

Chapter XII

WORKS devoted to natural rights are scarce. None of any importance has been published for over a generation. Sometimes a passing reference is found in sociological works to the history of the subject, but it is usually mentioned only to be dropped like a hot potato. It was Henry Macleod, the Scottish economist, educated at Eton, Edinburgh University, and Trinity, Cambridge, who, in his *Elements of Political Economy*, gave the clearest rendering of the physiocratic theory of natural rights. The quotation which follows is a long one, but its importance is sufficient excuse for its length:

The Creator has placed man upon the earth with the evident intention that the race should prosper, and there are certain physical and moral laws which conduce in the highest degree to ensure his preservation, increase, well-being, and improvement. The correlation between these physical and moral laws is so close that, if either be misunderstood, through ignorance or passion, the others are also. Physical nature, or matter, bears to mankind very much the relation which the body does to the soul. Hence the perpetual and necessary relation of physical and moral good and evil on each other.

Natural justice is the conformity of human laws and actions to natural order, and this collection of physical and moral laws existed before any positive institutions among men. And while their observance produces the highest degree of prosperity and well-being among men, the non-observance or transgression of them is the cause of the extensive physical evils which afflict mankind.

If such a natural law exists, our intelligence is capable of understanding it; for, if not, it would be useless and the sagacity of the Creator would be at fault. As, therefore, the laws are instituted by the Supreme Being, all men and all stages ought to be governed

by them. They are immutable and irrefragable, and the best possible laws; therefore necessarily the base of the most perfect government; and the fundamental rule of all positive laws, which are only for the purpose of upholding natural order, evidently the most advantageous for the human race.

The evident object of the Creator being the preservation, the increase, the well-being, and the improvement of the race, man necessarily received from his origin not only intelligence but instincts conformable to that end. Everyone feels himself endowed with triple instincts of well-being, sociability, and justice. He understands that the isolation of the brute is not suitable to his double nature and that his physical and moral wants urge him to live in the society of his equals in a state of peace, good-will, and concord.

He also recognizes that other men, having the same wants as himself, cannot have less rights than himself, and therefore he is bound to respect this right, so that other men may observe a similar obligation towards him.

What pretends to be a thorough exposition and analysis of the question was published in 1894. It is called *Natural Rights*, and it was written by the late David G. Ritchie, professor of logic and metaphysics in the University of St. Andrews. Quite candidly he says: "The reader may complain that after all these tedious and intricate discussions on matters that concern political practice, I give no practical help; I do not tell him 'what to do.' In answer I might say, in the first place, that my object has not been to preach, to exhort, to arouse to enthusiastic action; there are plenty of people engaged in doing that more or less effectively, more or less wisely. However I may have failed of my object, my object has been scientific, to expose confusions, to set people thinking who can be induced to think." It is true, he gives no practical help, for he discusses every phase of the subject but the basic one, and the chief reason for this lack of constructive aid lies in his method of ap-

proaching through "political practice." He says: "An adequate theory of rights and an adequate theory of the state must rest upon a philosophy of history; and a steady progress in political and social reform cannot be made unless there is a willingness to learn the lessons of experience. . . ." Here it is plain that he considers rights and the political state inseparably bound, and that progress depends on political action. What lessons of experience one should learn so that steady progress may be made are not mentioned. Will the lessons of Babylon, Greece, or Rome serve? Ritchie does not see that every political machine of the past failed to save the state; as it grew in size and complexity, it became top-heavy and could not be supported by the impoverished and rebellious people. Rome learned nothing from the lesson of Greece; Greece learned nothing from that supplied by Babylon. Politicians of the autumns of all civilizations become more Bourbon than the Bourbons. That strange hope, always unfounded, that one civilization will escape the consequences of economic evil practised by its predecessor, always blurs the vision of the well-intentioned investigator. Ritchie hopes but cannot hide his fears. Socialism, anarchism, and other threatening systems, no matter how vaguely described, haunt his mind, and make him fly those ills he knows not of; make him prefer slow, patient reform of the political system in which he has lost confidence. He admits, "it is possible to believe that political and social development is proceeding in a certain direction, if violent revolution is to be averted; and yet to feel very uncertain as to the precise form which society is likely to assume in fifty years time, or in the remote future, and to be rather sceptical about the value of certain remedies which are commonly advocated as if they were panaceas." He agrees that social problems stare everyone in the face, and "socialistic instead of

