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PRAGMATISM AND NATURAL RIGHTS AS SECURED BY THE CONSTITUTION

BY THOMAS P. WHALEN

I

WE ARE conscious that there is abroad today an attitude towards law which is widely different from that of our forebears. There has been an entire change of thought in certain very influential circles as regards the origin and nature of law, the origin, nature, and distinction of rights, the source and sanction of legal precepts. All this involves the relation of civil positive law and morality and, above all, the interpretation of certain constitutional provisions which are bound up with the very nature of the citizen as an independent, self-active, rational creature. One clearly observes the potent modernism of such statements as this.

Law begins as the product of the automatic action of society, and becomes in time a cause of the continued growth and perfection of society.¹

Dean Pound, who is in the vanguard of the forces that have applied the tenets of Pragmatism to the interpretation and reform of the law, essays the following in a very thoughtful and scholarly lecture:

If we compare the juristic writing and judicial decision of the end of the eighteenth century with juristic writing and decision at the end of the nineteenth century, the entire change of front with respect to the source of the obligation of legal precepts, and with respect to the relation of law and morals and consequent relation of jurisprudence and ethics, challenges attention.

Dean Pound has persistently stressed the superior virtues of Pragmatism as a basic philosophy of law. So he enunciates his antagonism to those natural rights which are secured by the Constitution.

The people think of themselves as the authors of all constitutions and limitations and the final judges of their meaning and effect.

What of the theory of natural rights under the logical consequences of such statements as the following:

If in any field of human conduct or in any human relation the law, with such machinery as it has, may satisfy a social want without a disproportionate sacrifice of other claims, there are no bounds imposed at creation to stand in the way of its so doing.

Coming nearer home we find the following characteristic statement of the philosophy of eternal change and flux emanating from the pen of Justice Marvin B. Rosenberry:

What we need in the field of jurisprudence is more thinking with reference to the facts as they exist and less exposition of eighteenth century philosophical concepts. We need clearer apprehension of what is necessary to do justice under the present order and less vindications of the concept of natural rights under the old order.

Arthur F. Hadley, the former president of Yale, refers to the second paragraph of the Declaration of Independence in words whose tone has become familiar to us of the present generation:

Few of us at the present day would be ready to subscribe to quite so broad a statement as this. We know that the right to liberty is not inalienable, but may be forfeited by misconduct. We know that the supposed equality of all mankind is something that has never been actually realized in human history. In fact, the signers of the Declaration of Independence themselves can hardly have meant what they said (was) to be taken literally.²

One cannot close these representative excerpts without some characteristic statements from the pen of the venerable, loveable, but essentially pragmatic, Justice Holmes.

The most fundamental of the supposed pre-existing rights, the right to life, is sacrificed without a scruple, not only in war, but whenever the interest of society—that is of the predominant power in the community—is thought to demand it.³

The same author frowns upon:

The jurist's search for criteria of universal validity which he collects under the heads of natural law.⁴

We could enlarge on our excerpts and citations but we have given sufficient to show the change of front mentioned at the outset. Furthermore, a superficial examination of our citations will convince the reader that the authors of those extracts are actuated by a new general attitude towards the universe which is so peculiarly modern. They are more concerned with fact than with principle. There exists for them no absolutes and immutables. They are immersed in that atti-

⁴Ibid.
tude of continuous flux which is so impressed on the human mind by the monistic materialism of thinkers who are merely camp-followers in the learned array of science. The modern mind has for its idols action, power, speed, and utility, the eternal flux and acceleration of matter which the chief laureate of the Victorian compromise sang in poem of singular and enduring beauty:

"Let the great world swing forever
down the ringing grooves of change."

Consider for a moment the older concepts, and by no means false, of the origin and nature of positive law, of its relation to a natural and eternal law of the sanction of legal rights and precepts. Reflect then on the thought and traditions in which the framers of the American Constitution grew and had their very being and one will be convinced of what a gulf lies between their moral attitude, their concept of natural and civil rights, and that of those modern theorists such as Dean Pound and Justice Holmes who constitute the vanguard of the growing forces.

We find among the works of Lactantius the following passage from Cicero's Last Treatise on the State:

There is a true law, right reason, consonant to nature, co-extensive with the race of man, unchanging and eternal. It is not allowed us to make any alteration in that law: we may not take away any least portion of it; nor can we repeal it as a whole. Neither Senate nor people have the power to release us from our obligation in its regard. We need not search for someone to explain and interpret it. We shall not find one law at Rome, another at Athens, one now, another hereafter; but that law one, everlasting and immutable, is binding on all races and at all times, and there is one common Master and Lord of all, God. He it is who drew up this law.

