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# THE AMERICAN REVOLUTION AND NATURAL LAW THEORY

BY LESTER H. COHEN\*

The authors of the Declaration of Independence were not interested in stating a *fait accompli*. They sought to justify the American separation from Britain on the ground that the separation was historically necessary. They attempted, therefore, to state unambiguously not only the reasons that justified America's separation from England, but also a set of general rules for determining whether or not any revolution is justified. Affirming the notion that a people ought not to revolt for "light and transient causes," the document stated that a revolution is justified only when the course of human events makes it "necessary"; only when conditions become "intolerable"; only "when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism. . . ." Under such conditions a people has not merely the right but the obligation to revolt, and therefore, its revolution is justified.

According to the Declaration and to commonly received maxims of eighteenth-century political theory, government is in itself merely a convenience. It operates on the basis of positive law, law created by men for the administration of the state. When government is properly constituted, however, deriving its authority from popular consent, its aim is to secure the happiness of the people and the people's inalienable rights, rights which are rooted in the Laws of Nature and of Nature's God. The government that is properly constituted, then, makes positive law an organic outgrowth of Natural Law.

The Declaration's argument is elegantly constructed to demonstrate the truth of its claims. It is designed to explain and to justify not only this revolution by these revolutionaries at this time. It articulates, in addition, a set of conditions under which any people might justifiably revolt, thereby establishing the universality of its argument and, at the same time, preempting the anticipated counter-claim that it was merely an expedient way of rationalizing actions which had already been taken. Similarly, to avoid the suggestion that it was designed solely for expediency, the Declaration rests the morality of revolution on its historical necessity: because British policies subverted the British constitution, leading inexorably toward the creation of an "absolute despotism," the revolution was necessary; and because it was necessary, it was morally justifiable.

More important, the argument of the Declaration is a subtle, if ambiguous, blending of empirical historical analysis and the metaphysics of Natural Law. To prove its central contention—that the revolution was made necessary by British policies—the document enumerates twenty-seven specific events in

\* This essay grows out of a paper which I delivered to the History Conference of the Indiana Academy of the Social Sciences, October 17, 1975. I am grateful to Professor Lester Schmidt, editor of the Academy's *Proceedings*, for allowing me to publish this expanded version of the paper.

recent history which reveal precisely how Britain acted to establish a despotism. These twenty-seven events, listed as grievances, constituted a strong case for the expediency of a revolution, for this people's rebelling at this time; and the reader of the document who would be satisfied with arguments of expediency alone, could accept that the enumerated grievances called for strenuous action, even action of a revolutionary nature.

But the revolutionaries meant to transcend arguments of expediency, for such arguments were always subject to the vicissitudes of opinion and opinion might lead one to conclude that a revolution was in fact unnecessary and therefore unjustifiable. To remove their claims from the arena of opinion and to ground them with certainty, the revolutionaries felt constrained to found the argument for justification on the principle of Natural Rights which was rooted in the theory of Natural Law as applied to politics and society. Thus the grievances enumerated in the Declaration, weighty in themselves for some readers, were for others concrete examples of how one nation attempted to subordinate another to an "absolute despotism." The grievances, taken together, demonstrated that British policies had violated the fundamental principles of Natural Law itself.

By thus attempting to join universal rules with specific conditions, moral truths with historical necessity, and metaphysical principles with empirical historical facts, the Declaration sought to justify as well as to account for the American separation from Britain. But "justification" meant more than the creation of a useful myth or an expedient rationale for the revolutionaries' actions. It entailed the articulation or, at the very least, the presupposition of an immutable standard of value against which the necessity and the propriety of revolution could be measured. That standard was Natural Law, a standard which assured epistemological certitude because it was transcendent, universal, and immutable, and thus beyond the ravages of historical exigency.

