that destruction was on the way. . . . In Newark, New Jersey, several families, convinced that a 'gas-attack' had begun, put wet cloths on their faces and tried to pack all their belongings in a car; the traffic was jammed for blocks around. A woman in Pittsburgh prepared to take poison, crying, 'I'd rather die this way!' A woman in Indianapolis rushed into a church screaming, 'New York destroyed; it's the end of the world . . .'"

That last observation contains a complete non-sequitur. It thereby emphasizes that the emotional content is often stronger than the logical among us humans. Right here we begin to see the scope of our problem, for the Natural Law assumes not merely that the universe is rational, but also that man is a rational creature in a rational creation.

No radio station in this country would today fake an atomic bomb attack. But, before drawing conclusions from one example of unrestricted freedom of expression I would like to mention another, not in the

field of entertainment but at the opposite poll of intellectual argument.

A century ago a disagreeable but unquestionably brilliant German scholar was spending his days in arduous research at the British Museum. The stated aim of Karl Marx was to appeal to the intelligence of mankind and certainly *Das Kapital* demands extraordinary mental concentration, even if one finally concludes that it is all pretentious rigmarole. Moreover, this undeniably influential book is characterized throughout by a pervading arrogance, and a complete absence of spiritual consideration of any kind. To Marx, in the words of a recent English critic: "*Das Kapital* was primarily a means to impose his superiority." That book therefore stands as a monument to unbalanced, intellectual self-expression. Today our country is engaged in a gigantic defensive effort against an evil that can be directly traced to the uninhibited distortions promulgated by this embittered German Jew.

Here are two very different illustrations — and everyone of us could supply others for himself — of the fact that self-expression, no matter how theoretically desirable from the individual viewpoint, can and does inflict injury on Society as a whole. That injury can be permanent, as well as transient. It may affect morons, or infect teachers in our colleges. Yet self-expression is certainly closely connected with that "Right" of Liberty, which our Declaration of Independence declares to be "unalienable," because it is a part of the endowment which men have received from their Creator — a part of Natural Law. The First Amendment to the Constitution confirms the freedom of speech and press implied

in this organic law as first adopted. Does this mean that we should uphold a freedom when it is used to attack this Constitution as a "bourgeois monstrosity," fit only for destruction? That is a most appropriate problem for the consideration of this Institute.

A clue, but only a clue, to the solution of this problem is found in the homely saying that "Liberty is not License," affirmed in a previous paper on this program. But that is not to my mind a very satisfying apophthegm, since literally Liberty is License, and nothing else *but* License. The word "license" comes to us from the Latin *licentia*, meaning "freedom to act." What is Liberty, if it is not freedom to act? What is the Right of Self-Expression, if it is not freedom to act in the field of the communication of ideas, spoken or represented?

So our clue brings us immediately to the mystifying fact that, in the course of centuries, the word *licentia* has had a wholly paradoxical development. On the one hand, it still means that which is permitted. If you have difficulties with a traffic cop it certainly helps to have a driving license. On the other hand, license also means something that should not be permitted. I suppose that any student at Notre Dame would be seriously embarrassed, to say the least, if his superiors could justly call him licentious. Thus — perverse though it may seem — nobody has license to be licentious.

Here is a literal confusion — a "pouring together" — of opposite meanings in a single noun. And as verbal detectives, confronted by this etymological confusion, we may reasonably guess that some other element was formerly involved in *licentia*. When that other element

is still present, license is permissible; if it is absent, license is not permissible. It will require a historical detour to identify that elusive ingredient. Possibly we would be better off if the modern American mind were as well designed to get around roadblocks as is the modern American car.

We may note that in ancient Rome only part of the population was entitled to *licentia* — or freedom to act. Slaves had no such freedom; nor did teenagers, and even in the case of women it was severely limited. The Roman matron was wholly subject to the decisions of the head of the family. Though the nominal head of a family myself, I do not claim that this was a desirable arrangement. I merely note that in the Golden Age of Rome it was the actual fact.

*Licentia*, in the Roman practice, was reserved for those who had *virtus* — the quality of free manhood. And there was still another restriction on license. A Roman had to possess *pietas* — a sense of duty — in order to have *licentia*. *Pietas*, however, was really a part of *virtus* to the Romans. If you were virtuous you were also pious and you could not be virtuous unless you were pious.

We live in an age in which many abstract words, along with the qualities for which they stand, have lost much of their pristine value. Today if one says that a man is virtuous and pious there is an implication that he is somewhat effeminate and namby-pamby. Women are illogically supposed to be more virtuous than men, though actually only more mulierish, if you will note the extra syllables. Indeed we are curiously prone to regard the virtuous as lacking virile qualities. The vir-

tuous are "good," we would agree, but not real "he-men."

To the early Romans it was exactly the opposite. Those whose conduct was brave and whose sense of responsibility was strong were therefore virtuous and pious, and you did not merit the adjectives unless you were manly as we use that word. Moreover, and this I emphasize, you had no license unless you were both pious and virtuous.

I am a charter member of the S.P.C.A.W. — the Society for the Prevention of Cruelty to Abstract Words. But I shall not apologize for this idiosyncrasy in an assembly containing so many budding lawyers who already realize that most of our spade work in legal discrimination and codification was done by the Romans. We must understand the thought behind Latin abstractions in order to understand the fundamentals of our legal system. We must ask ourselves, as Cicero did, the searching question that really divides the naturalists and positivists. Is law a matter of human discovery, or of human invention?

In their magnificent effort to discover law the Romans early came up against the problem of reconciling the innate individual sense of what is fair and reasonable, with the social necessity of generalized and therefore arbitrary rules of conduct. This dilemma was at least partially resolved by the doctrine of equity, meaning that in some respects all men — and women too for that matter — were deserving of equal treatment by the magistrate, regardless of whether the individuals affected were Roman or barbarian, patrician or plebeian, free man or slave. Thus, well before the coming of

Christ, it was generally accepted by the Romans that there is a universal natural law (*ius naturale*) back of the common law of peoples (*ius gentium*) and back of the law for Roman citizens (*ius civile*). That underlying natural law justified the doctrine of equity and was used to support the right of individual self-expression for every man, even if it were not specified in *ius gentium*; even if it were denied by *ius civile*.

The principle of equity, however, cuts two ways. On the one hand it emphasizes extenuating circumstances for the humble and underprivileged transgressor. On the other hand it demands even-handed justice for the powerful but irresponsible individual who considers that he is not subject to natural law. The purpose of equity, in Virgil's immortal words, is: "*Parcere subjectis et debellare superbos*,"—to spare the lowly and strike down the proud. Without the principle of equity we might never have seen the necessity of separating the judiciary from the executive, thereby placing those with political power under the control of law. But that is an aside.

What is very much to the immediate point is the balance that practical Roman experience brought into legal consideration. It was not by accident, nor as a result of any fine-spun theory, that license was given only to the virtuous and pious man. Slowly, and with a great deal of trial and error, it was discovered that no Right can be established without the acceptance of a conjoint Responsibility. Of course the Greeks, as Professor Maurice LeBel emphasized here two years ago, had seen the necessity of this synthesis and proclaimed it. But it was the Roman achievement to systematize the establishment of natural rights by tying them with

parallel responsibilities. The Romans, before the birth of Christ, had made the concept of natural rights practical by associating it with the doctrine of self-restraint. Only he who could restrain himself had license for self-expression. And that idea of self-restraint is the missing ingredient which, by its frequent absence, gives an equivocal meaning to the word license as we use it today.

The coming of Christianity was of course of the greatest possible import for the doctrine of natural rights in general, and the right of self-expression in particular. Christ emphasized the universality of these rights, to an extent that seemed revolutionary to the most liberal contemporary Romans. But He emphasized even more the parallel responsibilities of the individual. Every circumstance in the life of Christ tells us, indeed, that the acceptance of stern discipline is the condition for eventual reward. "Whosoever doth not bear his cross, and come after me, cannot be my disciple."

It seems to me — and I hasten to add that I am only an amateur historian — that the rigorous Christian religion took root quickly in the Roman Empire, in part because great minds had prepared the soil in advance. Cicero, for instance, had argued that any statute contravening the natural law need not be obeyed and indeed is not properly called law. In his own words, no more so than the regulations of a band of robbers. The commands and prohibitions of the natural law are laid upon all men, said this great Roman lawyer, through the medium of their conscience, the organ that "knows with" God. The role of statute law is really to supplement that which is ordained by God, supporting those

who wish to obey the supreme command, restraining those whose ears are deaf to divine promptings. "The discipline of law," wrote Cicero, "is drawn from the inmost nature of man." Those who recognize this discipline are for that reason — and for that reason alone — entitled or licensed to express themselves freely.

Cicero was murdered some forty years before the birth of Christ, shortly after lamenting in a famous letter that: "We have completely lost the Republic," an assertion all too well justified by subsequent Roman history. But political and social demoralization under the Caesars served to strengthen individual belief in natural law, as set forth in the teachings of Christ. The corruption of earthly government and the venality of man-made law did not undermine but fortified faith in the natural law, and in many ways this tremendous drama is being re-enacted in the hearts and minds of men today. Yet it was no easy doctrine that the twelve apostles went forth to preach. It was not, and is not now, easy for men to practice restraint and self-control. So there was no pretense that those who took up the cross of Christianity would find it a light burden, or that the Church would provide vacations, social security and old-age retirement pensions for all its adherents. "He that endureth to the end shall be saved." That doesn't sound like a "Fair Deal" election slogan.

I have been laboring to point out that even in the West, distinguished from the East largely by a more closely reasoned faith in Natural Law, that concept has always been regarded as contingent rather than absolute. Natural Law certainly exists independent of the minds of men, but you must personally discover its

meaning before you may personally claim its benefits. It follows that the Right of Self-Expression, derived from Natural Law, is only a contingent Right. Self-Expression may be freely exercised by those who have developed self-discipline. It is not granted unconditionally to anybody; decidedly not to those who assume that they can get Rights more cheaply from the President than from God.

In earlier days it was generally recognized that effort is the prerequisite for reward. When the ability to read and write was a distinction, acquired over serious obstacles by those who really valued learning, the sacrifice involved was itself a price paid for freedom of expression. But the child of today, taken by bus from home to school, coddled through the three R's by ingenious methods of instruction, with schooling from kindergarten to post-graduate level paid, in many cases, out of taxation, has himself made far less effort than used to be necessary to learn the art of self-expression. And this is true not merely of oratorical or literary skills. It applies to all the more definitely artistic forms of self-expression. I know nothing about the early training of Pygmalion, but the fact that he was so sour on women indicates that he had a tough apprenticeship. Mozart and Beethoven certainly toiled ceaselessly to develop their genius. And Michelangelo did not learn his anatomy in any public works of art project.

