

Origin of Human Rights

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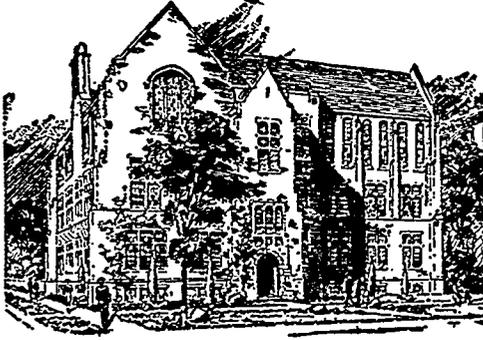
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THE ORIGIN OF HUMAN RIGHTS

WILLIAM STERNBERG

REFERRING to Father LeBuffe's scholasticism as displayed in the recent third edition of his little book on jurisprudence, one reviewer¹ says that it "can hardly be qualified by the term 'neo'—it is pure Saint Thomas Aquinas." It seems to me, however, that throughout Father LeBuffe's new book, there is a very deliberate effort to apply the fundamental principles of scholastic philosophy to present day problems in American jurisprudence. I wonder if the reviewer's criticism does not arise from a misunderstanding of the neo-scholastic movement. I think it may with some reason be said that present day scholasticism bears somewhat the same relation to the philosophy of St. Thomas that the Encyclical *Quadragesimo Anno* of Pius XI bears to the *Rerum Novarum* of Leo XIII. This relation was indicated by Pius XI in his own encyclical² when he said: "The new needs of our age and the changed conditions of society have rendered necessary a more precise application and amplification of Leo's doctrine." Instead of giving us a correction of the Leonine doctrine, Pius XI re-affirms and makes it the basis of a new order. Similarly the neo-scholastic move-

¹ Frederick E. Hines, Book Review (1939) 12 So. CALIF. L. REV. 332.

² Par. 40.

ment certainly does not purport to correct the errors of the old philosophy. It is rather a revival and re-emphasis accompanied by an amplification and adaptation of its fundamental principles to the conditions and problems of the 20th century.³ What especially distinguishes scholasticism, both new and old, particularly in its application to jurisprudential problems, is the recognition of God as the ultimate source of all civil authority and law. That is the unifying principle which gives the whole system its thorough-going consistency and coherence. Without the aid of this principle, it is scarcely possible to work out a convincingly rational system of jurisprudence. The problem as to the origin of human rights may serve as an illustration, particularly if we advance beyond the general theory as to their origin and observe the actual behavior of those who formulate the laws by which we are governed. I refer not only to the actual decisions of the courts, but also the decisions which every member of the legislature must make when he uses his vote and influence to help enact a statute. But first, a word as to the general theory.

The term "right" is so fundamental that it is extremely difficult, if not impossible, to find a more comprehensive term that might be used in defining "right" in the customary manner by genus and species. Any attempt to do so seems to result in an assemblage of words that is either misleading or unintelligible. Take, for instance, Father Rickaby's⁴ definition: "Right is a moral power residing in a person, in virtue whereof he refers to himself as well his own actions as also other things, which stand referred to him in preference to other persons."

It must certainly be a very perspicacious reader to whom that definition conveys any clear meaning. I prefer to define the term by reference to its essential concomitant conditions, particularly duty and law. It is customary to speak of rights and duties as correlative, but there is also a certain sense in which right and law are correlative, inasmuch as law is the essential condition or concomitant of every right. A right is inconceivable without some rule or norm by which that right is determined. To say that I have a right means that there is a certain binding rule of action, a law, which prescribes a certain course of conduct on the part of another person for my benefit. The other person has the duty; I have the right. I do not like to call it a power, as Father LeBuffe does, because, according to the general understanding of these terms, the question whether a person has the power to do a thing is radically different from the question whether he has the

³ Bernhard Jansen, S.J., *Papacy and the Neo-Scholasticism* (1930) 118 *STIMMEN DER ZEIT* 321.