At the heart of the Declaration, then, was an unstated epistemological assumption about the universal truth of Natural Law and about how men could in practice know that truth. Because the Declaration was not only a statement about a practical political event, but was in itself a crucial aspect of that event, this unstated epistemological assumption could remain unstated. Precisely by juxtaposing, without resolving, the empirical and the theoretical, the immanent and the transcendent, the Declaration left to its readers or auditors the problem of making clear the relationship between specific historical events and the truths of Natural Law. Attempting to justify the revolution in retrospect, however, proved a more difficult task. For in retrospect the ambiguity that persisted through the Declaration—the ambiguous relationship between the historical and the transcendent—became glaring. To justify the revolution in retrospect on the basis of principle required a new mode of interpretation, and that new mode, practiced by the historians of the revolution, involved the transformation of Natural Law into an historical process.<sup>1</sup>

<sup>1</sup> See in general, Carl Lotus Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (1922; rpt. New York, n.d.); Leo Strauss, *Natural Right and History* (1950; rpt. Chicago, 1974); Otto Gierke, *Natural Law*

America's "revolutionary historians," those contemporaries of the Revolution who wrote histories of the era, sought to accomplish what the authors of the Declaration seemed to have achieved so elegantly and easily: to justify the separation from England on the ground that historical conditions had made a revolution necessary. Like the authors of the Declaration, the historians, as Mercy Otis Warren put it, meant "to justify the *principles* of the defection and final separation from the parent state." The purpose was educational, even didactic, and the aim could not be achieved without relying on arguments of principle. John Lendrum said that he wrote history in order to provide future generations of Americans with the means "to form just ideas of the liberties and privileges to which the colonies were entitled by their charters." No argument for expediency would suffice to justify the revolution. Justification required statements of fundamental principle.<sup>2</sup>

Indeed, the historians, even more than the authors of the Declaration, were careful to make clear the distinction between arguments for expediency or utility and arguments for necessity which could only be founded on fundamental principle. Jedidiah Morse, for example, sharply distinguished between what he called "a mere question of EXPEDIENCY," and "metaphysical disquisitions about abstract rights," each of which was a valid form of argumentation as long as each was confined to its proper sphere.<sup>3</sup> Mercy Warren emphasized the same distinction, stating her disgust with some members of parliament who would "shamelessly . . . avow the necessity of leaping over the boundaries of equity, and [wink] out of sight the immutable laws of justice." Accusing parliament of giving in to arguments of expediency, she observed that the greatest evils lay in the idea espoused by Lord Mansfield, "that the original question of *right* ought no longer be considered; that the justice of the cause must give way to the present situation. . . ." Warren railed at this sacrifice of principle to a relativistic, situational ethic, reaffirming the idea that, when questions of truth and right were concerned, one properly appealed to "the immutable laws of justice" and to "the principles of rectitude."<sup>4</sup>

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*and the Theory of Society, 1500 to 1800*, trans. with an intro. by Ernest Barker (Cambridge, 1950), esp. Ch. 2. For a discussion of scientific natural law and its application to society: Caroline Robbins, *The Eighteenth-Century Commonwealthman* (New York, 1968), 67-72.

<sup>2</sup> Mercy Otis Warren, *History of the Rise, Progress and Termination of the American Revolution* . . . (3 vols.; Boston, 1805), I, viii; John Lendrum, *A Concise and Impartial History of the American Revolution* . . . (2 vols.; Boston, 1795), I, 107. See in general, William Gordon, *The History of the Rise, Progress, and Establishment of the Independence of the United States of America* . . . (4 vols.; London, 1788), II, 295; Timothy Pitkin, *A Political and Civil History of the United States of America* . . . (2 vols.; New Haven, 1828), I, iii; David Ramsay, *The History of the Revolution of South Carolina* . . . (Trenton, 1785), I, Preface, and *The History of the American Revolution* (2 vols.; Philadelphia, 1789, rpt. London, 1793), I, Preface.

<sup>3</sup> Jedidiah Morse, *Annals of the American Revolution* . . . (Hartford, 1824), 109.

<sup>4</sup> Warren, *American Revolution*, I, 280-81; III, 414.