Let me make my point clear. I am in no way criticizing educational techniques which have made learning so much easier and more attractive than it used to be. I believe in free public education and I can think of many worse ways of wasting the taxpayer's money than

Federal grants in behalf of even third-rate artists. I do draw the line at television ads asserting that childhood's tender bloom is wilted by parents who fail to see the educational value of Kukla, Fran and Ollie. But short of such simon-pure baloney I would go a long way in smoothing the path of any serious student.

Nevertheless, it remains eternally true that before anyone seeks license to express himself he should have acquired, somewhere, somehow, some part of that virtue and piety which the Romans of Cicero's day associated with *licentia*. Individual freedom of expression, in short, implies an honest individual effort, and beyond that certain generalized standards, to insure that the expression shall not be socially deleterious.

The necessity for such standards has long been recognized in most of those fields of self-expression that we call professional. The man or woman with an urge to express himself in medicine or the law must first "qualify" by passing examinations that require arduous and protracted training. It is not enough to have an interest in the subject, nor even to have worked at it spasmodically, as I happen to have done in the case of the law. Dean Manion is kind enough to think — or at least he thought until this morning — that I have a certain competence to address this Institute. That friendly judgment, however, does not entitle me to defend or prosecute the most trifling case in any court in this country. I am not qualified to do so.

In other professions, such as teaching, architecture, engineering and banking, the standards are less formalized, but not less real. They are very real in the vital field of religious self-expression. I am not ac-

quainted with the details of the sifting process which I know is rigorously applied to applicants for the priesthood, but I feel sure that it seldom errs on the side of laxity. My own religious affiliation — that of the Society of Friends — is unusual among other respects in that it has no professional priesthood. Here it would ill become me either to defend or criticize this custom. It is appropriate to point out that the practice is in no way at variance with the doctrine of Natural Law.

Quakers do not subscribe to ecclesiastical distinctions, because of their profound conviction that all men are on an equal footing before God. And this is really the strongest possible affirmation of the belief that Natural Law operates upon and is binding on Everyman. The absence of a professional ministry does not mean, as sometimes thought, that any worshipper in Quaker Meeting is equally entitled to rise and deliver a homily to his associates. Before such indulgence the true Friend must have felt himself "moved by the Spirit," and it is further assumed that he will have personally subscribed to the Discipline of his Yearly Meeting, or governing body, and will have answered conscientiously the Queries of his local Meeting. These are searching questions: "Do you endeavor to express in your daily lives the love and brotherhood, the sincerity and simplicity, that Jesus Christ lived and taught?" Only if you can answer that, and similar questions affirmatively, do you possess acknowledged Right to express yourself in Meeting..

And the Society of Friends, I venture to assert, has been influential beyond its numbers because every convinced Friend must accept Responsibilities before—not after — he lays claim to Rights. Precisely because this

conscientious attitude has been so well attested, our Civil Law is today generous to members of the Society of Friends. Their affirmation is the equivalent of an oath and those who claim conscientious objection to conscription are customarily allowed to perform alternative service.

The same general rule, it seems to me, must apply to our Society as a whole. The Rights of citizenship are contingent upon, and follow, acceptance of the Responsibilities of citizenship. And this acceptance cannot be merely perfunctory, if one expects to assert the contingent Right. The sense of responsibility must be positive. It must have been demonstrated, to general satisfaction, before the Right can properly be asserted.

When the sense of Responsibility is not affirmatively present, in any form of individual self-expression, it must be negatively imposed. This denial of license is clearly a function of the State—a part of the police power that none but anarchists would deny to the State. For it is sadly true that almost everybody is occasionally deaf to the commands of Natural Law, and that some are permanently hard of hearing when the still, small voice of Conscience tries to speak.

Therefore, as Cicero pointed out two thousand years ago, the Civil Law is set up to restrain, and assist, those who do not heed the commands of Natural Law on their own initiative. The effort of all legal philosophy, however, has been to make the Civil Law conform with the Moral Law, as understood by the religious sense of the historical period. Statutes as such must necessarily be concerned with actions rather than intentions, but under the doctrine of Equity every Court will take in-

tentions into account. They pave the road to Heaven as well as that which descends to Hell. Justice, we now agree, demands a jury of laymen as well as a judge and attorneys who know the law professionally. Reflect on whether we would have had the jury system unless those who evolved it had believed in Natural Law.

Nevertheless, the rule of the State, as law giver, remains essentially repressive. It can say what people must *not* do. It cannot with equal facility say what they *should* do. The affirmative function, in making man receptive to the promptings of his higher nature, belongs to the Church, whether it be separated from or linked with political government.

That point scarcely needs laboring. But what many people do not seem to realize is that the so-called Welfare State is today trying to assume functions that are not properly political. The effort to legislate morality may be due to a failure of the Church, to a lust for power on the part of those who direct the State, to the emphasis of the capitalist system on material values, or even to less obvious causes. In any case the trend points towards disaster, simply because virtue and piety are necessarily personal qualities. They cannot be impressed from without. They must be expressed from within. The Church is competent to help the individual in this respect. The State is not. And the expansion of State machinery in the moral field serves only to emphasize its soulless nature, leading further and further from the Confessional, closer and closer to the Concentration Camp.

It is customary nowadays to assert that the complexity of modern civilization has forced mankind to sur-

render the direction of his destiny to the State. If so, we are trying to kill the Hydra by cutting off its heads, for certainly State intervention creates at least two problems in place of one that is solved. The ghastly picture in the Far East is a case in point. When our dealings with China were primarily those of individuals, and largely directed by missionaries, the Chinese admired and respected us. Disaster came when our Government began to throw its weight around, on the basis of a bipartisan foreign policy interpreted to mean that nobody should criticize governmental blunders until too late.

Not the complexity of our civilization, but the failure of men to heed the Natural Law, is at the bottom of the moral crisis in which we find ourselves. And clearly it is not a crisis that can be resolved by piling up more statute law, or by demanding "world government" when men are forgetting how to govern themselves. President Truman—a badly confused leader—recently condemned the Eightieth Congress as "do nothing." To him it failed because it would not enact even more socialistic legislation. A wiser President would have realized that a Congress that does little, thus encouraging the people to do more for themselves, is thereby fulfilling the highest American ideals, of individual liberty and collective freedom.

The widespread indifference to Moral Law, the growing emphasis on Statute Law, can only lead—and is leading—to encroachment on freedom of expression of every kind, and perhaps especially on freedom of speech and press. Of course, even in our fortunate country, there have always been some restraints on the Right

to verbal and written self-expression. There is not merely the law of libel, but also blanket provisions against disturbing the peace or inciting to riot, not to mention explicit Constitutional provisions against treasonable utterances in wartime. It is noteworthy, however, that all these restraints are as applicable to the President, or the Chief Justice of the Supreme Court, as they are to the humblest citizen. They are not limitations imposed on the governed by their governors. They are limitations applied equitably by impartial law to all who clearly reveal an inability to govern themselves. The distinction is important and we should always bear it in mind.

Freedom of expression, even of a corrupting character, is more jealously guarded with us than is, for instance, the freedom to advertise falsely, or to sell impure food and deleterious drugs. That is not because we value our property, and our physical health, more than our spiritual welfare. We cling to the doctrine of *caveat emptor* — the buyer should beware — especially in the field of opinion because it is so difficult to be sure that any opinion is wholly meretricious. If it contains even a portion of truth, the suppression of a distasteful opinion may destroy that which could be helpful to mankind. Christians, so often persecuted for their views, should be the first to recognize this reasoning, superbly argued by John Stuart Mill in the *Essay on Liberty*.

But the logic of the *Essay on Liberty*, and indeed the whole case for freedom of expression, depends on the fundamental assumption that *virtus et pietas* — virtue and piety — are normal human attributes. Even with that assumption, safeguards must be placed around the

license of self-expression. If virtue and piety are empty words; if there is no God behind them to give these abstractions substance, then the safeguards of legal controls must be strengthened until finally all but the opinion of officialdom is *verboden*. Without authority there can be no social life. There is the Authority of God and there is the Authority of the State. At bottom there are no other alternatives. And the more the Authority of God is minimized, the more the Authority of the State must be augmented. It is as simple as that.

For a long time now we have been steadily contracting the sphere that belongs to God, and steadily expanding that which belongs to Caesar. The theory of the Welfare State moves, like the shadow of an eclipse, across the face of God. And as the divine warmth is cut off — by our own folly — we become not more secure but only more baffled, anxious and confused. I cannot myself believe that this eclipse will be permanent. There is too much of goodwill, which is of course God's will, still present in the hearts of men. But do the American people as a whole, today, possess as much faith in God as they have in the Atomic or the Hydrogen Bomb?

Recently a Washington newspaper published a survey indicating that 40 per cent of the population of the National Capital have no church affiliation of any kind. Now I do not equate religious faith with church attendance, nor could I do so without exposing myself to awkward questions from those who note my own observances. Nevertheless, a failure to belong to any congregation does certainly suggest an unwillingness to honor God. And it is startling, to put it mildly, to learn

that two out of every five people in Washington, most of whom work for a government founded on religious faith, are without any perceptible manifestations of such faith. Perhaps the Committee on Un-American Activities would be well advised to inquire into the religious inactivity of those who run the sprawling mechanism of government. There is such a thing as passive, as well as active, subversion.

This is really a matter of profound political concern. A person who is without conviction, or interest, in God is also without conviction or interest in God's law, which is the natural law. And while one may continue to observe a law about which one has no personal concern — out of a lingering sense of morality or a fear of punishment — that pallid observance will be wholly lacking in any sense of personal responsibility. Yet that ingredient of personal responsibility has always been a necessary part of the license — the freedom to act — permitted by Natural Law.

If you want a good football team — though perhaps I shouldn't say this at Notre Dame this year — you must give it close attention. If you want to preserve your savings these days, you had better give your investments careful thought. If you want your business to run some place other than downhill, it too must be given continuous supervision. If you want a foreign policy less wasteful of American lives and resources than the one we have, it would be wise to re-examine it, thoroughly. And if you want to preserve the Liberty that is the gift of God, it is only rational to give rather serious consideration to God himself. It isn't enough to use His name to re-enforce an expletive.