individualistic solutions are now the more frequently proposed." That was written when it was admitted by all careful observers that there were millions of people in Great Britain existing on the poverty line. But no solution, individualistic or socialistic, that was advocated was ever seriously considered by Parliament. Solutions were dangerous, "leaps in the dark," and every tinkering reform was preferable. In four years the nation leapt into the Boer War and added hundreds of millions to the national debt. One reason he gives why progress must be gradual: "no one nation can solve social problems apart from other nations." Never was a greater absurdity put forward, and if he realized all that is implied in his reason, he must have written his book not to expose errors in the theory of natural rights but to indulge a strange inclination to lay bare the pessimism in his soul.

But what qualifications were his to write a criticism of the theory of natural rights? He was a renowned logician and a respected metaphysician. He had written a work on *Darwin and Hegel*. Scholastically he was as well qualified for the job as anyone in Great Britain, if he had had a glimmering of economic fundamentals. His notion of a philosophy of history, whatever that may be, led him into a morass of trouble from the first. He begins with an analysis of the superficial aspects of natural rights—political rights, as they were announced in American and French declarations of the eighteenth century. This seems to be a strange beginning to make—putting the cart before the horse. It may be the old historical method of going to work; if it is, it must have an advantage not discernible in the first chapter. Now history as a form should include all the elements of the structure of political institutions, so that their character may be determined, and so that their

purpose may be understood. A philosophy of history which begins only with the state cannot be a complete philosophy. It is necessary to know how and why the state came into being, and the search for this knowledge should be the essential in the work of the historian. The old notion of a group of altruists inaugurating a state for the protection of individual rights will no longer serve as a premise. The physiognomic of each civilization is there from its birth, stamped, as it were, indelibly on its features, and every state will function and develop in accordance with the conditions that give it birth. The policies of the state are governed not by rulers so much as they are governed by the circumstances which made them possible, and the circumstances are always the fateful Norns which shape the destiny of the state. Therefore, a knowledge of economic fundamentals is necessary if the development and the decline of the state are to be understood aright. Historians can no longer dispense with primitive or natural conditions and characteristics; the day is gone when their academic rules, made to fit their deficiencies, decided the nature and the limit of the inquiry. Motive, too, can no longer be relegated to limbo as an improper question affronting polite society. As a specimen of confusion the following is hard to beat:

The real significance of the theory of natural rights is, however, entirely independent of any historical, or quasi-historical setting that may be given to it. The real significance of the theory is not to be determined by references to remote ages, or to rude peoples; as with all political theories, and as with all philosophical theories which are a genuine expression of the thought and feeling of the period in which they prevail, its meaning is only understood aright if we consider it in relation to the circumstances of the very time in which it was maintained. The real significance of the appeal to nature is, in the first place, the *negative* element in the appeal; it is an appeal

against authorities that had lost their sacredness, against institutions that had outlived their usefulness; against artificiality in art, in literature, in manners, in dress—against wigs and hair-powder.

The reverse of nearly all this is true. The theory is to be determined by references to remote ages; it is not a political theory, there is no negative element in the appeal to the theory of natural rights; and the significance of the theory is not affected by time and space; indeed, as it was in the beginning, world without end, so long as man inhabits the planet, natural rights will be his for the asking. So far he has not asked for natural rights, because he has not taken the trouble to find out just what they are. Had he known the real significance of the theory, he would not have accepted mere political rights in lieu of natural rights. It is quite true that a few men knew the difference when the declarations of the eighteenth century were made, but so strong were the political reasons for change that they, some reluctantly, sold rights for privileges. If Ritchie had read Thomas Paine with greater care, he would have learned that Paine himself differentiated between natural rights and civil rights. In his controversy with Burke, Paine says: "Natural rights are those which appertain to man in right of his existence . . . every civil right grows out of a natural right. . . ." Paine is always clear about the difference, but it is not easy for students reared on modern political history to follow him; one reason for this being the nature of the conflicts in France and America in which he took a leading role. They were first and last political conflicts waged by politicians. That Paine was conscious of this is clearly shown in his essay called *Agrarian Justice*: "It is a position not to be controverted that the earth in its natural, uncultivated state was, and ever would have continued to be, the common property of the human race." Here he refers to those rights "which appertain to