Justification depended upon arguments of principle, and only arguments of principle could constitute the necessity of a movement for independence. Timothy Pitkin found the emphasis upon necessity in the colonies' instructions to their delegates to the Continental Congress. New Jersey, for example, instructed its delegates to support a motion for independence "in case they judged it necessary and expedient for supporting the just rights of America. . . ." Similarly, Pennsylvania stated that it would support independence, but "at the same time, asserted, that this measure did not originate in ambition or in an impatience of lawful authority, but that they were driven to it, in obedience to the first principles of nature, by the oppressions and cruelties of the king and parliament, as the only measure left to preserve their liberties, and transmit them inviolate to posterity."<sup>5</sup> Maryland, according to Pitkin, affirmed the same notion that independence was a proper action only if it were deemed a necessary action, and only if it were taken as a last resort to preserve fundamental rights and liberties.<sup>6</sup>

The historians' concern for demonstrating the necessity of the separation from Britain was nowhere clearer than in David Ramsay's simple assertion that "Necessity, not choice, forced [the Americans] on the decision" to revolt.<sup>7</sup> Following the argument of the Declaration itself, he added that the historical conditions then prevailing "made a declaration of independence as necessary in 1776, as was the non-importation agreement in 1774, or the assumption of arms in 1775." The logic of necessity was inexorable: the declaration "naturally resulted" from these earlier events, just as they had been necessitated by still earlier ones.<sup>8</sup>

Writing in 1788, William Gordon presented a similar case for the necessity of the revolution. By the time British and American forces engaged at Lexington and Concord, the contest would have to "issue in independence or slavery" for the colonies. The decision to declare independence "may be deemed by some presumptuous," he continued. "But how could it have been avoided?"<sup>9</sup> Likewise, Jedidiah Morse was convinced that in 1776 the "immediate necessity [of independence] was proved."<sup>10</sup>

Morse coupled his claim for the necessity of independence with the notion that the stakes of the contest involved nothing less than Americans' "natural and indisputable rights," the parameters of which were "certain and thoroughly understood."<sup>11</sup> Mercy Warren presented perhaps the clearest case for the relationship between historical necessity and the Natural Right-Natural Law thesis when she observed that the American people "considered [Britain's] measures as the breach of a solemn covenant; which at the same time that it subjected them to the authority of the King of England, stipulated to them all the rights and privileges of free and natural born subjects." When such a solemn covenant is broken, when the King demands subjection at the same time refusing to acknowledge the people's rights, then the obligation to obey is annulled and, as Warren stated it, the people must "hazard the consequences of returning to a state of nature, rather than quietly submit to unjust and arbitrary measures continually accumulating."

<sup>5</sup> Pitkin, *Political and Civil History*, I, 363.

<sup>6</sup> *Ibid.*, 364.

<sup>7</sup> Ramsay, *American Revolution*, I, 335.

<sup>8</sup> *Ibid.*, 338.

<sup>9</sup> Gordon, *History* II, 296-97.

<sup>10</sup> Morse, *Annals*, 246.

<sup>11</sup> *Ibid.*, 255.

Precisely when a people is returned to a state of nature Natural Law and its concomitant Natural Rights begin to operate directly and immediately.<sup>12</sup>

These historians sound confident that the separation from Britain was justified because historical conditions had made a revolution necessary. The Crown's policies constituted a threat not merely to positive law but to the Law of Nature itself. But the historians were writing in retrospect and they became aware of certain difficulties that arose as a consequence of retrospective analysis. The easiest argument to make, after all, was that what happened in fact, happened by necessity. The historians had no difficulty *asserting* the necessity of the revolution, but the ground upon which they argued that necessity was eroding under their feet. They discovered that necessity and justification could exist independently of one another, and that even if they could demonstrate that the revolution was necessary they still might not be able to make an absolute case for its justification.