As the Communists know very well, the denial of God is necessary for the triumph of their system. Lenin said: "We do not believe in God" and therefore we "repudiate all morality that is taken outside of human class concepts." But the Communist attack on religion as "the opiate of the people" is far older than the Russian Bolsheviks. In the famous Communist Manifesto, written by Marx and Engels in London in January, 1848, you will find it asserted that "Law, morality, religion are so many bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests."

Law — morality — religion. It was not by accident that Marx coupled them together. They are joined together, and they will stand or fall as one. Destroy religion and you destroy morality — not immediately, but as a room grows cold when the embers die. Destroy morality and you destroy law, in so far as it is an effort to support morality with an enforceable code that assumes the equality of men and the individual right of man to pursue his happiness. As morality may linger after the decay of religious observance, so courts of law will continue, and indeed multiply, after morality is gone. But they will no longer dispense justice. The spirit of the law will be dead. And the business of the courts, as in Russia today, will be the enforcement of the dictates of those in power.

If that evolution — and it is certainly threatened — comes to pass there will be no more Right of Self-Expression. Why should there be, if the concept of Natural Law, which alone supports that Right, is dead? Destroy the idea of God and you destroy all the abstractions that emanate from that central idea. Liberty is

destroyed, and Justice, Mercy, Charity, Forgiveness, Kindness — everything in life that is not directly functional or for which, in the dreary words of John Dewey, “no confirmatory experiential meaning or test can be found.” The Central Committee of the Russian Communist Party only carried this positivist thought to its logical conclusion when it ruled, three years ago, that:

“Soviet writers, artists and cultural workers can have no other interest save the interests of the people and the State. That is why all advocacy of art . . . without politics, of art for art’s sake, is alien to Soviet literature . . . and must not find a place in our books and periodicals.”

Since the Communists, when they come to power, deny the Right of Self-Expression to all non-Communists, should we, under Liberal doctrine, deprive them of this Right to which, as men, they have a qualified claim? Logically, such tolerance would seem to be misplaced. No Communist believes in freedom of expression. They are quite open about it and their entire political and social theory is indeed based on the eradication of this freedom. It is appealed to, by American Communists, only to give them opportunity to undermine the system they abhor. They admit as much. So every local government in this country is thoroughly justified in demanding that no teacher affiliated with the Communist Party should be employed. No school which is supported by taxes can properly hire a teacher who is hostile to the fundamental principles of the government that these taxes support. But there is more to it than that. The man who denies the Natural Law can

scarcely claim the privileges that spring from Natural Law, and from that source alone.

Nevertheless, free speech and a free press are guaranteed by the Constitution. And even if that were not the case we should be very careful about denying Communists the right of self-expression, as distinct from position under, and benefits from, the government.

There is an obvious argument for permitting the Communists to talk, and to continue the publication of the *Daily Worker* and their other papers. By self-expression they tend to give themselves away, as has proved true even of some of the clever ones who have infiltrated the Government service. That is better than driving the entire Communist movement underground. But this is a superficial argument, and does not touch the deeper issues.

Of far more importance is the fact that every statute which encroaches on the Right of Self-Expression is thereby an encroachment on the Natural Law. There is no doubt that such encroachment may be necessary. It may even serve to bolster, prop and support the Natural Law. But, as a general rule, the greater the political regulation, the less the spiritual development; the more men are regimented by the State, the less they will discipline themselves; the more we depend on statutes, the less consideration we give to Natural Law.

The State has concentration camps for lost sheep. But the way of the Good Shepherd was different. The scribes murmured, saying "This Man receiveth sinners and eateth with them." To those who knew only the written law that was objectionable. It was not, we know, objectionable to the angels.

The best way to protect the Right of Self-Expression

is not to crack down on the tiny minority — the one per cent perhaps — of actual subversives. As we have seen, there are many of them who can and will repent. To deny them Rights is the negative approach to the problem, even when the denial is justifiable. We cannot encroach upon the natural rights of any of our fellow-men without at least threatening encroachment upon those rights for ourselves.

The positive approach lies, I conclude, in a keener realization of our ideals among the 99 per cent who have not realized their need of repentance. The indifferent, the apathetic and the agnostic constitute a more real threat to America than those who openly attack its institutions. It is the absence of faith in our own creed, rather than the presence of emissaries of the Kremlin, that is the danger.

Those who fail to affirm God thereby fail to affirm the Natural Law that God alone sustains. We have forgotten that to divorce ourselves from moral Responsibility is simultaneously to eliminate our claim to moral Rights. No Constitutional guarantees will serve to save the Freedom of Expression, for all Americans, unless we also demonstrate belief in God.

# THE NATURAL LAW AND THE RIGHT TO PURSUE HAPPINESS

*Reverend John C. Ford, S.J.*

(Professor of Moral Theology, Weston College; Professor of Ethics, Boston College. A.B., 1927, A.M., 1928, Boston College; S.T.L., 1933, Weston College; S.T.D., 1937, Gregorian University, Rome; LL.B., 1941, Boston College. Formerly Professor of Jurisprudence and Domestic Relations, 1943, Boston College; Professor of Moral Theology, 1945-6, Gregorian University, Rome. Member, Catholic Theological Society of America. Author of books and monographs in the fields of Moral Theology, Philosophy, and Legal Philosophy.)



## THE NATURAL LAW AND THE RIGHT TO PURSUE HAPPINESS

THERE is no exception to the proposition that happiness is what everyone desires and seeks. "To desire happiness," says St. Thomas, "is nothing else than to desire that the will be satisfied, and this every man desires."<sup>1</sup> Happiness indeed "*is an act in discharge of the function proper to man, as man.* There is a function proper to the eye, to the ear, to the various organs of the human body; there must be a function proper to man as such."<sup>2</sup> And so the desire for happiness is not something accidental or acquired by experience. It is as natural as the desire for food or the desire for social communication through speech. It is part of man's original endowment, and is fundamental to his nature. The pursuit of happiness, therefore, whether conscious and explicit or not, is the universal occupation and pre-occupation of mankind.

From time immemorial there have been countless theories as to the nature of happiness—the ultimate good of man. St. Augustine, with the help of Marcus Varro's book *De Philosophia* was able to compile two hundred and eighty-eight opinions of the philosophers as to the nature of happiness. None of the two hundred and eighty-eight satisfied Augustine. It is not likely,

---

<sup>1</sup> ST. THOMAS, *Summa Theologica*, I. 11, quaest. 5, art. 8. And cf., ST. THOMAS, *Summa Contra Gentiles*, III, 1.

<sup>2</sup> RICKABY, *Moral Philosophy* 7 (3d ed. 1892).

then, that in the present article any theory of happiness will be discovered which has been unheard of before. This field has been well ploughed and thoroughly cultivated throughout the ages, while the concept remains as enigmatic as it is familiar.

Nor is it my purpose to discover new theories or propose novel considerations. I merely intend to explain somewhat, (to the extent possible in a brief paper) the concept "pursuit of happiness" as it occurs in the American Declaration of Independence. To do this it is first necessary to view briefly some of the principal theories of happiness that the great philosophers of the past have bequeathed to us, so that we can place the philosophy of the Declaration in its proper setting.

## I.

### *Theories of Happiness*

Early in Greek thought the concept of happiness became identified with "the good" of man. Plato, refining the theories of Socrates, taught that the good or "well-doing" (*eupraxia*) depended on such harmony between the various faculties of man that a proper subordination of lower to higher, of non-rational to rational elements was preserved. To the earlier Greeks happiness was the reward of goodness of life. To Plato it was rather the flowering of that harmonious functioning. Happiness belonged to the whole man and not to any particular faculty of man, when his being was functioning as it should by "following nature." Happiness was not a passive state, therefore, but consisted in harmonious activity.

But when various schools of philosophy came to define in the concrete what "following nature" meant, the Epicureans took one path and the Stoics another. To the Epicureans, following nature meant satisfying the senses with pleasure, for the desires of the senses were the voices of nature. To the Stoics, following nature meant satisfying reason, which bids man to suppress, as they thought, all his sensuous appetites. Thus while verbally in agreement with Plato's principle of following nature, these two schools arrived at exactly opposite opinions as to what constituted in the concrete the good of man, and consequently his happiness.

Aristotle agreed with Plato that nature means human nature as a whole, which is both sensuous and rational. Hence the good of man must satisfy both sensuous and rational appetites. But the highest good of man is happiness, because that is what all men always and unrelentingly seek. Therefore this happiness or highest good must be the real purpose of a man's life.

But in what does this happiness consist? This is answered by a penetrating analysis by a leading scholar: <sup>3</sup>

Not in mere passive enjoyment, for this is open to the brute, but in action, (*energeia*) of the kind that is proper to man in contrast with other animals. This is intellectual action. Not all kinds of intellectual action, however, result in happiness, but only virtuous action, that is, action which springs from virtue and is according to its laws; for this alone is appropriate to the nature of man.

---

<sup>3</sup> Maher, *Happiness* in 7 CATH. ENCYC. 131-2 (1913).

The highest happiness corresponds to the highest virtue; it is the best activity of the highest faculty.

Though happiness does not consist in pleasure, it does not exclude pleasure. On the contrary, the highest form of pleasure is the outcome of virtuous action. But for such happiness to be complete it should be continued during a life of average length in at least moderately comfortable circumstances, and enriched by intercourse with friends. . . .

Virtues are either ethical or dianoetic (intellectual). The latter pertain either to the practical or to the speculative reason. This last is the highest faculty of all; hence the highest virtue is a habit of the speculative reason. Consequently for Aristotle the highest happiness is to be found not in the ethical virtues of the active life, but in the contemplative or philosophic life of speculation in which the dianoetic virtues of understanding, science, and wisdom are exercised.

*Theoria*, or pure speculation, is the highest activity of man, and that by which he is most like unto the gods; for in this, too, the happiness of the gods consists. It is in a sense a Divine life. Only the few, however, can attain to it; the great majority must be content with the inferior happiness of the active life.

Happiness (*eudaimonia*), therefore, with Aristotle, is not identical with pleasure (*hedone*), or even with the sum of pleasures. It has been described as the kind of well-being that consists in well-doing; and supreme happiness is thus the well-doing of the best faculty. Pleasure is a concomitant or efflorescence of such an activity. [Paragraphs supplied.]