⁴ *REV. JOSEPH RICKABY, S.J., MORAL PHILOSOPHY*, 304.

right to do it. Thus, without attempting a formal definition by seeking a more comprehensive term to designate the thing which we call a "right," it will serve every practical purpose if we say that a right is what a person has when the law prescribes a course of conduct on the part of another person for his benefit.

There is another point to be noted here. It is elementary knowledge that right and duty are correlative, but it is sometimes overlooked that this correlation also makes them co-eval. It is sometimes assumed that the law creates obligations and that rights arise merely as a consequence of the obligation. This assumption would make any case at law turn principally on defendant's failure of duty. The tendency of more recent cases, however, is to put upon the plaintiff the burden of showing that he has some right which has been violated. Even the law of torts, which took its name from the old assumption, is coming more and more, through the influence of Wigmore and the Restatement, to place the right of the plaintiff in the foreground of the consideration, and thus deduce the defendant's failure of duty from the violation of the plaintiff's right. In other words, the tendency of the more recent cases is to reverse the old assumption; instead of determining whether plaintiff's right has been violated by considering whether the defendant has done wrong, they determine whether defendant has done wrong by considering whether he has violated any right of the plaintiff. As a matter of logic, it may perhaps be preferable to deduce the right from the duty, but it should be remembered that in the process of creation, neither precedes the other. They are not successive but simultaneous creations of the law. The same fact-situation which discloses the duty of one person also discloses the right of another person. Rights result from law not merely as an indirect consequence from the creation of duties, but by direct operation. Indeed, it may be said with reference to the act in question, right and duty are not essentially different; they are merely different aspects of the same human act. Thus, if *A* has a duty and *B* has the corresponding right, both necessarily relate to the same act: the duty is to do the act, the right is to have it done, and thus the law, in requiring it to be done, simultaneously creates both the right and the duty. Doctor Cronin⁵ puts it very succinctly thus:

"Sometimes that to which the law obliges one is the doing of some act for the good of another person. The effect of such a law is to establish in one person the duty to do something and in the other person the right to its being done. Right, then, springs from law simultaneously with duty."

We may therefore assume that every human right is the immediate and direct creation of law, but it does not follow that all laws create

⁵ REV. MICHAEL CRONIN, 1 SCIENCE OF ETHICS 660.

rights. There are many which merely recognize and protect rights already created. A moral right is a right created by the moral law, but if I should attempt to use the analogous terminology and say that a legal right is one created by a legal law, I at once flounder in confusion and redundancy, because the English word "legal" is derived from the Latin word for law (*lex*). Moreover, the analogy is merely verbal, not conceptual. I therefore prefer to avoid this terminology and to say that a legal right is a moral right for which the state has provided a sanction. Father LeBuffe⁶ said almost exactly the same thing in the first edition of his book: "A legal right is a moral right which is granted and enforced by the state." Why he deleted this sentence from the second edition of his book, I do not know, but it could hardly be on the ground that he considered it unsound, because he replaced it with the statement⁷ that, unless a moral right is pre-supposed, "the legal right is only apparent, for it is based on an unjust law." The point which I desire to emphasize and illustrate is Father LeBuffe's further statement:⁸ "All legal rights are ultimately based on natural rights," and that the court, in construing a statute, should endeavor to ascertain the natural right upon which it is based and then adopt that interpretation which will most effectively protect that right.

To most practicing attorneys, Father LeBuffe's statement may seem somewhat surprising. They think, for instance, of their common law rights, which in some sense may be considered natural rights but which lawyers usually do not consider inalienable, for the simple reason that many rules of the common law may be changed at any time by statute. Starting from the correct proposition that all rights are created by law, it is assumed that the three classes with which they are most familiar—common law rights, constitutional rights, and statutory rights—are those which are respectively created by the common law, the constitution and the statutes. Let us see to what extent this is true.