In fact, the historians found themselves arguing the case for necessity on the ground of expediency, and yet it was exactly such arguments which they felt constrained to transcend. David Ramsay noted that "Several [people] on both sides of the Atlantic, have called the declaration of independence 'a bold, and accidentally, a lucky speculation,' but subsequent events have proved, that it was a wise measure."<sup>13</sup> John Marshall also resorted to a retrospective analysis based upon expediency when he observed that, despite the opposition of a "formidable minority," "It cannot, however, be questioned, that the declaration of independence was wise and well timed. . . ."<sup>14</sup> The problem, of course, was that it *could* be questioned. Relying on "subsequent events" seemed to prove nothing.

Similarly, when William Gordon claimed that the separation from England was "unavoidable," he attempted to demonstrate the truth of his claim by asserting: "The people were ripe for it. Prudence dictated a compliance with their expectations and wishes. A disappointment might have disgusted [them], and produced disorder." By the same token, declaring independence, according to Gordon, might result in many advantages to the Americans; it might make the French less "timid" and "animate" them to exertions on behalf of the new nation. The people, moreover, "have nothing worse to apprehend from the declaration than before. . . . Besides, the quarrel is in such a stage, that it cannot be ended with safety to the inhabitants, but by their separating from Great Britain, and becoming independent. . . ."<sup>15</sup>

What more utilitarian argument for expediency could Gordon have presented? He not only made no reference to the transcendent, immutable Laws of Nature, nor to "the principles of rectitude," but he depicted the declaration of independence as a cunning subterfuge, a ploy to gain material

<sup>12</sup> Warren, *American Revolution*, II, 145; John Locke, *Two Treatises of Government*, ed. with intro. by Peter Laslett (Cambridge, 1960; rpt. 1963), *Second Treatise*, Ch. 2, sects. 1-12; Ch. XVI; Strauss, *Natural Right and History*, 202-51.

<sup>13</sup> Ramsay, *American Revolution*, I, 347.

<sup>14</sup> John Marshall, *The Life of George Washington* . . . (5 vols.; Philadelphia, 1804-07), II, 413.

<sup>15</sup> Gordon, *History*, II, 297; Jeremy Belknap, *The History of New Hampshire* (3 vols.; Boston, 1792), II, 405.

and political advantages for the American cause. Indeed, Gordon's argument represented the same cynical sacrifice of principle to expediency for which Mercy Warren had excoriated parliament.

Even Jedidiah Morse, the historian who had so scrupulously distinguished between questions of mere expediency and metaphysical principles of Natural Law resorted in his own writings to the argument for expediency. With the events of 1775, Morse wrote, "the question of the expediency of independence [was] decided." "While the *legality* of the measure was thus argued," he continued, "its immediate necessity was proved."<sup>16</sup> Here the final twist of logic is turned, confusing altogether the usual terms of the debate. For Morse was willing to see the necessity of independence as a function of its expedience; and the obvious implication of his statement is that, even if debate were to conclude that independence was illegal it was, nevertheless, necessary, and because it was necessary it was justifiable.

The problem of reconciling arguments of expedience with arguments of principle which would justify the revolution was nowhere clearer than in the historians' attempts to discuss a sympathetic figure who had opposed independence. Tories were one thing; John Dickinson was another. Almost all of the historians made it a point to observe that some "worthy men," among whom they numbered John Dickinson, had given serious thought to the implications of a decisive break with Britain. When the Continental Congress was debating the issue of independence men like Dickinson had doubts that a separation was even desirable, much less necessary. David Ramsay referred to men like Dickinson as "misguided" but "honest" men, "respectable people whose principles were pure, but whose souls were not of that firm texture which revolutions require." William Gordon added that when Dickinson opposed independence he did so "openly, and upon principle."<sup>17</sup>

But how could one say with such certainty that John Dickinson, a man who had been in the forefront of the struggle against British policies since the 1760's, was "misguided?" And if he were an "honest" man whose principles were pure, did that imply that Dickinson was appealing to some standard or set of principles other than the Laws of Nature, or "the immutable laws of justice," or "the principles of rectitude" to have arrived at his erroneous opinions? Insight into Natural Law required intuition, according to John Locke. Whose intuition into the Laws of Nature was brighter, more immediate, more certain: Ramsay's or Dickinson's? Any answer would be as absurd as the question.<sup>18</sup>

Something clearly was wrong, and the problem seemed to lie in the traditional theory of Natural Law or with its retrospective application to concrete historical events. Indeed, the traditional theory seemed to be flying back in the face of the historians, for its greatest virtue—the fact that it offered epistemological certitude because it was transcendent—now seemed to be its greatest pitfall. For the gap between the transcendent and the his-

<sup>16</sup> Morse, *Annals*, 246; my emphasis.