Therefore, the following seems to be a correct definition of Aristotle's idea of happiness: "Happiness is a bringing of the soul to act according to the habit of the best and most perfect virtue, that is, the virtue of the speculative intellect, borne out by easy surroundings, and enduring to length of days."<sup>4</sup>

I think the modern reader is apt to be somewhat repelled by the cold and metaphysical approach to happiness that characterizes Aristotelian thought. He does mention length of days, reasonable comfort and the society of friends. But one wonders to what extent his choice of pure speculation as the happiest human activity was due to his occupational prejudice as a philosopher. One also wonders whether he was really happy while he speculated on happiness. Along with his fore-runners in Greek thought, Aristotle's happiness was a happiness of this life and of this world. Nor does he identify the object that can satisfy the infinite capacity of that speculative faculty.

It is not surprising then that when Christian thinkers turned their minds to the philosophy of happiness they expanded the theories of Plato and Aristotle by invoking their belief in a future life to be spent in the eternal enjoyment of the one Infinite God who can satisfy man's utmost yearnings. Of these thinkers St. Augustine more than any other influenced the course of future Christian thought. He propounded his views first in a brief dialogue, *De Beata Vita* (*On the Happy Life*), written at the time of his conversion, later in his tremendous treatise *De Civitate Dei* (*On the City of God*), and

---

<sup>4</sup> RICKABY, *op. cit.* *supra* note 2, at 12.

finally in his renowned *Confessions*. His approach to the subject is more psychological than metaphysical, and though he writes of the City of God his mind is, paradoxically, down to earth.

After disposing of the two hundred and eighty-eight above-mentioned opinions he comes to the point immediately: <sup>5</sup>

If, then, we be asked what the city of God has to say upon these points, and, in the first place, what its opinion regarding the supreme good and evil is, it will reply that life eternal is the supreme good, death eternal the supreme evil, and that to obtain the one and escape the other we must live rightly. . . . As for those who have supposed that the sovereign good and evil are to be found in this life, and have placed it either in the soul or the body, or in both, or, to speak more explicitly, either in pleasure or in virtue, or in both, . . . — all these have, with a marvelous shallowness, sought to find their blessedness [happiness] *in this life and in themselves*. [Emphasis supplied.]

To those who seek their happiness in evil pleasures he says: "You are seeking the happy life in the region of death; it is not there. How can there be happy life, where there is not even life?" <sup>6</sup> In this life happiness consists in hope: "As, therefore, we are saved, so we are made happy by hope." <sup>7</sup> When Augustine insists that

---

<sup>5</sup> ST. AUGUSTINE, *De Civitate Dei* 19.4.1, as translated in 2 DODS, *The City of God* 301-2 (1871).

<sup>6</sup> ST. AUGUSTINE, *Confessionum*, 4.12 (Wagnereck ed. 1930). [Translated by the author.]

<sup>7</sup> ST. AUGUSTINE, *De Civitate Dei* 19.4.5, as translated in 2 DODS, *op. cit.* *supra* note 5, at 307.

true happiness is in the knowledge of the One Truth and in the enjoyment of it, he is reminiscent of Aristotle's activity of the speculative reason. ". . . this [is] the happy life: to recognize piously and completely the One through whom you are led into the truth, the manner in which you enjoy the truth, and the bond that connects you with the supreme measure."<sup>8</sup> "Happiness is nothing else but joy in the truth. . . . The truth is so loved that whoever love something else want what they love to be the truth. . . . He therefore will be happy . . . who rejoices in the only truth, the truth itself through which all things are true."<sup>9</sup> "How therefore do I seek Thee, O God? Because when I seek Thee, my God, I am seeking the happy life."<sup>10</sup> All of Augustine's psychology, philosophy and theology of happiness is summed up in the famous phrase from the first page of his *Confessions*: "Thou hast made us for Thyself, and our heart is restless until it rests in Thee."<sup>11</sup>

About one hundred years after the death of St. Augustine, Boethius wrote his famous *The Consolation of Philosophy*. This work, written in prison, had exceedingly great influence on medieval and subsequent Christian thought. Its author was a Christian scholar well versed in the works of Plato and Aristotle and acquainted, too, with the thought of Augustine. Boethius had occupied important public offices but fell into disfavor, lost his wealth, was imprisoned, and finally ex-

<sup>8</sup> ST. AUGUSTINE, *De Beata Vita* 4.35, as translated in SCHOPP, *The Happy Life* 13 (1939).

<sup>9</sup> ST. AUGUSTINE, *op. cit. supra* note 6, 10.23. [Translated by the author.]

<sup>10</sup> *Id.*, 10.20. [Translated by the author.]

<sup>11</sup> *Id.*, 1.1. [Translated by the author.]

cuted. He was well able to testify from sad experience to the truth of Augustine's dictum: "... lettered leisure, or public business, or the alternation of these, do not necessarily constitute happiness."<sup>12</sup> Although some have cast doubt on his sanctity and even on his Christianity, Boethius was honored in the middle ages as a martyr and even today is revered in Pavia under the title St. Severinus Boethius, Martyr.

His discourse on happiness is in the style of a classical dialogue between himself and the lady Philosophy who comes to console him in prison. His thought reflects the ancient philosophers and neo-Platonists, and to a lesser extent Christian teachings. When Philosophy instructs him that the aim of all men, without exception, whether they know it or not, is the Good, Happiness, God, and that the righteous attain this their aim and end, while the wicked fail to reach it, we see the influence of Augustine as well as of Plato.<sup>13</sup> For Boethius "true happiness . . . is not to be found among any of the perishable things men so eagerly pursue."<sup>14</sup> He says: <sup>15</sup>

The forms of good are the same thing as happiness, and happiness is the Highest Good which is God. . . .

Perfect good [happiness] exists when all the kinds of good . . . are gathered together into a

---

<sup>12</sup> ST. AUGUSTINE, *De Civitate Dei* 19.2.1, as translated in 2 DODS, *op. cit. supra* note 5, at 297.

<sup>13</sup> BARRETT, BOETHIUS, *Some Aspects of His Times and Work* 94 (1940).

<sup>14</sup> *Id.*, at 90.

<sup>15</sup> BOETHIUS, *De Consolatione Philosophiae*, 3.34, as translated in SEDGWICK, *King Alfred's Version of the Consolations of Boethius* 98, 101 (1900).

single kind of good; then there will be no form of good lacking; all the forms of good will form a unity and this unity shall be eternal.

Among other celebrated definitions of Boethius (another example being his definition of eternity), which were commonplaces of medieval scholasticism, is his definition of happiness: *Beatitudo est status omnium bonorum aggregatione perfectus* (Happiness is a state perfected by the accumulation of all good). Boethius' teaching is especially apropos in a paper on natural law and happiness, because his *Consolation* is a conscious attempt to determine what happiness is in the light of reason, unaided by the data of revelation.

There is no doubt whatever that when the Scholastics of the classical age, culminating in St. Thomas, adopted and adapted the ethical system of Aristotle their thought was mightily influenced by Augustine's *City of God* and Boethius' *Consolation of Philosophy*. But since the doctrine of St. Thomas on happiness remains essentially unchanged today in the teaching of scholasticism and in the teaching of the Catholic Church, I will pass it by temporarily, in order to discuss briefly a few of those philosophers who wrote after the time of Descartes, and who were outside the scholastic tradition.

John Locke's teaching is especially important because his works were in the hands of the founding fathers, and his political philosophy was very influential in shaping American revolutionary thought. He discusses happiness and the pursuit of happiness, however, when dealing with free will rather than in a political context. According to Locke, also, happiness is that "which we

all aim at in all our actions.”<sup>16</sup> Desire is the well-spring of all human action. And he declares:<sup>17</sup>

If it be . . . asked, what it is moves desire? I answer, happiness, and that alone. Happiness and misery are the names of two extremes, the utmost bounds whereof we know not. . . . But of some degree of both we have very lively impressions . . . which for shortness’ sake I shall comprehend under the names of pleasure and pain, there being pleasure and pain of the mind as well as of the body . . . or, to speak truly, they are all of the mind; though some have their rise in the mind from thought, others in the body from certain modifications of motion.

Happiness, then, in its full extent, is the utmost pleasure we are capable of, and misery the utmost pain; and the lowest degree of what can be called happiness is so much ease from all pain, and so much present pleasure, as without which any one cannot be content.

He then goes on to explain how the good is that which causes happiness, and the evil that which causes pain, and yet not every good moves man’s desire, because not every good, however great, is apprehended as a necessary part of his happiness. “Happiness, under this view, every one constantly pursues, and desires what makes any part of it. . . .”<sup>18</sup>

Locke’s theory of happiness was closely connected

<sup>16</sup> LOCKE, *An Essay Concerning Human Understanding* 2.21.36, in 2 *Philosophical Works* 380 (St. John ed. 1901).

<sup>17</sup> *Id.*, 2.21.41-2, 2 *Philosophical Works* at 384.

<sup>18</sup> *Id.*, 2.21.43, 2 *Philosophical Works* at 385.

with his idea of a morality based upon the will of God. The ultimate criterion of God's will, and consequently of moral good, is "public happiness" in its highest degree, for God has "... by an inseparable connexion joined virtue and public happiness together. . . ." <sup>19</sup> Hence, says Fowler of Locke, "we have only to ascertain, by the use of the natural reason, what on the whole conduces most to the public welfare, in order to know the Divine Will." <sup>20</sup> This ethical theory, then, is a theistic form of utilitarianism based on a theological regard for the will of God. Its influence on subsequent writers has not always been sufficiently recognized. <sup>21</sup> We shall later see that it appears in the thinking of some of the founding fathers.

Among the writers influenced by Locke was William Paley, Archdeacon of Carlisle (1743-1805) who was a contemporary of the revolutionary statesman and who published his *Principles of Moral and Political Philosophy* in 1785. <sup>22</sup> That work contains a much-quoted chapter on happiness wherein the learned divine strangely enough restricts himself almost entirely to a shrewd consideration of the meaning of happiness in this life, though he admits in passing that "A man who is in

<sup>19</sup> *Id.*, 1.3.6, 2 *Philosophical Works* at 160.

<sup>20</sup> FOWLER, JOHN LOCKE 153 (1880). These are not Fowler's own sentiments; he is paraphrasing Locke.