COMMON LAW RIGHTS

Father LeBuffe⁹ refers to cases of first impression at common law and says that the courts in such a case "apply the principles of natural justice" and in doing so they "give explicit expression to the implicit principles" and "do not make law," because "when the legislature has not spoken, the resultant freedom of the courts can well be said to be the will of the legislature." The reviewer takes the author very severely to task for this statement.¹⁰ He calls it a "patent fiction" and a "propo-

⁶ LE BUFFE, *PURE JURISPRUDENCE* (1st ed.) 83.

⁷ LE BUFFE, *PURE JURISPRUDENCE* (3d ed.) 146.

⁸ LE BUFFE, *loc. cit. supra* note 7.

⁹ LE BUFFE, *op. cit. supra* note 7, at 25.

¹⁰ Frederick E. Hines, Book Review (1939) 12 *So. CALIF. L. REV.* 332.

sition at which reason rebels." If the reviewer is correct, then the conclusion would be that the jurisdiction of the courts is strictly limited to those cases to which the constitution or the statutes can apply, and all the decisions in the common law cases are just so many examples of judicial usurpation of legislative authority. This, if I may be allowed the retort, is hardly a proposition in which reason rejoices. In such cases the court is confronted with these two alternatives: either it can say there is no law governing the case and hence refuse to entertain the case (which in effect would usually mean a decision for the defendant); or else it can say that there is a law, and then endeavor to determine what it is and decide the case accordingly.

What, then, is the law governing a case that does not come within the purview of any positive enactment, whether constitutional or statutory? It must be a law that was in force at the time the transaction occurred; otherwise it would be open to the objection of being *ex post facto*. And if the decision is for the plaintiff, it can be justified only on the ground that this law created a right which was in existence when the plaintiff started his suit. Out of the thousands of cases of this kind, there is not one which proceeds on the theory that the judicial decision itself creates the right on which the judgment is based. A decision for the plaintiff necessarily implies some right of his, existing at the time the transaction occurred; and since rights arise only by law, it follows that there must have been a law in force at that time. And yet this law, although never enacted or promulgated by any human agency, is nevertheless the law by which the rights and duties of the parties litigant are determined. Thus, in this class of cases, the conclusion is that common law rights are rights created by what scholastic philosophers call the natural law. The rule laid down by the court is merely a deduction from a broader principle in its application to a particular case. The courts, as Father LeBuffe correctly says, "apply the principles of natural justice" by making explicit that which is implicit in the common law.

Take, for instance, the right to own property. If we define ownership as a collection of rights with respect to property and assume that these are natural rights, then it becomes necessary for the courts in particular cases to determine what specific rights are included in this collection. Pius XI¹¹ says: "The limits of ownership have been left by God to man's own industry and the laws of individual peoples." It seems generally conceded that this collection includes the right to have property pass by descent. Thus again Pius XI¹² refers to "man's natural right of owning and transmitting property by inheritance." Father

¹¹ *Quadragesimo Anno*, p. 49, quoting *Rerum Novarum*, par. 7.

¹² *Op. cit. supra* note 11, p. 49, quoting *Rerum Novarum*, par. 6.

LeBuffe includes the right to dispose of the property and makes no distinction between disposition by descent, by devise and by transfer *inter vivos*. It is difficult to determine whether this accords with the view of the English courts or whether they regard the right of disposition *inter vivos* as created by the statute *Quia Emptores* which was enacted in 1290. Feudal tenure as it existed in England before that time did not recognize the owner's right of alienation except by subinfeudation or by the payment of a fine to the overlord. The statute abolished both fines and subinfeudation and provided that "It shall be lawful for every freeman to sell at his pleasure his lands and tenements or any part thereof." In the United States, courts have always assumed, usually without discussion, that ownership includes the right to dispose of the property, but since the statute *Quia Emptores* is regarded as part of the common law in every state of the Union, it can not be determined whether American courts regard this right as created by the statute or created by the natural law and made enforceable by the statute.