<sup>17</sup> Ramsay, *American Revolution*, I, 337; Gordon, *History*, II, 289; Marshall, *Life of Washington*, II, 412-13.

<sup>18</sup> John Locke, *An Essay Concerning Human Understanding*, Collated and Annotated by Alexander Campbell Fraser (2 vols.; New York, 1959), II, 176-78.

torical seemed to have widened beyond man's ability to bridge it philosophically. Peter Gay has observed that by the end of the eighteenth century European thinkers had given up the Natural Law thesis and had become confirmed proponents of the principle of utility. Leo Strauss has also suggested that the seeds of the crisis of Natural Rights theory which were being harvested in the late eighteenth century had been sown as early as the mid-seventeenth century, when Thomas Hobbes had written *De Cive* and *Leviathan*.<sup>19</sup> America's revolutionary historians, however, tried to face the difficulties which others had either avoided or overcome to their own satisfaction. But in the face of such troubling logic, Mercy Warren, for one, resigned herself to the idea that, try as man might to understand and to live by transcendent imperatives, he "yet discovers an incapacity to satisfy his researches, or to announce that he has already found an unerring standard on which he may rest."<sup>20</sup>

If the logic of transcendent, immutable Natural Law seemed no longer to work in practice, why, then, did the historians persist in using the rhetoric? It is tempting to conclude with good twentieth-century "political realism" that Natural Law had become a fiction, providing no more than a rhetorically strategic language which was enormously useful for disguising the real, less than divine, reasons for separating from Britain. It is also tempting to see the revolutionary historians' use of Natural Law theory in the light of how nineteenth-century idealistic philosophers transformed it, or in the light of the Utilitarians' rejection of the theory altogether. The historians, however, did not articulate an incipient theory of dialectical idealism, nor were they prepared to abandon the theory of Natural Law and to replace it with the principle of utility. For they feared that to eliminate a transcendent standard of truth and value meant to plunge man into a chaos of relativism, leaving him to sink or swim in an ethical and historical whirlpool which was devoid of certitude or even meaning.

There was, however, already present in the histories an alternative to relativism and to transcendent absolutism, although the modern reader will almost doubtless agree with Daniel Howe's judgment that the alternative was at best "a brave front," which for a time "helped stave off intellectual chaos."<sup>21</sup> The alternative involved the perpetuation of the theory of Natural Law, but it was a Natural Law no longer conceived as a static body of immutable principles. Rather, Natural Law was historicized; it was seen as a process by which fundamental principles were made concrete in the course of history itself. Natural Law was thus conceived to require historical action or practice for it to be "legal."

James Wilson, America's most important legal philosopher of the period, came closest to stating this processive theory of Natural Law *as* a theory. By doing so he pointed to the problem and to the possibility of its solution in practice. In his essay "Of the Law of Nature," Wilson wrote unequivocally

<sup>19</sup> Peter Gay, *The Enlightenment: An Interpretation: The Rise of Modern Paganism* (New York, 1967), 18; Strauss, *Natural Right and History*, Chs. 5, 6.

<sup>20</sup> Warren, *American Revolution*, III, 423.