<sup>21</sup> *Ibid.* "This form of Utilitarianism, resting on a theological basis, and enforced by theological sanctions, is precisely that which afterwards became so popular and excited so much attention, when adopted in the well-known work of Paley. . . . I shall not here criticize Locke's theory so far as it is common to other utilitarian systems of ethics, but shall simply content myself with pointing out that its influence on subsequent writers has seldom, if ever, been sufficiently recognized."

<sup>22</sup> PALEY, *The Principles of Moral and Political Philosophy* in 1 *THE WORKS OF WILLIAM PALEY* (Wayland ed. 1937).

earnest in his endeavours after the happiness of a future state, has, in this respect, an advantage over all the world: for he has constantly before his eyes an object of supreme importance. . . .”<sup>23</sup> His theory of human happiness on earth is reduced to this: happiness consists in a preponderance of pleasure over pain.<sup>24</sup>

The word *happy* is a relative term. . . .

In strictness, any condition may be denominated happy, in which the amount or aggregate of pleasure exceeds that of pain; and the degree of happiness depends upon the quantity of this excess . . .

I hold that pleasures differ in nothing, but in continuance and intensity: from a just computation of which, confirmed by what we observe of the apparent cheerfulness, tranquillity, and contentment of men of different tastes, tempers, stations, and pursuits, every question concerning human happiness must receive its decision.

Despite these pronouncements, Paley’s further exposition shows that he is not a pure hedonist, but rather a theistic utilitarian. For he makes the conduciveness of human acts to temporal happiness, the criterion of their morality; but he recognizes that it is the will of God which has ordained that those acts which in the long run make mankind happy are also morally good.

It is not my purpose here to trace the further development of the concept of happiness in English and Continental philosophers. The theories range from the altruistic stoicism of German rationalists who followed

---

<sup>23</sup> *Id.*, 1.6.23.

<sup>24</sup> *Id.*, 1.6.14-5.

in the footsteps of Emmanuel Kant (1724-1804) to the hedonism and "hedonistic calculus" of Jeremy Bentham (1748-1833), the utilitarianism of John Stuart Mill (1806-1873), and the evolutionary system of Herbert Spencer (1820-1903). Their common denominator, if any, lies in the divorce of philosophy from theology, and a consequent preoccupation with the psychological constituents of happiness in this life, whether it be the happiness of the individual or the "greatest happiness of the greatest number."

The philosophy of happiness with the most ancient lineage is the *philosophia perennis* of scholasticism. The teaching of St. Thomas, derived from Aristotle and Plato through Augustine and the Fathers of the Church, remains essentially unchanged today in the teaching of the neo-scholastics and of the Catholic Church. The following is a brief summary of that teaching: <sup>25</sup>

Man is complex in his nature and activities, sentient and rational, cognitive and appetitive. There is for him a well-being of the whole and a well-being of the parts; a relatively brief existence here, an everlasting life hereafter. *Beatitudo*, perfect happiness, complete well-being, is to be attained not in this life, but in the next. Primarily, it consists in the activity of man's highest cognitive faculty, the intellect, in the contemplation of God — the infinitely Beautiful. But this immediately results in the supreme delight of the will in the conscious possession of the *Summum Bonum*, God, the infinitely good. This blissful activity of the highest spiritual faculties, as the Catholic Faith teaches,

---

<sup>25</sup> Maher, *supra* note 3, at 133.

will redound in some manner transcending our present experience to the felicity of the lower powers. For man, as man, will enjoy that perfect beatitude. Further, an integral part of that happiness will be the consciousness that it is absolutely secure and everlasting, an existence perfect in the tranquil and assured possession of all good — *Status omnium bonorum aggregatione perfectus*, as Boethius defines it. This state involves self-realization of the highest order and perfection of the human being in the highest degree. It combines whatever elements of truth are contained in the Hedonist and Rationalist theories. It recognizes the possibility of a relative and incomplete happiness in this life, and its value; but it insists on the importance of self-restraint, detachment, and control of the particular faculties and appetencies for the attainment of this limited happiness and, still more, in order to secure that eternal well-being be not sacrificed for the sake of some transitory enjoyment.

## II.

### *Philosophical Origins of "The Pursuit of Happiness"*

The never-dying words of the Declaration of Independence cannot be quoted too often, and for our purpose it is necessary to quote some of them again:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the *pursuit of Happiness*.—That to secure these rights, Govern-

ments 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*. [Emphasis supplied.]

When Jefferson sat down to write this declaration he did not have to consult books to find his principles. They were part of his thinking as they were part of the political and philosophical thinking of the times. He tells us himself: "I know only that I turned to neither book nor pamphlet while writing it."<sup>26</sup> And again he tells us that his purpose was:<sup>27</sup>

. . . not to find out new principles, or new arguments, never before thought of, not merely to say things that had never been said before; but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent. . . . Neither aiming at originality of principles or sentiments, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind. . . . All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc.

---

<sup>26</sup> As quoted in BECKER, *The Declaration of Independence* 25 (1922).

<sup>27</sup> *Ibid.*

It has been sometimes the fashion to belittle the fundamental philosophical principles of the founding fathers, and to consider this "common sense of the subject" to be in the nature of a series of glittering generalities, with little or no definite content. But the natural law, like philosophy, "always buries its undertakers."<sup>28</sup> Previous convocations of this Institute as well as the other papers contributed to the present sessions are ample evidence that natural law, which is that portion of the eternal law of God made known to man by the light of natural reason, is not yet dead nor ever will be. I consider the natural law philosophy which was in the very air breathed in England and America in the eighteenth century to be substantially the natural law philosophy of St. Thomas Aquinas and that which scholasticism continues to teach today.<sup>29</sup> Our task at present, however, is to examine the phrase "pursuit of happiness" and determine what its meaning and origin are in the Declaration.

In enumerating fundamental natural rights, many followers of Locke, including Samuel Adams, had been content with the classical enumeration "life, liberty and property." Some modern writers with a predilection for so-called human rights over property rights, and

---

<sup>28</sup> GILSON, *The Unity of Philosophical Experience* 306 (1937).

<sup>29</sup> I am not speaking here of French naturalism or of Rousseau's natural man. The substantial agreement to which I refer includes the following points: an infinite personal Creator, the source of man's inalienable rights and of moral obligation; principles of law and justice which transcend all human positive laws, and which have their basis in God; human nature as the measure in some sense of the immutable principles of morality.

with a prejudice, perhaps, against private ownership, have thought to see in Jefferson's substitution of "pursuit of happiness" for "property" a great innovation. V. L. Parrington writes: <sup>30</sup>

. . . in Jefferson's hands the English doctrine was given a revolutionary shift. The substitution of 'pursuit of happiness' for 'property' marks a complete break with the Whiggish doctrine of property rights that Locke had bequeathed to the English middle class, and the substitution of a broader sociological conception. . . .

But is it not very unlikely that Jefferson would disagree with the Constitution of Virginia which at the very time of the Declaration of Independence was being drafted by George Mason with the assistance of James Madison? That document enumerates as inherent natural rights "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."<sup>31</sup> Nor is there any reason at all for believing that Jefferson did not consider the right of acquiring property as one of the fundamental and unalienable rights for which governments existed to protect. It is much more likely that Jefferson chose the more general term "pursuit of happiness" simply because it was more general and inclusive, and because it echoed an ethical and political view of hap-

---

<sup>30</sup> PARRINGTON, *Main Currents in American Thought*, as quoted in BOYD, *The Declaration of Independence* 3-4 (1945).

<sup>31</sup> VA. CONST. § (1776). This language has been retained in all subsequent Constitutions, and is now found in VA. CONST. Art. I, § 1.

piness current in the philosophy of the times.<sup>32</sup> For there is no doubt that the right to pursue happiness includes the right to acquire property as well as the right to life and liberty; and there can be no doubt, either, that among the then current theories both of ethics and of political science was the idea that happiness is a criterion of morality, and general happiness the ultimate criterion of good government.

The eighteenth century was a period during which nature and power of natural reason were glorified. In England — and consequently in America — although

---

<sup>32</sup> Cf. HARVEY, JEAN JACQUES BURLAMAQUI: *A Liberal Tradition in American Constitutionalism* 123-4 (1937). "Burlamaqui as one source for the phrase, 'pursuit of happiness,' and its underlying philosophy rests upon a number of factors. Jefferson owned a copy of *Natural and Politic Law*. It is conceded that George Wythe, with whom Jefferson studied law, was familiar with the work. In all probability Dr. Small, one of Jefferson's mentors, was acquainted with it. In reading and copying Wilson's pamphlet he imbibed freely the doctrine of Burlamaqui. Moreover, the concept was a rather common one in the thought of the period. The similarity of the concept with that of Burlamaqui is unmistakable. This has been noted by Fisher in his study of this period. Professor Corwin declares a striking likeness. However, he is of the opinion that the immediate source of the phrase was Blackstone. If this should have been the case, it came originally from Burlamaqui. In the early portion of the *Commentaries* Blackstone copied liberally from *Natural and Politic Law*. Sir Henry Maine has charged that Blackstone copied 'textually' from Burlamaqui. Again, granting that Jefferson took the idea from Wilson's *Considerations*, it must be remembered that Wilson copied and cited Burlamaqui as an authority for the concept. Upon the evidence at hand it is submitted that the original of the phrase 'pursuit of happiness' is *Natural and Politic Law*." See also *id.*, at 96, 112, 120 for apposite citations from Burlamaqui. Cf. also BOYD, *op. cit. supra* note 30, at 5 n.10, where it is stated that the phrase "pursuit of happiness" occurs three times in John Locke, though not in a political context. Boyd also cites CHINARD, *Thomas Jefferson, The Apostle of Americanism* (1939), and GANTER, *Jefferson's "Pursuit of Happiness" and Some Forgotten Men*, 16 WILLIAM AND MARY QUARTERLY (2d) 442, 558 (1936). See also DUMBAULD, *The Declaration of Independence and What It Means Today* 60 *et seq.* (1950).

the prevailing tone was religious, and God's revelations in Scripture were still accepted with profound respect, many thinkers (among them Jefferson, I believe) seemed to have lost that: <sup>33</sup>

. . . sense of intimate intercourse and familiar conversation with God which religious men of the sixteenth and seventeenth century enjoyed. Since the later seventeenth century, God had been withdrawing from immediate contact with men, and had become, in proportion as he receded into the dim distance, no more than the Final Cause, or Great Contriver, or Prime Mover of the universe; and as such was conceived as exerting his power and revealing his will indirectly through his creation rather than directly by miraculous manifestation or through inspired books. In the eighteenth century as never before, 'Nature' had stepped in between man and God; so that there was no longer any way to know God's will except by discovering the 'laws' of Nature, which would doubtless be the laws of 'nature's god' as Jefferson said.