man in right of his existence." Furthermore, he distinguishes land value from improved value; the idea of landed property arose from the impossibility of separating the improvement made by cultivation from the earth itself, "but it is nevertheless true, that it is the value of the improvement only, and not the earth itself, that is individual property." It is strange how Ritchie can quote Paine, not unsympathetically, and yet seem to avoid the passages which show how well he understood that vast difference between natural rights and civil or political rights. The confusion in which Ritchie flounders all through his book is attributable to mixing up two quite different rights. In criticizing Ulpian's view that "the law of nature applies not only to men but to all animals," Ritchie, repeating Ulpian's statement, "by the law of nature all men at the first were born free," says: "The appeal to the common usage of all animals would hardly serve Ulpian here, had he known of the slave-holding communities of ants. In using these words, he probably only meant that apart from definite human institutions the status of slave did not exist. It might be added, neither did that of the free citizen—the free man in the full sense of the term." What the addition has to do with Ulpian's statement is not clear. If the status of the slave did not exist, apart from definite human institutions—notwithstanding the slave-holding communities of ants—then the man who made the first slave could not have been a slave—and must have been a free man. Not a free citizen, of course not, for time elapsed before the makers of slaves reached the stage of political distinction when robber hordes began to use the terms state and citizen. "The free man in the full sense of the term," therefore, means the free man in the political sense of the term, and denotes a period when the state was fully developed. But is the citizen a free man in the full sense of the term? It should have been

obvious to Ritchie at the time he was writing that millions of citizens in Great Britain were conscious that they were not free in the full sense of the term. The man with a vote is not free because the state permits him to call himself a citizen. Of course, it might be urged that no one in the modern state is free, but, leaving restrictive laws pertaining to the superficial affairs of life aside, only few men enjoy economic freedom; the millions do not. When two entirely different conditions are juxtaposed, as in the statement quoted above, the student cannot help but think the philosopher is a little mixed and does not know he is. As an example of the economic and moral confusion to which Ritchie's method of reasoning leads, suppose, for an exercise in logic, the following: "All men at first were born free, but ancient political society was based on slavery, therefore, the Imperial Roman Code secured for some Roman citizens the property produced by their slaves, but, while recognizing the political principles accepted by mankind in dealing with alien races in time of peace, permitted the robbery of their property and the enslavement of their persons in times of war."

It is a long leap historically, as old records reveal, from men born in economic freedom to the slave basis of the state. Many philosophers of the nineteenth century looking backwards somehow imagined man before the state in the Hobbesian sense, a savage who could not progress without state agencies to assist him. What the savage thought of civilized man, when he came into military contact with him, is another story.

When Ritchie says: "Hence it (*jus gentium*) left much more scope for the exercise of his own judgment of what was right or wrong on the part of the prætor, tempered by that respect for precedent in which the Romans resemble the English—a respect for precedent which has contributed so largely

to the stability and quiet growth of legal and social institutions among both peoples," the student is puzzled to know whether the philosopher is serious or joking. The statement can mean no more than, the Romans had a respect for precedent and the English had a respect for precedent. In what and how their precedents differ does not matter seemingly, so long as a comparison is made. The stability and quiet growth of Roman legal and social institutions, based on slavery, came to an end—and what an end! It will not be *chattel* slavery that will bring England to an end, and the precedents which have made for the growth of her legal and social institutions are so different from those of Rome that any analogy would be far-fetched. Anyway, what is ancient legal precedent but the freebooting herald of privilege disguised in the cap and gown of positive law? Rome never outgrew the precedent of slavery.

