



5-1-1933

# Paradox of Law and Liberty

Charles C. Miltner

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

## Recommended Citation

Charles C. Miltner, *Paradox of Law and Liberty*, 8 Notre Dame L. Rev. 451 (1933).

Available at: <http://scholarship.law.nd.edu/ndlr/vol8/iss4/6>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

## THE PARADOX OF LAW AND LIBERTY

*The virtue of every subject consists in his being well subjected to his ruler. —Aristotle.*

There is no denying the fact that law is a yoke and a burden. It places a restraint upon action, and a limit upon the exercise of rights. It curbs and regulates, prescribes and proscribes, and sometimes coerces and condemns the doings of men. It insists often enough, if not always, that individuals not only sacrifice a certain freedom of action, but also a part of their material goods, and services, and at times even their lives for the sake of the common welfare. It exacts a price for the security which it gives and the liberties which it makes possible and safeguards. Legislators do not inquire of anyone living within their territory whether they prefer to live therein as citizens, partaking of the common life of the national society, enjoying its privileges and sharing its burdens, or to remain outside and independent of the community and live their own individual life in their own individual way. They simply assume that all such human beings are and ought to be subject to their jurisdiction and so proceed to impose the law upon them. The anarchist and the nihilist are considered not merely as enemies of the state but also as enemies of themselves, of their own genuine welfare, and so are made the object of legal coercion, and forcibly deprived of what they mistakenly conceive to be their liberty. "He who is unable to live in society," says Aristotle, "or who has no need because he is sufficient for himself, must either be a beast or a god."

This is not said in criticism of the legislators. For man is by nature a social being. History credits the assertion to the Stagirite. But surely no one that has ever taken stock of his native endowments needs to be reminded of it. The index of a man's needs are his dependencies. But whereas

animal instincts provide adequately for animal needs in a state of solitude, human instincts leave man in a state of utter helplessness during the whole period of his infancy and adolescence. Even after he has passed through these periods, and acquired the use of his reason, he depends upon association with and the assistance of his fellow-beings in order to bring the art of thinking to a respectable state of development. Man is under the necessity of learning during the greater part of his life, and of developing a set of habits or virtues that are indispensable to social living. Being a free agent, he is under the compulsion of constructing his own moral order. Law is the means to that end.

Now though the individual has a voice in this law-making, it is only one voice out of many. Conflicts of judgment are inevitable. For men differ violently at times both on the question as to what is for the common good and upon the best means for obtaining it. Interests also, especially within a large territory, are so varied that what finally is decided to be necessary for the general welfare unavoidably carries with it hardships for individuals and for groups of individuals. So in this respect also, law becomes a yoke and a burden, a source of irritation and of discontent. A shining illustration of this is the prohibition law. In theory, such a law is thoroughly justifiable if it can be shown to be morally necessary for the common welfare, and as thoroughly unjustifiable if it cannot. But even if justifiable, the means taken to enforce it have furnished occasion for endless irritation, bitter enmities, and violent conflicts of opinion. While some therefore have defended this law as a triumph of justice against an iniquitous and injurious traffic, and looked upon those who have lost their lives in the attempt to enforce it, as little less than martyrs, others, with equal sincerity and zeal for the common good, have roundly condemned it as unnecessary, morally impossible of enforcement and, worst of all, subversive of respect for all laws.

The anarchist lacks reverence for law because he lacks understanding of liberty, and he is confused about liberty because he is confused about life. It is not without reason that the terms life, liberty, and happiness are so often found linked together, nor, as will appear later, is it difficult to trace their connection with law. The first fallacy of the anarchist is the notion that man is an independent being. Nothing could be further from the truth. Independence implies self-sufficiency, the possession of such perfection as to be able to account for one's being and one's actions without reference to or assistance from outside agencies, the ability to make one's own way in life, regardless of what others may do or think. Whatever else anarchy may imply, the apotheosis of man is indisputably its cardinal pre-supposition. For it is not content to say that man is made in the image of God. By demanding utter independence for man, it virtually says that man *is* a god, that is, is supreme and self-sufficient.