This view of Becker has a considerable element of truth in it, for the eighteenth century was the stronghold of deism.

But it does not seem accurate to point to John Locke, as Becker does, as authority for the unqualified proposition that "*men, barely by the use of their natural faculties, may attain to all the knowledge they have.*" <sup>34</sup> For, especially where moral truths are concerned, Locke

---

<sup>33</sup> BECKER, *op. cit. supra* note 26, at 36-7.

<sup>34</sup> *Id.* at 57.

explicitly points out the shortcomings of natural reason.<sup>35</sup>

Natural religion, in its full extent, was nowhere that I know taken care of by the force of natural reason. It should seem, by the little that has hitherto been done in it, that it is too hard a task for unassisted reason to establish morality in all its parts, upon its true foundation, with a clear and convincing light. And it is at least a surer and shorter way to the apprehensions of the vulgar and mass of mankind, that one manifestly sent from God, and coming with visible authority from Him, should, as a king and law-maker, tell them their duties and require their obedience, than leave it to the long and sometimes intricate deductions of reason to be made out of them. Such trains of reasoning the greater part of mankind have neither leisure to weigh, nor, for want of education and use, skill to judge of. . . . You may as soon hope to have all the day-labourers and tradesmen, the spinsters and dairy-maids, perfect mathematicians, as to have them perfect in ethics this way. Hearing plain commands is the sure and only course to bring them to obedience and practice. The greater part cannot learn, and therefore they must believe.

Fowler continues, with excerpts from Locke: <sup>36</sup>

It is true that reason quickly apprehends and approves of these truths, when once delivered, but "native and original truth is not so easily wrought out of the mine as we, who have it delivered already dug and fashioned into our hands, are apt to

---

<sup>35</sup> Locke, as quoted by FOWLER, *op. cit. supra* note 20, at 158.

<sup>36</sup> *Id.* at 159.

imagine;" moreover, "experience shows that the knowledge of morality by mere natural light (how agreeable soever it be to it) makes but slow progress and little advance in the world."

But by the time of the American revolution the seed sown by Locke and his followers had ripened. In addition men had come to have a greater and greater reliance on their ability through mere natural reason to discover the moral laws of nature and the will of God. Consequently, there is considerable truth in the assertion that: <sup>37</sup>

In the eighteenth century . . . these truths were widely accepted as self-evident: that a valid morality would be a "natural morality," a valid religion would be a "natural religion," a valid law of politics would be a "natural law." This was only another way of saying that morality, religion, and politics ought to conform to God's will as revealed in the essential nature of man. . . .

Thus the eighteenth century, having apparently ventured so far afield, is nevertheless to be found within hailing distance of the thirteenth; for its conception of natural law in the world of human relations was essentially identical, as Thomas Aquinas' conception had been, with right reason.

It would be an oversimplification to imagine that the natural law philosophy of the fathers of the revolution represented scholasticism pure and undiluted. Historically it is fair to state that their ideas were a mingling

---

<sup>37</sup> BECKER, *op. cit. supra* note 26, at 57, 61.

of many factors and influences. Bryce points out: <sup>38</sup>

They had for their oracle of political philosophy the treatise of Montesquieu on the Spirit of Laws, which, published anonymously at Geneva forty years before, had won its way to an immense authority on both sides of the ocean. . . . Of the supposed influence of other Continental authors, such as Rousseau, or even of English thinkers such as Burke, there are few direct traces in the Federal Constitution. . . . But . . . abstract theories regarding human rights had laid firm hold on the national mind. . . . The influence of France and her philosophers belongs chiefly to the years succeeding 1789, when Jefferson, who was fortunately absent in Paris during the Constitutional Convention, headed the democratic propaganda.

From English sources they inherited the common law tradition which was primarily Christian and scholastic, although many of them also were influenced by Locke whose ideas on happiness we have previously characterized as a variety of theistic utilitarianism. It cannot

---

<sup>38</sup> 1 BRYCE, *The American Commonwealth* 29-30 (2d ed. 1911). Compare BECKER, *op. cit. supra* note 26, at 27. For evidence of scholastic influence on the Founding Fathers, see the following pertinent references. Figgis, *On Some Political Theories of the Early Jesuits*, 11 *TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY* (N.S.) 94 (1897): "From the Society of Jesus the theory passed to the English Whigs. Locke and Sidney, if they did not take their political faith bodily from Suarez or Bellarmine, [sic] managed in a remarkable degree to conceal the differences between the two." McILWAIN, *The Political Works of James I* xxvii (1918), in speaking of Bellarmine and his fellow Jesuits, stated: "At a single glance it becomes obvious how much English theorists, for two centuries and more owed to a party whom they dared not acknowledge." HUNT, *The Virginia Declaration of Rights and Cardinal Bellarmine*, 3 *CATHOLIC HISTORICAL REVIEW* 276-89 (1917).

be stated apodictically that the happiness philosophy underlying the Declaration was derived from this or that source alone. But we shall indicate some of the doctrines about happiness as the end of government, and happiness as a criterion of morality which appear to have played a part in the political formation of the founding fathers.

Happiness as the end of government is an ancient idea, declares Julian P. Boyd, and it is embraced by James Wilson, Alexander Hamilton, John Adams, George Mason, James Otis and a great number of the contemporaries of Jefferson, to "say nothing of Burlamaqui, Wollaston, Beccaria, Bolingbroke, and a friend of Thomas Hobbes, John Hall. . . ." <sup>39</sup> In fact it is commonplace with scholastic writers, too, that temporal felicity (as they term it, to make sure it will not be confused with beatitude) is the end of civil society. For instance, in a typical manual, that of Nicholas Russo, one finds the doctrine that the end of civil society is the safety, prosperity and perfection of its citizens. The state provides for their safety by making them secure in life, liberty and property; it provides for their prosperity by helping them according to their needs and abilities to provide for themselves a supply of material goods; it promotes the perfection of its citizens by supplying means through which their bodily health, and mental and moral faculties may be perfected. <sup>40</sup>

The same general conception is found in Emerich de Vattel's *Law of Nations*, which was a political manual for John Adams, James Wilson, Thomas Jefferson and

<sup>39</sup> Boyd, *op. cit.*, supra note 30, at 4.

<sup>40</sup> Russo, *De Philosophia Morali* 235 n.320 (1891).

many of the revolutionary statesmen. Vattel teaches: <sup>41</sup>

The end or aim of civil society is to procure for its citizens the necessities, the comforts, and the pleasures of life, and, in general, their happiness; to secure to each the peaceful enjoyment of his property and a sure means of obtaining justice; and finally to defend the whole body against all external violence. . . .

John Adams may have been unconsciously drawing on Vattel, whom he had studied, when he said: <sup>42</sup>

Upon this point all speculative politicians will agree, that the happiness of society is the end of government, as all divine and moral philosophers will agree that the happiness of the individual is the end of man. From this principle it will follow that the form of government which communicates ease, comfort, security, or, in one word, happiness, to the greatest number of persons, and in the greatest degree, is the best.

The philosophy of nature and of natural law found its way into the Colonies in the eighteenth century through Americans educated abroad, and through the works of Newton and Locke and their expositors, which were available at Yale, Harvard and Princeton well before the Declaration.<sup>43</sup> Furthermore the whole common law tradition of England, which was the basis of

---

<sup>41</sup> VATTEL, *Law of Nations*, as quoted in BOYD, *op. cit. supra* note 30, at 5 n.10. Boyd is of the opinion that this philosophy of Vattel, in which human happiness and good politics are intermingled, stems from Leibnitz' theory of human perfectibility which was adopted by Christian Frederick von Wolff and digested and popularized by Vattel.

<sup>42</sup> As quoted in BOYD, *op. cit. supra* note 30, at 4.

<sup>43</sup> See BECKER, *op. cit. supra* note 26, at 74-5.

colonial institutions, was a Christian, natural law tradition.

John Hall, a friend of Hobbes, asserted the pursuit of happiness as a natural right of the individual in 1651 in his work *The Grounds and Reasons of Monarchy Considered*, in these terms: <sup>44</sup>

. . . my natural liberty, that is to say, to make my life as justly happy and advantageous to me as I can, he [the monarch] can no more give away from me than my understanding and eyesight, for these are privileges which God and nature hath endued me with, and these I cannot be denied, but by him that will deny me a being.

The same point of view of the individual's right to pursue his temporal happiness is implicit in the whole conception of happiness and morality adopted by Locke, and exemplified by such diverse writers as Blackstone, Wilson, and Paley.

Blackstone, whose *Commentaries* had a wide circulation in America after their first publication in 1765, expounds the relation between natural law and happiness as follows: <sup>45</sup>

As, therefore, the Creator is a Being, not only of infinite *power*, and *wisdom*, but also of infinite *goodness*, He has been pleased so to contrive the constitution and frame of humanity that we should want no other prompter to inquire after and pursue the rule of right, but only our own self-love, that universal principle of action. For He has so inti-

<sup>44</sup> As quoted in BOYD, *op. cit. supra* note 30, at 4.

<sup>45</sup> 1 BL. COMM. \*40.

mately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter [happiness of the individual] cannot be attained but by observing the former [laws of eternal justice]; and if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connection of justice and human felicity, He has not perplexed the law of nature with a multitude of abstracted rules and precepts . . . but has graciously reduced the rule of obedience to this one paternal precept, "that man shall pursue his own true and substantial happiness." This is the foundation of what we call ethics or natural law.

Of which excerpt I will only remark at this point that it seems to make good and evil depend ultimately on the will of God rather than on His nature, and that it over-simplifies the norm of morality — to say the least.

A similar blending of theology, natural law and happiness as a moral criterion appears to be expressed in the following statement of James Wilson of Pennsylvania: <sup>46</sup>

[God] being infinitely and eternally happy in himself, his goodness alone could move him to create us, and give us the means of happiness. The same principle, that moved his creating, moves his governing power. The rule of his government we shall find to be reduced to this one paternal command — Let man pursue his own perfection and happiness. . . .

---

<sup>46</sup> WILSON, *Of the Law of Nature* in 1 THE WORKS OF JAMES WILSON 99, 104, 105, (Andrews ed. 1895).