Perhaps Aristotle is to blame for leading so many philosophers astray. When he laid down the axiom, "Man is by nature a political animal," he, maybe unwittingly, started many philosophical theologians and sociologists off on the wrong scent. But if he had substituted the word economic for the word political and had made the axiom read: "Man is by nature an economic animal," many philosophers would not have been able to make head or tail of it. Still, philosophers would have written about Aristotle's *Ethics* and *Politics* just as they have written about Socrates' state, but not being able to fit the economic animal into their conception of the political state, they would have left the Aristotelean conundrum alone as strictly as they have left that one on justice presented by Socrates. The aim of civil society and its practice are poles apart. Who now would whole-heartedly accept the Aristotelean ideal, "Civil society has for its aim an alliance offensive and defensive, designed to shelter each individual from

injustice"? But here injustice is that of the political state, offences against positive law. Even the ideal is whittled down to a section of the people: those who are freemen that day. Neither aim nor practice applies to the freeman of yesterday who has fallen into bondage. The ideal of Socrates is something else and admits of none of the quibbles Aristotle delights in, in his *Ethics* and *Politics*. One consolation there is to be offered: Aristotle did not know any more than most philosophers know what Socrates was driving at. Aristotle's *Ethics* are those of a freeman of a state based on slavery. Socrates' ethics antedate slavery.

It is safer from the legal standpoint for the student to go to Sir Henry Maine for guidance. His work, *Ancient Law*, surveys a large field and carries the search for origins far behind the beginnings of the state. Tracing back the reason which prompted Roman jurists to seek the Law of Nature, Maine says:

There are some writers on the subject who attempt to evade the fundamental difficulty by contending that the Code of Nature exists in the future and is the goal to which all civil laws are moving, but this is to reverse the assumption on which the old theory rested, or rather perhaps to mix together two inconsistent theories. The tendency to look not to the past but to the future for types of perfection was brought into the world by Christianity. Ancient literature gives few or no hints of a belief that the progress of society is necessarily from worse to better.

This might have been addressed to such writers as Ritchie, who never got within hailing distance of the theory of Natural Law conceived by Roman jurisconsults. Some philosophers can be so civilized that they can easily make themselves believe that order could not exist before robber herdsmen ceased slaying their victims and made slaves of them. But early Roman

jurists were not so far removed from natural conditions as modern philosophers are. Their memories of patriarchal communities were alive and lingered for long generations after the state was a going concern. The poems of all ancient peoples prove it; indeed, their earliest records reveal many traces of recollection of happier conditions existing before slavery became the basis on which their state was reared. Such memories no doubt stirred Roman jurists to search for a system "which ought gradually to absorb civil laws without superseding them, so long as they remained unrepealed." And they were not the only searchers for "a type of perfect law," who looked to the past for the best system. In the Gathas it is written: "Of the two she chose the husbandman, the thrifty toiler in the fields, as a holy master with good mind's wealth. Never, Mazda! shall the thieving nomad share the good creed." Jesus said: "I come not to destroy the law but to fulfil it." The ancients always looked for something natural and happier for the many rather than what was legal and safer for the few, until the memory of "the thrifty toiler in the fields" was worn out by long generations of slavery; until crushing burdens of legal machinery and fiscal exactions made them fit and proper subjects for the political state. Maine says:

It is important, too, to observe that this model system, unlike any of those which have mocked men's hope in later days, was not entirely the product of the imagination. It was never thought of as unfounded on quite untested principles. The notion was, that it underlay existing law and must be looked for through it. Its functions were, in short, remedial, not revolutionary or anarchical. And this, unfortunately, is the exact point at which the modern view of a Law of Nature has often ceased to resemble the ancient.