But in what is man self-sufficient or independent? Not surely in his existence, for both its beginning and its continuation and its terminus are beyond his control. This is the plain fact; and one need not here moralize about it. Neither is he independent in his intellectual and moral life. Nature does not make him so. Education is essentially a social, that is, a cooperative process. No man literally educates himself, nor can even the most highly educated claim independence of others, if for no other reason than that his powers are neither great enough nor his life itself long enough for him to amass by himself all the relevant facts in even one department of knowledge. And as for morals, whether in the sense of the *mores*, or of acquiring the social virtues of justice and charity, sympathy, prudence, etc., the dependence upon others is so evident that it were idle to attempt to prove it. Neither is the claim of independ-

ence better founded when there is question of political life. There can, of course, be no body politic, no state or civil society, without hierarchy of persons and hence also of rights and duties, and so finally of dependence upon established authority or definite laws.

A nihilistic state would be like an army without training or discipline or officers to coordinate and direct its activities. It would be a crowd of people, not a society of men. Each in going his own way would exclude the possibility of a common way, and so make confusion and conflict inevitable. No, men are not independent; they are rather interdependent. They are not gods, not even perfect human beings, not ideal, but very "real," which means to say, very selfish and self-seeking. Helpless for the most part when left to themselves, they succeed only in the measure in which, following their rational instincts, they group themselves together in a social order and subject themselves to a supreme authority and strive for their common welfare by the use of common means. It is not only that such has always been the case, or historically true, but that man's nature is such that it must always be the case, or philosophically true. The anarchist in refusing to be subject to law, refuses insofar to be a man. In refusing to do reverence to a ruler, he refuses to show a proper regard for himself. An outlaw does not live the life of a man; he rather imitates the habits of a beast of prey. In his mind, might is right, and obeisance is only to the strong.

But anarchy does not always wear the same face, nor speak the same language. There is, after all, something in a name. Few philosophers like the name "materialist." It has an unpleasant connotation. It irritates the public ear. We find them therefore styling themselves "Realists" or "Positivists" or "Nominalists," or choosing some other more euphemistic title. The counterfeit passes with the majority,

and as it is the ear of the majority they wish to reach, they can afford to ignore the criticism of the few who know them for what they really are. So also the anarchist has a pseudonym which, far from causing any shock, rather tickles one's vanity, and so is well received. Let the anarchist but call himself an individualist, and the moral weakness connoted by the former term is transformed into a suggestion of moral strength by the latter. But the delusion is the same in both cases,—the perennial delusion of independence or of self-sufficiency. Where the anarchist says there is no legitimate authority over men, the individualist holds that all authority must come from within man himself; for man forsooth is an end in himself. He will admit that there is an imperative mood, but he will not admit that it is anything more than a mood, nor indeed, more than his own mood. Neither is the case altered by insisting that the imperative is a categorical imperative. For the imperium is of one's own making; it originates in oneself, and so makes one his own legislator, makes one the supreme judge in matters of right and wrong. What is more, it enables one to identify right with liberty, to say with Spencer, following Kant: "Every man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man." Thus if I am willing to grant that others may do as I do, I am at liberty, or have the right, to do anything which I may choose. Thus "the divorcee will say, according to the Kantian formula: 'I insist on my right to a divorce, because I am willing that divorce be raised into a universal law.'"<sup>1</sup> Or, I insist on my right to employ laborers at the lowest possible wage I can compel them to accept, because I have no objection to that principle being raised into a law for all other employers. Paradoxically, the individualist calls himself a liberalist, as though the greatest amount of liberty could be achieved

---

<sup>1</sup> Haas, *Man and Society*, 48.

through the least amount of restraint. How liberty really fares, however, under such a legal theory is clearly seen in the following considerations.

My claim to liberty to employ a destitute man at a mere subsistence wage could surely not be allowed just because I am willing to concede this prospective employee a like liberty to exact from me, if he can, a higher than normal wage. Owing to the difference of circumstances, the liberty of the seeker of employment is by no means a liberty equal to that of the employer. To say to him: "You are free to take this wage or leave it," is in no sense to guarantee him security for his right to the necessities of rational living in return for his labor, but really amounts to extortion and a gross violation of his rights. What he is really told is this: "You are at liberty to take this unjust wage or starve." If the end of law, which is the foundation of rights, is the common good, the well-being of the community, then certain it is that rights conceived as mere liberties fail utterly to secure this well-being for all the members of society. One cannot have his cake and eat it. Freedom cannot be claimed to defeat freedom; or, "a common freedom must be an equal freedom." The restraints of law necessary for social liberty cannot be left to be determined by the individual motivated solely by his personal conception of what liberties should be conceded to all other men. Such subjection to law or submission to legal restraint is far from adequate in order to make a citizen "well subjected to his ruler."