<sup>21</sup> Daniel Walker Howe, *The Unitarian Conscience: Harvard Moral Philosophy, 1805-1861* (Cambridge, Mass., 1970), 29.



that "The law of nature is immutable," and that "The law of nature is universal." But he also observed that "It is the glorious destiny of man to be always progressive," and that man's progress was directed by immutable principles.<sup>22</sup> Perhaps contrary to one's expectations, Wilson did not resolve this apparent ambiguity by suggesting that man's progress was itself a law of nature. Rather, he argued that "the law of nature, though immutable in its *principles*, is progressive in its operations and effects. Indeed the same immutable principles will direct this progression."<sup>23</sup>

Insofar as Wilson continued to affirm the transcendence of Natural Law, his thesis failed to overcome the difficulties inherent in the traditional theory, difficulties which the historians ran into when they attempted to justify the revolution in retrospect on the ground of necessity. But Wilson had opened another dimension of Natural Law theory by seeing it is a process in which "[the natural law] will not only be fitted, to the contemporary degree, but will be calculated to produce, in future, a still higher degree of perfection."<sup>24</sup> Natural Law, then, while immutable in its *principles*, required history for its fulfillment.

If Wilson and, to some extent Thomas Jefferson, pointed the way to a processive theory of Natural Law, it remained for the historians of the era to realize the theory and to make it work in practice.<sup>25</sup> In the writings of the historians the processive theory of Natural Law was, in the first place, shorn of its transcendence. The Natural Rights of man, which are rooted in the Law of Nature, wrote Mercy Warren,

are improved in society, and strengthened by civil compacts; these have been established in the United States by a race of independent spirits, who have freed their posterity from the feudal vassalage of hereditary lords.<sup>26</sup>

The significance of Warren's formulation is two-fold: in it she implies that Natural Rights are abstract rights; they become actual rights only in historical situations, only when "a race of independent spirits" practices them. Secondly, to demonstrate the legality of Natural Rights and to know, therefore, when they have been violated, the historian must establish that those rights have a tradition, that they have been practiced for generations.

In his historical survey of the *Canon and Feudal Law*, John Adams exhorted:

Be it remembered, that liberty must, at all hazards, be supported! We have a right to it, derived from our maker! *But if we had not*, our fathers have

<sup>22</sup> Robert Green McCloskey, ed., *The Works of James Wilson* (2 vols.; Cambridge, Mass., 1967), I, 145-46.

<sup>23</sup> *Ibid.*, 147; Wilson, "Of the General Principles of Law and Obligation," *ibid.*, 97-125. <sup>24</sup> *Ibid.*

<sup>25</sup> Jefferson's "A Summary View of the Right of British America . . . (1774)" in *The Portable Thomas Jefferson*, ed. Merrill D. Peterson (New York, 1975), 3-21, can be read as a harbinger of the processive theory of Natural Law. Like the Declaration of Independence, however, it is still more an uneasy mixture of the historical and the transcendent than a synthesis of them.

<sup>26</sup> Warren, *American Revolution*, III, 327; Ramsay, *The History of South Carolina* . . . (2 vols.; Charleston, 1858), II, 75.

earned it and bought it for us, at the expence of their ease, their estates, their pleasure and their blood.<sup>27</sup>

Liberty is an absolute right, derived from God, according to Adams; it is in *principle* eternal and immutable. But what gives Adams' point its power is his reliance on tradition, for experience has shown that principle is frequently trampled under the boot of expediency. Therefore, even if liberty were not a right derived from God, Americans still had an absolute right to it because of what the fathers had done to earn it. Liberty is, in short, a fundamental dimension of the American constitution.

As a practical form of historical analysis the processive theory of Natural Law echoed Edmund Burke's theory of tradition. Burke identified concrete historical practice with Natural Law, arguing that the natural constitution is identical to the constitution which a society had developed in the course of generations.<sup>28</sup> It was with this conception of Natural Law, incidentally, that Burke found the means of supporting the American Revolution but not the French. Consistent with Burke's view, Jedidiah Morse wrote that Americans' rights had not only been "stipulated and confirmed by royal charters, [and] acknowledged by the people of Great Britain"; in addition, they had been practiced by Americans, "enjoyed by the colonies for more than a century. . . ." Any violation of such rights "would be inconsistent with the British constitution and an infringement on [sic] [Americans'] natural and essential rights."<sup>29</sup> Morse thus blurred any distinction between Natural Rights and traditional rights, precisely as he blurred the distinction between a people's "natural charter" and their "constitutional rights" elsewhere.<sup>30</sup>