II

The traditional thought that is an integral part of our Western civilization assumes towards the natural law exactly the same attitude as Cicero. Saurez speaks the ideas of the Catholic Church. His views may be summed up in the following propositions. The civil legislator makes laws as the minister of God: the legislator is required by the divine and natural laws to pass laws; this power and its exercise are necessary for the common good. The scholastic philosophers have upheld the idea of Cicero which is European and traditional from Aquinas who considers the civil law as a participation in the eternal and natural law to the most recent exponent of scholastic ethics who very succinctly states that "all civil law may properly be regarded as

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either a reaffirmation of the natural law, or as an application of its
precepts, principles or derived conclusions."

This idea was held not merely by speculative philosophers but also
by men eminently practical and learned in the law. Thus we have the
clear statement of Blackstone.

This law of nature, being with mankind, and dictated by God him-
self, is, of course, superior to any other. It is binding all over the
globe, in all countries and at all times; no human laws are of any
validity, if contrary to this; and such of them as are valid derive all
their force and all their validity mediately or immediately from his
original.

There are then the glowing words in Washington's Last Inaugural
Address, "We ought to be no less persuaded that the propitious smiles
of Heaven can never be expected on a nation that disregards the eternal
rules of order and right, which Heaven itself has ordained." We
would multiply instances and excerpts to show that the traditional con-
cept of the civil law was in no way divorced from the natural law
which it presupposed, but was reaffirmed or derived many of its con-
clusions therefrom.

There is, however, one notable exception. We cannot overstate the
influence of Kant in modern thought. The grim sage of Konigsberg
was primarily a metaphysician. But while many are ready to admit
his extraordinary influence in the domain of thought speculative and
practical there is not in English speaking countries a proper appreci-
ation of his influence on modern jurisprudence.

To Kant and those who followed him more immediately the first
problem in law was the relation of law to liberty. He lived in an
age of codification, an age of absolute governments, in where there was
and it was taken that there had to be external constraint and coercion.
But he lived also in the age of the French Revolution, a democratic
age in which some other basis than mere authority was required to
sustain the arbitrary and authoritative; the age of the classical economics
in which the individual demanded the widest possible freedom of action.
Hence the problem was how to reconcile these two ideas—external con-
straint and individual freedom of action. This question furnishes the
clue to all philosophical discussion of the basis of law in the last cen-
tury. Kant met it by formulating what has come to be known by
the significant name of legal justice; by working out the idea of an
equal chance to all, exactly as they are, with no artificial or extrinsic
handicaps. In other words, he put a new philosophical foundation
under the idea of justice as the maximum of individual self-assertion
—the idea which came in with the Reformation, and so enabled it to
reach its final logical development in the law of the nineteenth century.

Down to Kant, all jurists had been in agreement as to the methods
of legal science. Much as they might differ as to details they were
agreed in using philosophical method and in postulating a natural law by which all questions were to be tried. As the effect of Kant's demolition of the old natural law came to be felt, for a time philosophical jurisprudence was pushed to the wall, and it is only in the present century that philosophy has begun to regain the place it once held in legal science.⁶

Kant's principle so runs in his own words: "Act externally in such a manner that the free exercise of thy will may be able to co-exist, with the freedom of all others according to a universal law." According to this theory we can see that a right is only a liberty to do what you will as long as you do not harm others, so that you will be willing to have your decision erected into a general rule of conduct. Consider then Herbert Spencer's formulation of a similar principle, "Every man has freedom to do what he wills provided he infringes not the equal freedom of any other man."⁷ Such principles are not based on the natural law. There is no postulation of divinely imposed moral obligations. The functions of the law is conceived as coercive rather than that of promoting the general welfare and protecting those natural rights with which the Creator endowed man. The conceptions of the state as something artificial is Rosseaustic and un-American. When Kant speaks of a universal law we must in no way identify this law with the moral or natural law, rather must it be identified with a universal law of freedom. The will of the individual as the touchstone and interim of the application of this principle and law emanates from the will of individuals or multitudes.

This traditional concept of jurisprudence with its postulation of the facts of the Creator and creature, of divinely imposed obligations, of a natural or moral law which is man's participation in the eternal law colored all our legal thinking until the great revolution initiated by Kant. One appreciates this the more when one turns to what is the chief purpose of our discussion—those natural rights with which man has been divinely endowed and which are guaranteed by the Constitution of the United States. We intend to show that the framers of the Constitution did not think of those rights in the terms of Rousseau and Kant. We intend to touch on the medieval heritage of a democracy based on natural rights. Above all we intend to show that Pragmatism as the philosophical basis for jurisprudence and legal decision destroys the whole theory of natural rights, that its principles are diametrically opposed to that theory and that it is inimical to the spirit of the Constitution interpreted flexibly with proper adjustment of principles to the fluctuation of facts as understood in the light and tradition of its

⁷ Herbert Spencer, Principles of Ethics, II. 46.
framers, and consequently is destructive both of the proximate and ultimate ends of that natural society which is the American State.