In what then does this virtue of being well-subjected consist? A virtue is a habit, a permanent disposition of mind and will, by the exercise of which things are well done, and the agent himself is perfected, because he is acting in accordance with his rational nature. It is the part of a subject to obey, to conform his will to the enlightened and salutary commands of another who, by virtue of the social organization called the state, has been placed in a position of moral

superiority and hence endowed with the right to ordain through laws the actions of the multitude toward the common good. As a social being therefore, a member of a commonwealth, every man finds himself naturally called upon to cooperate with others, to give up certain individual goods in return for social goods. He really gains by this exchange. He obtains greater security for life and property, greater opportunities and more efficient instruments for personal development, greater freedom to devote himself to other occupations than the constant personal solicitude for his basal needs. By sacrificing a portion of his individual life and accepting in return the limitations and the restraints of the common or social life, he not only does not lose, but he actually enlarges his personal freedom.

Accepting social life, neither as an arbitrary restraint imposed from without by reason of some fanciful ancestral social contract, nor as an evil made necessary by reason of his existence among a multitude of other free beings, but as the normal expression of a spontaneous desire on the part of men to live in a rational manner, he readily realizes that as it is proper for him to be a social being, so also that his proper virtue or most indispensable moral attitude is to yield prompt and cheerful obedience to the laws that society imposes upon him.

Looked at in this way, reverence for law becomes reverence for human personality itself; respect for self becomes respect for law. Law is seen to be indissolubly linked up with life, an inestimable help to the successful conduct of life, and an indispensable means to the end of life. The good man, none will deny, is he who through well directed personal activity has been able in large measure to develop his latent capacities of intelligence and right choice. Goodness or perfection implies evolution, growth, development. It is, as a process, a progressive accumulation of greater freedom, an overcoming of limitations (in knowledge, understanding, judgment, taste, tact) and, as a product, integrity,

completion, finish, fulness of being. For of the good man it is not said, He can *become* wise or just, prudent or charitable; but He *is* wise and just, prudent and charitable.

As in individual life perfection comes of action,—exercise, training, study, thought, reflection, control,—so in social life it is interaction, acting with or for or against others that makes men perfect. But in both cases it is law which determines the right kind of action, that is, the only kind that benefits the doer. It not only *is* law, but it *must be* law that does this. Else it would be quite impossible for us in view of our restricted knowledge and insight to determine in each individual circumstance whether our action would be just or unjust, wise or foolish, helpful or detrimental, right or wrong, perfective or destructive.

It is clear then that even while law is a burden and a yoke, it exempts us from carrying an even heavier burden; even while it restrains, it sets us free; even while it sets limitations, it removes limitations. Because laws, or rules of right human conduct, are provided for me, I am liberated from the burden of labor that would otherwise be mine to determine rules for myself. I am relieved of the worry and care that would otherwise obsess me lest in my ignorance I do wrong to others or injury to myself. I am enabled to pursue my way safely and securely within the varied and complex relationships which bind me to my fellowmen. In a word, reflection makes it clear to me that if there were no effective laws guiding and controlling me, neither peace nor order nor tranquility nor security for life and property, nor opportunity for leisure nor consequently for the development of the intellectual and spiritual life would be possible. Might alone and cunning would decide all issues, and men would revert to barbarism and savagery. The paradox of law and liberty is the paradox of life and love. For as he who would grow in life and love must deny and mortify, restrain and sacrifice himself for the sake of others, so he who would enlarge his liberty under the law must begin by

voluntarily curtailing it in order that thus limited as a prerogative of the individual, it may transcend even its original breadth by being taken up into the more powerful and perfect life of the social organism.

To say then that without law there would be no liberty, while true, is not the whole truth. The full truth is that without law there could be neither civilization nor culture nor rational living of any appreciable kind. The full truth is that it is good law that makes good men, law that directs and guides them to the ends of life known to reason and revealed by God. For if it is true that "law is the perfection of human reason," it is only because human reason in formulating just laws is in accord with the law of nature which, rightly understood, is but the will of Him who set up the order of nature and appointed to each creature its proper place and function in relation to the whole. Ultimately then we should reverence law because we revere God who gave it to us that we might live happily ourselves and worthily of Him.

*Charles C. Miltner, C.S.C.*

University of Notre Dame.