The historians applied the same reasoning to the great issue of taxation and representation. The English Lord Camden, quoted by practically every historian, said in 1766 that "Taxation and representation are inseparable. This position is founded on the laws of nature. It is more, it is itself an eternal law of nature."<sup>31</sup> The American historians, of course, agreed with Camden in principle. But they recognized that it was no longer sufficient to invoke the self-evidence of Natural Law, however satisfying self-evidence was epistemologically. One had to show that the rights at issue were rights in practice. Thus Timothy Pitkin wrote that taxation and representation were indeed inseparable; but it was because

The colonists, from their first settlement, considered themselves entitled to the rights of Englishmen as secured by magna charta and confirmed by the

<sup>27</sup> Quoted in Pitkin, *Political and Civil History*, I, 191; my emphasis.

<sup>28</sup> Edmund Burke, "Speech on Conciliation with the Colonies" (March 22, 1775), Intro. and Notes by Jeffrey Hart (Chicago, 1964), *passim*; Strauss, *Natural Right and History*, 294-323; Sheldon S. Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought* (Boston, 1960), 409-10; Leslie Stephen, *History of English Thought in the Eighteenth Century* (2 vols.; 1876; rpt. London, 1962), II, 197ff.

<sup>29</sup> Morse, *Annals*, 99; Ramsay, *Revolution of South Carolina*, II, 213; Warren, *American Revolution*, I, 274.

<sup>30</sup> Morse, *Annals*, 92.

<sup>31</sup> Quoted in Lendrum, *American Revolution*, I, 244.

bill of rights. . . . The most important of these rights, were those of *taxation and representation*.<sup>32</sup>

Similarly referring to the seventeenth century, David Ramsay noted that "Long before the declaration of independence, several of the colonies on different occasions declared, that they ought not to be taxed but by their own provincial assemblies, and that they considered subjection to acts of a British Parliament, in which they had no representation, as a grievance."<sup>33</sup> And Mercy Warren, believing that Natural Rights were "improved in society," thought that "old opinions, founded in reason" had become so firmly entrenched in the American mind since the settlement that they had become no less than a "part of the religious creed of a nation."<sup>34</sup>

The processive theory of Natural Law, involving as it did the reliance upon traditional practice, prompted the historians to treat the ancestors as incipient revolutionaries themselves. To show that the Natural Rights of which they spoke were not mere abstractions, the historians argued that the principles of the revolution "were the principles which the ancestors of the inhabitants of the United States brought with them . . . to the dark wilds of America. . . ." Indeed, even before the settlement,

These were the rights of men, the privileges of Englishmen, and the claim of Americans: these were the principles of the Saxon ancestry of the British empire, and of all the free nations of Europe previous to the corrupt systems introduced by intriguing and ambitious individuals.<sup>35</sup>

These long-standing, traditional principles were supported, even institutionalized by the settlers of America who "were all of one rank; and were impressed with the opinion that all men are born entitled to equal rights." Those "sober, industrious, and persevering people" established "the same spirit among their descendents, finally [leading] them to liberty, independence and peace." David Ramsay stated the point clearly and emphatically: "The English Colonists were from their first settlement in America, devoted to liberty, on English ideas, and English principles. They not only conceived themselves to inherit the privileges of Englishmen, but though in a colonial situation, actually possessed them."<sup>36</sup>

Such idealized portraits of the fathers are more befitting hagiography than biography. But even if they sound like mythology to the modern ear one must appreciate the historians' intent in idealizing their forebears. By "creating a usable past" the historians meant to demonstrate that Natural Law and Natural Right had been established in the constitution of American society. But by "constitution" the historians, like Edmund Burke, did not mean a compact which symbolized the transition from the state of nature

<sup>32</sup> Pitkin, *Political and Civil History*, I, 85. Jedidiah Morse observed that taxation and representation were one right which amounted to "a privilege of ancient date" (*Annals*, 98).

<sup>33</sup> Ramsay, *American Revolution*, I, 16.