On the other hand, the right to use and enjoy property is included in the general collection of rights called ownership, and yet the courts cannot proceed very far in the application of this general rule before they encounter the maxim *sic utere tuo ut alienum non laedas*. This is well exemplified in the cases on lateral support. As a consequence of the application of the natural law which includes in the concept of ownership the right to use and enjoy the property, it has become the established rule of the common law that every landowner is entitled to so much lateral support from the adjacent land as will be sufficient to support it in its natural state.¹³ Thus, if *A* and *B* are adjacent landowners and *B* excavates on his own land in such a manner as to withdraw this lateral support from the land of *A*, he violates *A*'s right of ownership. Thus the natural law which creates the right of ownership and qualifies it with the maxim *sic utere* is, in this kind of a case, made identical with the common law. The conclusion is that our so-called common law rights are rights created by the natural law.

I have spoken only of property cases, but the same proposition may be exemplified by contract cases. Contractual rights, we say, are created by contract. In a sense that is entirely true, and for the superficial student that is a sufficient explanation. Courts themselves rarely, if ever, go beyond that assumption. If it is found that a certain agreement satisfies the requirements of a valid contract, then it is assumed that it necessarily creates rights and duties. But if we stop to inquire why it is that a contract can create a right (or a duty), some further ex-

¹³ 1 TIFFANY, REAL PROPERTY 1187; 1 REEVES, REAL PROPERTY 278; 1 THOMPSON, REAL PROPERTY 654.

planation is necessary. It cannot operate *proprio vigore* because it is the creature of the contracting parties, and we have no statute, no constitutional provision, and no positive enactment of any kind which says that a man must live up to his contract. Thus we are driven back again to the theory of natural rights and to the natural law with its categorical command: *Pacta sunt servanda*. This is a dictate of commutative justice, so universally accepted that courts never stop to discuss it. It is the foundation of our whole law of contracts in common law cases.

CONSTITUTIONAL RIGHTS

If, then, we must look to the natural law for the origin of our common law rights, what about our constitutional rights? It is sometimes assumed that these are created by the constitution. This is a radical misconception. There may indeed be some that are created by the constitution, like the right of trial by jury, but these are created merely for the purpose of protecting a larger and more fundamental right. Thus, the right of trial by jury is created merely as one means of protecting the right to a fair trial for every accused person. These fundamental constitutional rights were not created by the constitution. They are called such because they are *protected* by the constitution. For this reason, we refer to the provisions as "guaranties." They are guaranties of rights created by a more universal law beyond and above all human legislation; rights, existent and most vociferously claimed by our forefathers before the constitution was adopted. Thomas Jefferson formulated the general statement of these rights for all time to come when, in the Declaration of Independence, he declared that all men are endowed by their *Creator* with certain inalienable rights. The conclusion again is that constitutional rights have their origin, not in the constitution, but in the natural law.

STATUTORY RIGHTS

It may be argued that at least our statutory rights originate in positive enactments. To a certain extent this is certainly true, but not nearly in the measure which is commonly supposed. A great many are merely resultant rights in an indifferent situation. The traffic rules furnish the best example of this. Suppose, for instance, *A* and *B* meet at an intersection of streets. If we assume that according to traffic regulations *A* has the "right of way," it means that *A* has the right to keep going and *B* has the duty to stop and let him pass. Here *A's* right, created by statute or ordinance, is not in aid of any other right of his. It is merely a right which results to him as a consequence of the necessity of making *some* rule in an otherwise indifferent situation. The same is true if they are coming from opposite direction on the same street. They could

avoid a collision if each turns to his right or if each turns to his left, but in order that both may know in advance which way to turn, the traffic law says "keep to the right."