. . . what is the efficient cause of moral obligation — of the eminent distinction between right and wrong? . . .

. . . I give it this answer — the will of God. This is the supreme law.

As a final example of this philosophical tendency which was current when the founding fathers lived, and which influenced their views on the pursuit of happiness, let me quote an interesting application which Paley makes of his theologico-utilitarian concept of happiness. For though this was published after the American Revolution, yet it pre-supposes the same ideas that underlay revolutionary thought. In fact it is particularly apropos, as being a criticism of the Declaration itself in the light of a philosophy of happiness taken for granted by Paley with which Jefferson may have agreed. Paley is discussing the grounds of civil obedience. He rejects any original contract or social compact and assigns as "the only ground of the subject's obligation, THE WILL OF GOD AS COLLECTED FROM EXPEDIENCE." He argues as follows: <sup>47</sup>

"It is the will of God that the happiness of human life be promoted:"—this is the first step, and the foundation not only of this, but of every moral conclusion.—"Civil society conduces to that end:"—this is the second proposition.—"Civil societies cannot be upholden, unless, in each, the interest of the whole society be binding upon every part and member of it:"—this is the third step, and conducts us to the conclusion, namely, "that so

---

<sup>47</sup> 1 PALEY, *op. cit. supra* note 22, 6.3.318.

long as the interest of the whole society requires it, that is, so long as the established government cannot be resisted or changed without public inconvenience, [*i.e.*, public happiness] it is the will of God (which *will* universally determines our duty) that the established government be obeyed,"— and no longer.

This principle being admitted, the justice of every particular case of resistance is reduced to a computation of the quality of the danger and grievance on the one side, and of the probability and expense of redressing it on the other.

But who shall judge this? We answer, "Every man for himself."

Among the practical rules inferred from the general one of public expediency, which largely coincides with Locke's "public happiness," is this one: <sup>48</sup>

"The interest of the whole society is binding upon every part of it." No rule, short of this, will provide for the stability of civil government, or for the peace and safety of social life. Wherefore, as individual members of the state are not permitted to pursue their emolument to the prejudice of the community, so it is equally a consequence of this rule that no particular colony, province, town, or district, can justly concert measures for their separate interest, which shall appear at the same time to diminish the *sum* of prosperity [another name for human happiness]. I do not mean that it is

---

<sup>48</sup> *Id.*, 6.3.322-3.

necessary to the justice of a measure that it profit each and every part of the community . . . ; but what I affirm is, that those counsels can never be reconciled with the obligations resulting from civil union, which cause the *whole* happiness of the society to be impaired for the convenience of a *part*. This conclusion is applicable to the question of right between Great Britain and her revolted colonies. Had I been an American, I should not have thought it enough to have had it even demonstrated, that a separation from the parent state would produce effects beneficial to America; my relation to that [parent] state imposed on me a farther inquiry, namely, whether the whole happiness of the empire was likely to be promoted by such a measure; not indeed the happiness of every part; that was not necessary, nor to be expected; — but whether what Great Britain would lose by the separation, was likely to be compensated to the joint stock of happiness, by the advantages which America would receive from it.

Paley is vague in this passage as to whether in his opinion the Americans really had justice on their side. The significance of the quotation, however, is to show that for Paley, with whom Jefferson probably agreed, the general happiness was the test. He was convinced of that, although he might differ with others on the question of fact, whether the American revolt would result in a sufficiently greater happiness of a sufficiently greater number of people to justify itself.

The possibility of misuse and abuse of such a doctrine of happiness did not escape the profound mind of

James Madison, who wrote to Monroe as follows:<sup>49</sup>

There is no maxim, in my opinion, which is more liable to be misapplied, and which, therefore, more needs elucidation, than the current one, that the interest of the majority is the political standard of right and wrong. Taking the word "interest" as synonymous with "*ultimate happiness*," in which sense it is qualified with every necessary moral ingredient, the proposition is no doubt true. But taking it in the popular sense, as referring to immediate augmentation of property and wealth, nothing could be more false. In the latter sense, it would be the interest of the majority in every community to despoil and enslave the minority of individuals.

### III.

#### *Critique of "Pursuit of Happiness" as a Natural Right*

Now that we have had a bird's-eye view of general theories of happiness, and have investigated, superficially at least, some of the sources from which the founding fathers drew their notions on happiness as the end of civil society, and the right of the individual to pursue his own happiness, we are in a position to see where this philosophy fits into the general tradition, and to evaluate from the viewpoint of scholasticism the meaning of the proposition: "Man has a natural right to pursue happiness."

We saw that from the time of Descartes on, there

---

<sup>49</sup> 1 MADISON, *Letters and Other Writings of James Madison* 250-1 (Congressional ed. 1884). Hence, the general welfare should not mean the same thing as the greatest happiness of the greatest number. The equality of man demands that the general welfare, not the greatest happiness of the majority should control.

was a definite tendency to divorce philosophy from theology, and that many subsequent writers, even though religious-minded men, were more interested in analyzing and describing man's felicity in this life than in speculating about the nature of beatitude. Furthermore, the practical bent of the English mind betrayed itself in the psychological approach to the question of man's felicity on earth; a habit of mind which did not relish the metaphysical reaches of Aristotelian thought. The theories of happiness current in Jefferson's day, therefore, were theories of man's happiness in this life. And so we must not imagine that the happiness of the Declaration is the *eudaimonia* of Aristotle or the *beatitudo* of St. Augustine and St. Thomas. It belongs in a different tradition. The pursuit of happiness in this life is broad enough to include doubtless, the pursuit of eternal happiness, and should include it, but the Declaration is dealing with a philosophy of civil society, which concerns itself directly with the temporal welfare of the body politic, and the temporal felicity of its citizens. It is the function of another order, the Church, to provide directly the means of eternal happiness. The state according to its scope and constitution confines itself to temporal concerns.

But since so much of political theory deals with the general welfare as the end of government the question also arises whether the happiness of the Declaration means the general happiness (welfare) of the body politic or the happiness of individual men. It seems to me to be clearly intended as individual happiness in the phrase "pursuit of happiness." Just as every man individually is endowed by his Creator with an inalien-

able right to life and liberty — his *own* life, his *own* liberty —, so each individual is endowed with the right to pursue his own happiness here on earth. On the other hand, at the end of the same paragraph there appears the phrase “their safety and happiness.” Here it is the general happiness or general welfare that is intended, because here the Declaration speaks of the right “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.” It is the promotion of the general happiness for which new governments are formed and for which every government exists.

This theory is in substantial harmony with the scholastic teaching of today. Victor Cathrein, S.J., one of the most widely used of the modern manualists, propounds the following thesis: <sup>50</sup>

The end of civil society is public prosperity, *i.e.*, the sum of the conditions requisite so that as far as possible all the organic members of society will be able directly by themselves to achieve complete temporal felicity, subordinated to their last end. And among these conditions, the enjoyment of the juridical order, as the natural structure of society postulates, occupies the first place while in the second place is a sufficient abundance of the goods of soul and body which are necessary to achieve the aforesaid felicity and which cannot be sufficiently attained by private initiative.

Another author, in asserting that ‘the specific proxi-

---

<sup>50</sup> CATHREIN, *Philosophia Moralis* 391 n.516 (6a ed. 1907).

mate end of civil society is the public good of peace and prosperity, explains that the remoter, but still specific, end of the state is temporal felicity. "That the remote end of the state is temporal perfect felicity we assume from common sense and from the fact that man tending towards such felicity and finding it impossible of attainment in domestic society alone, institutes civil society for the attainment of his perfect temporal felicity."<sup>51</sup> Thus it appears to me that though there are various formulas for expressing the idea, scholasticism is in close harmony with the Declaration in its assertion of temporal happiness as the end of government, and in close harmony with the Preamble to the Constitution which spells out this same temporal happiness.

But there are one or two points worth mentioning where the natural law philosophy of some of the authors we have quoted differs from that of scholasticism.

The first is the idea that the natural law is based on the will of God, *i.e.*, the free will of God. Apparently Locke, and after him Paley, made right and wrong, good and evil, depend solely on the will of God.<sup>52</sup> Certainly from the quotation from Blackstone given above one can infer that he considers the ultimate cause of the distinction between right and wrong to be God's will. James Wilson still more clearly asserts: ". . . what is the efficient cause of moral obligation? — I give this answer — the will of God. This is the supreme law."<sup>53</sup>

Here we find confusion, it seems to me, of the two

---

<sup>51</sup> COX, *Liberty: Its Use and Abuse* 364 n.536 (2d ed. 1943).

<sup>52</sup> Cf. FOWLER, *op. cit. supra* note 20, at 153-4.

<sup>53</sup> WILSON, *op. cit. supra* note 46, at 105.

questions, what is the *cause of moral obligation*, and what *causes the difference between moral good and moral evil*. Scholastic philosophers dispute about the cause of moral obligation, and many of them do invoke the will of God as the ultimate reason why one is obliged to choose good and shun evil,—but the will is not God's *free* will. This, however, is not the same question as what *makes* a good act good and an evil act evil. The basis of this difference, Scholastics teach, is the eternal nature of God, not His will, and especially not His free will. The eternal law of God, universal and unchangeable, is the expression of His very nature. Man's participation in that law through natural reason is called the natural law. Hence the dictates of natural law, when properly formulated, are unchangeable, because they are based on the unchangeable nature of God. It was because of the difficulty of this concept and its practical application to moral problems that there were so many disputes amongst the Schoolmen as to what God could permit by way of dispensation or exception, and what He could not permit as being entirely contrary to His nature and to the nature of man. Some of the eighteenth century philosophers who were outside the scholastic tradition lost sight of this important distinction. Pufendorf, a natural law philosopher much read by the founding fathers, teaches that the ultimate difference between good and evil must be traced to the *free* will of God, but once God freely decreed good and evil to be thus and thus the decree was unchangeable.<sup>54</sup>

---

<sup>54</sup> Cf. CATHREIN, *op. cit.* *supra* note 50, at 74 n. 78.