III

The second paragraph of the Declaration of Independence clearly enunciates that we have certain inherent, inalienable rights which belong to us not because we are citizens but because we are men. "We hold these truths to be self-evident: that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness." We find that same doctrine enunciated in Article I of the Constitution of Wisconsin, "All men are born equally free and independent and have certain inherent rights; among these are life, liberty and the pursuit of happiness: to secure these rights governments are instituted amongst men, deriving their just powers from the consent of the governed."

For a proper interpretation of the Constitution we must look to the thought and traditions out of which it grew. It would be well to remember in this connection the maxim of Hamilton: "After all, the instrument must speak for itself. Yet to candid minds the contemporary explanation of it, by men who had a perfect opportunity of knowing the view of its framers, must operate as weighty collateral reason." Hamilton again we find advising a controversial adversary of his in words that plainly condemn Hobbes and Rousseau and show us the strict adherence of the writer to the time old theory of natural law and inherent rights.

There is so strange a similitude between your political principles and those maintained by Mr. Hobbes, that, in judging from them, a person might very easily mistake you for a disciple of his. His opinion was exactly coincident with yours relative to man in a state of nature. He held as you do, that he was then perfectly free from all restraint of law and government. Moral obligation, according to him, is derived from the introduction of civil society; and there is no virtue but what is purely artificial, the mere contrivance of political for the maintenance of social intercourse.

Good and wise men, in all ages have embraced a very dissimilar theory. They have supposed that the Deity from the relations we stand in to Himself and each other has constituted an eternal and inimitable law, which is indispensably obligatory on all mankind, prior to any human institution whatever. Wilson in his speech at the Convention in Pennsylvania urges a similar idea:

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Our ancestors were never inconsiderate enough to trust those rights which God and nature had given them, unreservedly into the hands of their princes.\textsuperscript{10}

Again we have a most instructive and most explicit declaration from the pen of Madison:\textsuperscript{0}

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.\textsuperscript{11}

Of the Declaration of Independence, Jefferson himself wrote to Henry Lee, May 8, 1925,

Neither aiming at originality of principle or sentiment, nor yet copied from any particular or previous writing, it was intended to be an expression of the American mind, and to give to that expression proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Sidney, Cicero, Locke, etc.\textsuperscript{12}

Consider then the political ideas of Hamilton, Madison, Wilson, Jefferson. They are the traditional ideas of the Whig political code. They are doubtless rooted in a deeper tradition but that is outside the scope of our discussion. We have to consider the Constitution in the light of this tradition and the circumstances surrounding its origin and growth. We are clearly convinced that it enunciates the protection of those natural rights which it presupposes and that its framers thought of natural rights in the traditional, rational sense as divinely bestowed on man and not created by the state. In this light and in no other must we consider and interpret Jefferson’s immortal synthesis—a document which in spirit and letter would dissolve under the tests and criterion as disclosed by the disciples of the school of thought which today is urged as the only sound basis for general social welfare and legal adjudication.

John Quincy Adams in a discourse delivered in New York in 1839 has a statement which shows that he and his contemporaries never regarded the Constitution as separate and apart from the Declaration of Independence. Said Adams:

The Declaration of Independence and the Constitution of the United States, are parts of one consistent whole founded upon one and the same theory of government.\textsuperscript{13}

\textsuperscript{11} Madison’s Works, Vol. I, p. 250.
\textsuperscript{13} John Quincy Adams, The Jubilee of the Constitution, A Discourse.
Jefferson's immortal synthesis clearly enunciates the doctrine of natural, inherent rights. We can conclude nothing else when we reflect on the thought and traditions prevalent among his contemporaries and with himself. The very words ring out clear and voice the personal enthusiasm of the man for the doctrine of inherent natural rights.

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 governments were 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.

Consider then the relation of those splendid words to the Fifth Amendment to the Constitution of the United States which provides:

No person shall be deprived of life, liberty, or property without due process of law.

This amendment was of course intended as a restriction on the Federal Government only.

Consider then in relation to both the Fourteenth Amendment which provides:

Nor shall any state deprive any person of life, liberty, or property without due process of law.

This it is clear and well settled was and is a restriction in the power of the states.