Practically all of our other statutory rights should be described by some such word as subsidiary, auxiliary, or ancillary, because they are created by statute merely as a means of protecting and enforcing some other more fundamental or natural right recognized as existing before the statute was enacted. This is true, for instance, of the whole code of procedure, both civil and criminal. All these rights are created by statute merely as a means of protecting the natural right to a fair trial—a right not created by statute, but directly deducible from the natural law.

While this may be more obviously true of statutory rights, created in the field of pleading and procedure, it is by no means limited to such statutes. A good example is furnished by the statute against fraudulent conveyances, which, though not usually regarded as procedural, is nevertheless remedial in its nature. It will be conceded that, within proper limits, a creditor has a natural right to have the property of his debtor applied to the payment of his claim. But suppose the debtor, instead of using his ample means to pay his debt, conveys his property to a third person for the very purpose of escaping liability. The creditor still has his natural right, but in the absence of any property belonging to the debtor, he has no means of enforcing it. This is where the statute against fraudulent conveyances comes in. It gives the creditor the right to have the conveyance set aside. This is strictly a statutory right in the sense of a right created by statute, but it is merely subsidiary to the principal right which existed before the statute was enacted.

Another example is the right to vote, whether regarded as created by statute or by constitutional provision. In either case it is the creature of positive enactment, but it is created, not as an end in itself, but merely as a means of protecting a more fundamental right. The point is clearly stated by Rev. Joseph Keating, S.J.:¹⁴ "No one has an innate right to vote; all have a right to be well governed, but not necessarily by personal intervention in the government." Thus the right to vote is created, not simply to give the citizen the satisfaction of personal participation in the government, but to protect his natural right to be well governed.

There are other statutes whose spirit and purpose would be better understood if it were clearly recognized that the rights which they create were intended merely as a means of protecting some more fun-

¹⁴ 123 THE MONTH 91 (Jan. 1914).

damental and natural right. Let us apply this theory to the Statute of Frauds and the Statute of Limitations.

Take, for instance, the guaranty clause of the Statute of Frauds. No person should be held liable as a guarantor, unless he has actually made a contract of guaranty. But suppose, in an action on an alleged guaranty, the plaintiff procures witnesses who perjure themselves to prove the contract. From a moral standpoint everyone will agree, I think, that the defendant should not be liable on such an alleged contract. In other words, he has a natural right to be free from liability in such a case. The purpose of the statute is to protect this natural right by giving to the defendant in such a case the subsidiary right to require written evidence. It is not because a written promise is in its nature more binding than an oral one, but because written evidence is more likely to be true; it cannot be so easily falsified without detection. Thus it appears again that the statutory right is merely a means of protecting the principal right which existed before the statute was enacted. The other clauses of the Statute of Frauds may be explained in the same way. Their ultimate purpose is to prevent a person from being the victim of perjured testimony. Of course it does not completely accomplish this laudable purpose, but its wisdom and justice is attested by the fact that it has been operating in England and the United States for nearly three centuries (the original statute was enacted in 1676) and, although it has sometimes been criticized, no one has ever suggested that it ought to be repealed.

It is my personal conviction that the same theory should be applied to the Statute of Limitations, which may be explained so as to show that it is not really designed to create title by adverse possession but to protect the natural right of ownership against false claims. It should be construed, not as passing title from the rightful owner to the wrongdoer, but as establishing a rule of evidence for determining who, at the time of the suit, is the real owner, the person who has been in occupation claiming the property as owner for more than ten years, or the person whose only evidence of ownership is a deed of conveyance more than ten years old. To say that the statute operates to take the title from one person and to give it to another would be bad enough, but to say that it takes it from the rightful owner and gives it to the tortfeasor who has no other ground of claim than his own wrongful acts is preposterous. It is equivalent to saying that if a person does a wrongful act, he shall suffer the penalty, and if he continues to do it for nine years, he shall suffer a greater penalty, but if he persists in his wrongdoing for ten years, then he shall not only escape the penalty, but also be handsomely rewarded for his perseverance. There could hardly be a more grotesque distortion of the maxim *vigilantibus non dormien-*