The second point of difference between scholasticism and the theories of the eighteenth century is akin to the first. The happiness philosophy of Locke and Paley, and presumably of Jefferson, Adams and others, was a kind of theistic utilitarianism: theistic because based on God's will; utilitarian because temporal happiness was made the measure and criterion of human morality. As Wilson stated it: "The rule of his [God's] government we shall find to be reduced to this one paternal command — Let man pursue his own perfection and happiness."<sup>55</sup> God's will makes things good or evil. But His goodness has led Him to *contrive* things in such wise that happiness and good coincide — even on earth. Consequently by computing happiness (temporal felicity) according to quantity, or quality, or extent, or all these combined, one has a measure of goodness or evil. In other words the norm of morality is the usefulness of human conduct in producing temporal felicity either of the individual or of the generality.

Scholasticism teaches, of course, that the good and the ultimate good coincide with beatitude, or eternal happiness. But only in a severely limited sense can we say that human felicity is the measure of the good life on earth. Generally speaking, perhaps, the man who observes the moral law has a better chance of achieving felicity on earth than the man who flouts that law. But as far as observation unmistakably teaches us, that is not universally so. There are so many exceptions, that temporal felicity cannot be the essential criterion in spite of the fact that the sinner often pays for his sins in

---

<sup>55</sup> WILSON, *op. cit. supra* note 46, at 99.

this life, and that nature, as it were, frequently avenges herself on those who rebel against her injunctions.<sup>56</sup>

But this is not the place to refute this type of utilitarianism. It is enough for our purpose merely to point out that the norm of morality according to the Scholastics is not temporal felicity or any other utilitarian ideal, but human nature itself. Thus the true measure and criterion of a human act is a comparison of it with human nature as a whole, viewed in its relations to self, to one's neighbor, and to God. Hence right reason, the natural law, may sometimes demand painful sacrifices which in this life will have no reward. This realistic point of view recognizes that the good are often unhappy in this life and the evil happy, or at least that the good are not as happy as the evil appear to be.

And so finally we come to the question: Has man a natural law right to happiness in this life? — or at least has he a natural right to *pursue* temporal felicity? And let us use the term temporal felicity in the same connotation as Paley — preponderance of pleasure over pain, understanding that both pleasure and pain are of the body, mind and soul — not that I consider this the only or the best way of describing temporal happiness. Perhaps it would be more accurate to say with Janet: "Happiness is not, as Bentham claims, the greatest pos-

---

<sup>56</sup> Compare BUTLER, *Sermon XII, Upon the Love of Our Neighbor* in 2 THE WORKS OF JOSEPH BUTLER 226 (Gladstone ed. 1896): "As we are not competent judges, what is upon the whole for the good of the world, there may be other immediate ends appointed us to pursue, besides that one of doing good, or producing happiness. . . . For there are certain dispositions of mind, and certain actions, which are in themselves approved or disapproved by mankind, abstracted from the consideration of their tendency to the happiness or misery of the world. . . ."

sible sum of pleasure: *it is the highest possible state of excellence, from whence results the most excellent pleasure.*"<sup>57</sup> In other words it would be philosophically more accurate to describe even temporal happiness in Plato's terms of the well-doing (*eupraxia*) of man's higher faculties, which has as its natural concomitant an efflorescence of pleasure. But in speaking of a preponderance of pleasure over pain we at least call attention to the relative and incomplete character of earthly happiness and provide a rough measurement of what is meant by happiness on earth. Nor does this by any means exclude the hope of heaven as an element of that comparative freedom from pain, comparative excellence of functioning, and comparative peace of mind that deserve to be called happiness here below.

I find it impossible to show that *all* men have a right to the *actual* attainment of this kind of happiness on earth, for these reasons: First, there is no such absolute right because there are circumstances in which the observance of the moral law results in unhappiness for this or that individual. Yet the individual has no right to achieve his happiness at the expense of the moral law. Secondly, neither reason nor revelation promises us an infallible reward of earthly happiness in return for observance of the natural law; nor is there anything inherent in the nature of things which prevents me from admitting that life is inevitably unhappy for many people. In fact the doctrine of original sin and its consequences prepares us for much human misery not personally deserved. Thirdly, human experience shows

---

<sup>57</sup> JANET, *The Theory of Morals* 77 (1894).

that many people who without blame on their part, and without any injustice on the part of others, are destined to live unhappy lives. Each one of us can think of many instances, but the example that comes to my mind are the thousands upon thousands of mentally ill. If these sufferers have an absolute right to actual happiness here on earth then someone is doing them a grave injustice. Is it man? No one can point to the man. Is it God? *Absit*. Fourthly, we see so much of the I-have-a-right-to-be-happy philosophy and to what it leads amongst the heroes and heroines of fiction as well as the less heroic characters of real life, that we cannot help but be skeptical as to the existence of any such right.

Men are undoubtedly meant by nature to be happy. They are made for it. And if they observe nature's laws their chances of achieving comparative happiness even in this life are good. (But I have heard a very wise man say that there are no happy lives; there are only happy days.) Furthermore no one will be deprived of eternal happiness except by his own fault. But have *all* men a right from nature to *achieve* actual happiness on earth? Neither experience, nor philosophy, nor revelation warrant the assertion of such a right.

But the right to *pursue* temporal happiness is another matter. That all men have a right to seek the happiness of this world, subject to the dictates of the moral law, and in subordination to their final end, is a proposition so clear that to establish it is to labor the obvious.

First of all, temporal happiness is a good worth having; it is a thing of true value. Even the Stoics recognized this, but sought their human felicity in an attempt to eliminate sensuous pleasures entirely. Certainly

neither scholastic philosophy nor Christian asceticism will tolerate the idea that human pleasures whether of body or soul are something evil in themselves, and to be shunned.<sup>58</sup> Even St. Augustine, the ascetic and philosopher of the *City of God*, enumerates the good things of the earthly city that constitute its blessedness here below.<sup>59</sup> This relation between humanism and the ascetical ideals of Christianity could be elaborated at great length.

Secondly, temporal happiness is a good *specifically proper* to man because the universal instinct of all men is to seek earthly happiness, to shun pain and sorrow, to achieve the peace, contentment and the "well-doing" that befit mankind. Only the most intolerable and irrational pessimism would deny this instinct its scope. Only an insane or upside down philosophy will hold that such a tendency is evil. Its existence is compelling proof that man has a right to seek earthly happiness. For the purposes of illustration this right can be compared with the inherent right which, according to the Scholastics, all men have in relation to property (though in fact it is much more obvious and much more fundamental than that right). Everyone has a right to *acquire* ownership of property. But not everyone has actual ownership. Furthermore those who have not, have no right to acquire property by hook and by crook. So too, everyone has an inherent right to pursue temporal happiness, but those who are without it have no right to

---

<sup>58</sup> Cf. TRINKHAUS, *Adversity's Noblemen: The Italian Humanists on Happiness* (1940) *passim*.

<sup>59</sup> ST. AUGUSTINE, *De Civitate Dei* 22.24, as translated in 2 DODS, *op. cit.* *supra* note 5, at 522 *et seq.*

attempt to acquire it at the expense of the rights of others or in violation of the natural law. Finally, if we examine more in particular what the conditions of this happiness are, they will generally resolve themselves into elements and values which admittedly are objects of natural rights, such as life, liberty, property, and the rest.

Scholastic philosophy and Catholic teaching therefore, as stated above,<sup>60</sup> recognize:

. . . the possibility of a relative and incomplete happiness in this life, and its value; but it insists on the importance of self-restraint, detachment and control of the particular faculties and appetites for the attainment of this limited happiness, and still more, in order to secure that eternal well-being be not sacrificed for the sake of some transitory enjoyment.

And so the "pursuit of happiness," as it appears in the Declaration of Independence, has little to do with the *eudaimonia* of Aristotle or the *beatitudo* of scholasticism. It is concerned with temporal felicity conceived along more practical lines. Indeed, one of the philosophical currents which appears to have influenced it is a type of theistic utilitarianism which scholastic philosophy rejects. Nevertheless, no matter what its sources — and we have seen how varied and mingled they were — as it stands, it is a statement of natural law right entirely in accord with scholastic theory. For it does not assert an absolute right which all men have to the actual achievement of happiness in this life, but rather

---

<sup>60</sup> See note 25 *supra*.

records the self-evident proposition that the right to seek happiness here below is part of man's very nature.

When Augustine was writing *The City of God*, discoursing tranquilly on the nature of happiness, the northern barbarian invaders were overrunning the civilization of Rome. Today when our own civilization is threatened, not only from without by similar oncoming hordes, but from within by some who share the materialistic philosophy of the aggressor, it may seem unduly academic to discourse upon the pursuit of happiness. But happiness is not really academic with any of us. It is our daily preoccupation. Let us thank God, then, that our right to pursue it as human beings, clothed with the dignity that belongs to every human, is protected by the fundamental laws and principles and institutions of the beloved land in which we live.

Civilizations live and die by principles. If the principles of the Declaration of Independence were a mere tinsel of glittering generalities, our American civilization would not have survived to this day. For at the bottom of every human problem, and at the bottom of every political problem, there always lies a theological problem. Who is God? What is He like? Who is man? What is his nature? Is God his destiny?

The founding fathers of this republic had definite answers in their minds to these questions, answers which though not in entire agreement with Catholic faith and scholastic tradition, yet were substantially the truths of the Christian religion and of natural religion. These answers were reflected in their political philosophy. Their house was not built on sand, because their principles were true. Those principles recognized man for

what he is, a creature of God, endowed by God with certain natural rights, and among these, the right to pursue his happiness here on earth.

Our views on happiness are inevitably shaped by our views on these fundamental theological issues. If man is mere matter, his only happiness is the pleasure of this life, whether higher or lower. If man is only a bundle of reflexes and reactions, then his happiness is nothing more than that "adequate adjustment to environment" which is the goal of psychiatry and mental hygiene. But if man is a creature of body and spirit, with the supernatural beatific vision of God as his immortal destiny, then the happiness of this life must be but a shadow of that which is to come; and the agonies of the human heart which besiege us on all sides begin to have some meaning and explanation. Neither this happiness nor those agonies are academic.

What does the *City of God* say about them? Augustine asserts: <sup>61</sup>

. . . that life eternal is the supreme good, death eternal the supreme evil, and that to obtain the one and escape the other we must live rightly. And thus it is written, "The just [man] lives by faith," (Heb. ii. 4) for we do not as yet see our good, and must therefore live by faith; neither have we in ourselves power to live rightly, but can do so only if He who has given us faith to believe in His help do help us when we believe and pray.

---

<sup>61</sup> ST. AUGUSTINE, *De Civitate Dei* 19.4.1, as translated in 2 Dods, *op. cit.*, *supra* note 5, at 301-2.