Many Tory philosophers think there can be no change of a drastic nature other than revolutionary or anarchical, "the

destruction of all orderly society whatever." The idea of economic change is quite beyond them. Yet it was economic change that underlay the Roman jurists' notion of establishing Natural Law. A system based on economic justice had existed, for the memory of it lingered in the mind of ancient people. Maine is right when he says: "The value and serviceableness of the conception arose from its keeping before the mental vision a type of perfect law." He succeeded in getting at the core of the notion, because he divested himself of the petty legal garments of civilization, and in thought abandoned the modern environment. He stood with the jurisconsults near to boundary-stones of Terminus. It was an attempt in the early history of Rome, like so many attempts of other ancient peoples, to recall a past which lived in the memory as a golden age, when justice required no legal aids, before the "thieving nomad" spared the "thrifty tiller" and made a slave of him.

Many truths have marched to triumph on error, so the philosophers of the "As If" school point out. Vaihinger says: "The logicians of the eighteenth century always regarded it as their duty to include error in a general way within their logical systems." Probably it is wellnigh impossible for modern thinkers to shake off the old errors on which so much philosophy and history are constructed. Owing to the technique of civilization, it may be impossible now to escape the tyranny of error upon which the political state is founded. Vaihinger says: "The consciously false plays an enormous part in science, in world-philosophies, and in life." The Greek notion of an inherited curse and the third curse of the Hebrews might have sprung originally from the same error, though the *Œdipus* legend differs somewhat from the Hebrew injunction regarding the removal of the landmark. That there is a connexion between the old Greek notion of freeing the

land from debt pillars as a means of putting an end to a system which reduced freemen to slavery, and the Hebrew command against removing landmarks, has not been recognized by modern philosophers; nor have they noticed how closely allied is the idea of the office of the god Terminus to the Hebrew command, "Thou shalt not remove thy neighbour's landmark!" Moses knew what slavery was. In his system it was to have no part. After four hundred years of bondage in Egypt it was to be avoided at the cost of the severest penalties; a thing abhorred, a thing accursed. The Romans stoned to death a man who removed a boundary-stone. Hebrews, Greeks, and Romans in their early days evidently thought alike on this question. The error of permitting freemen to be reduced to slavery was recognized by their law-givers. Yet the modern philosopher of the Tory school in a work on *Natural Rights*, finds that "slavery was a necessary step in the progress of humanity." Ritchie says:

It mitigated the horrors of primitive warfare and thus gave some scope for the growth, however feeble, of kindlier sentiments towards the alien and the weak. It gave to the free population sufficient leisure for the pursuit of science and art and, above all, for the development of political liberty; and in this way slavery may be said to have produced the idea of self-government.

The necessary step was about six thousand years; a long step. Consider the progress of humanity from the Indian standpoint, or the Babylonian, or the Greek, or the Roman, that of any ancient people, what development of political liberty saved the state? And was it really a mitigation of horrors in warfare to spare the captive's life and give him the yoke? Was it kinder to send him to Greek mines, where the average life amounted to two years, or to a Roman school for kindlier

sentiments such as the pits and quarries, where at best the life average was six years? It is not easy to define the kindness of cruelty, but to the student seeking information from the great thinkers of nineteenth-century philosophy and history, Ritchie's mitigation of horrors amounts to an extra turn of the screw; and a quick dispatch, such as kind folk give animals, when threatened by pain, was converted to slow torture because the nomad had learned the economic fact that the employment of slaves gives masters "sufficient leisure for the pursuit of science and art." But when did slavery mitigate the horrors of primitive warfare? Was there more or less warfare after any of the great ancient civilizations? Were the hordes behind Alaric primitive or civilized? They have been called barbarian. How slavery had affected Christian civilized warfare is quite another question. Certainly, the abolition of slavery, having served as the "necessary step in the progress of humanity," has in no way mitigated the horrors of civilized warfare; indeed, Maine suggested an increase of bloodshed as a consequence of the decay and abolition of slavery. Ritchie died twelve years before the outbreak of the great war. Maine died in 1888. What they would have thought about the world's greatest political achievement, carried out by the world's most perfect military and naval machines, would have made interesting reading. What would they have thought of the peace treaties! Probably Maine would have noticed that after the development of political liberty it was left to modern statesmen to discover a new way of making slaves, and that other necessary steps in the progress of humanity, as set down in the treaties, have caused such suffering in all parts of the world that many think the horrors of primitive warfare must have been short and mild by comparison.