tibus jura subveniunt. I am well aware that courts do not regard the reward of the wrong-doer as the purpose of the statute, but under their construction, that is the necessary effect. And yet such construction was not at all necessary in order to accomplish the general purpose of the statute which is to make land titles more secure. They could easily have adopted the same theory which they adopted in prescription cases. A person may acquire a prescriptive right without the aid of any statute at all, and this by weight of authority is not on the theory that the adverse use creates the right; rather, it is conclusive evidence that the right has been created in some other way, *i.e.*, by grant.¹⁵ The Statute of Limitations could easily have been construed as establishing the same rule of evidence in regard to adverse possession. Actual occupation for ten years with open and undisturbed claim of ownership is certainly some evidence of ownership. On the other hand, a deed of conveyance even though it be ten years old, is also some evidence on the same point. Now the natural law does not say which is the stronger evidence, or which has the greater probative value. This is the proper place for the civil authority to step in with what LeBuffe¹⁶ calls a "determinative positive law." Dr. Cronin also remarks that possession over a long period itself normally raises a presumption of ownership. "And this presumption," he says "is sufficient to justify the civil authority in accepting actual possession over a long period as indicative, even against arguments on the other side, of rightful possession from the beginning."¹⁷

As a matter of fact, the courts did adopt this construction of the Statute of Limitations in its application to contracts. In Nebraska a debt created by a written contract is outlawed in five years. This does not mean that the debt has been extinguished by the statute or by the lapse of time. Rather, the lapse of time is taken as conclusive evidence that the debt has been extinguished in some other way; *e.g.*, by payment, by release, by accord and satisfaction, or by some other technical method of discharge. The fact that for five years the creditor has taken no action to enforce his right is at least some evidence that it has been extinguished in some manner. Whether it should be regarded as conclusive is a question on which reasonable men may differ. Here again is the proper place for the intervention of civil authority, and the courts have had no difficulty in construing the statute as establishing this rule of evidence.

¹⁵ 2 TIFFANY, REAL PROPERTY 2030; 1 REEVES, REAL PROPERTY 195; 1 THOMPSON, REAL PROPERTY 481; BURDICK, REAL PROPERTY 412.

¹⁶ LE BUFFE, PURE JURISPRUDENCE (3d ed.) 129.

¹⁷ MICHAEL CRONIN, SCIENCE OF ETHICS 148.

Thus the contract cases and the cases on prescriptive rights are perfectly consistent with the natural law. If the courts had adopted the same theory in regard to adverse possession, any conflict with the moral law would have been more clearly avoided, and the general purpose of the statute accomplished just as effectively.

Incidentally, it may be remarked that there is a remarkable difference between our law of adverse possession and the canon law of prescription as stated by the Catholic Encyclopedia.¹⁸ It is stated there that "the beneficiary must act in good faith. The Fourth Lateran Council requires this in no uncertain terms." In addition there must be a "semblance of good title." This is not necessary in our law.¹⁹

I cannot help thinking that this striking difference is due to the fact that the courts have construed the Statute of Limitations without reference to any pre-existing natural right. And yet, I hope that this discussion has made it clear that the true meaning of any just positive enactment by which a right is created can be ascertained only by endeavoring to determine what pre-existing natural right it was intended to protect and enforce. Thus Father LeBuffe appropriately puts at the end of his book the conclusion toward which his whole discussion tends and which this article was intended to exemplify in its application to common law rights, constitutional rights, and statutory rights: "All positive law is declarative or definitive of the Natural Law; all rights and duties are derived immediately or remotely there-from."²⁰

¹⁸ 12 CATHOLIC ENCYCLOPEDIA 394.

¹⁹ 2 TIFFANY, REAL PROPERTY 1940.

²⁰ *Op. cit. supra*, note 16, at 272.