<sup>34</sup> Warren, *American Revolution*, III, 370.

<sup>35</sup> *Ibid.*, 306-07.

<sup>36</sup> Lendrum, *American Revolution*, I, 204; John McCulloch, *A Concise History of the United States* . . . (4th ed.; Philadelphia, 1813), 32; Ramsay, *American Revolution*, I, 27.

to civil society; they meant the order of things, how principles were lived in practice—constitution meant, in short, the way in which society was “constituted.”

By understanding Natural Law as an historical process rather than as a static body of transcendent principles, one can return with an altered perspective to the historians’ efforts to justify the revolution on the ground of its necessity. The revolution was justified, according to this view, because the British had violated rights which traditionally had been believed and practiced by the American people. They were “Natural Rights” precisely because they had grown up *in* historical experience, modified by the demands of the environment, and organically transmitted, generation by generation, from the settlers to the revolutionaries.<sup>37</sup> They were “Natural Rights” because they were taken-for-granted; they were assumed in the very process of living in the colonies. British policies, then, threatened not merely abstract rights—models of what rights would be like if they were ideal; nor did British policies threaten merely positive laws which were practiced by convenience. What the British threatened were “constitutional rights,” rights which had been practiced for so long that they *were* the constitution of society. They threatened, therefore, the very structure of American existence.

With this view of Natural Law the tension between necessity and expediency was overcome, for by seeing both Natural Law and specific historical events as immanent in the historical-societal order of things the historians no longer had to create a bridge between the transcendent and the mundane. Thus an appeal to traditional practice—to concrete historical usage and custom—was itself an appeal to Natural Law. It was, of course, conceivable that some revolution might not be justified because it was merely expedient, because it was not demonstrated that traditional, practical rights had been abridged. This was the ground of Edmund Burke’s hostility to the French Revolution.<sup>38</sup> Necessity was still established by appealing to Natural Law, but an appeal to Natural Law had become an appeal to history itself.

The effect of historicizing Natural Law theory was double-edged. At the same time that the historical theory of Natural Law resolved certain problems and ambiguities it tended to generate others. While, for example, it overcame the epistemological separation between the transcendent and the immanent, it also required the historians to repudiate in practice what had amounted to a religious faith in the transcendent as an immutable standard against which historical action could be measured with certainty. Equally important, while the historical theory freed the historians to make moral judgments about events without being required to point to any standard outside the events themselves, the Tory historian could argue that historical

<sup>37</sup> Ramsay, *American Revolution*, I, 28ff.

<sup>38</sup> Compare Burke’s “Speech on Conciliation” with his *Reflections on the Revolution in France*, ed. Thomas H. D. Mahoney (Indianapolis, 1955), esp. 39-102. Mahoney summarizes the point: “One of the main reasons why Burke opposed the French Revolution was precisely because the French were breaking violently with their past instead of using it . . . as the foundation for the future” (*ibid.*, xxii).

morality thereby became situational—not only relativistic philosophically, but suspiciously subject to the vagaries of ideology.

Similarly, the historical theory of Natural Law made problematic the idea of “historical necessity.” As long as necessity was understood in the context of the divinely-ordained providential, it was taken to be an absolute imperative of the transcendent. And there is reason to think that some of the historians continued to affirm the providential historical order. Once historicized, however, necessity was seen to arise *in* history rather than from without, and as a uniquely historical principle necessity raised problems of interpretation. For in the revolutionary histories, historical necessity meant something more like the manifest tendency of events rather than the absolute determination of history. But in presenting an argument for the general tendency of events the historian, who was as much the participant in those events as he was their narrator, opened himself to the charge of bias. His claim that the American Revolution was indeed historically necessary was easily construed as the product of political blindness or, less charitably, of ideological motive.<sup>39</sup>

These difficulties with the historical or processive theory of Natural Law underscore the point that there was still room to debate the justifiability of the American Revolution. The “patriot historians” were not going to convince the Tories that the revolution was justified because Natural Rights—traditional American rights and practices—had been violated. Jonathan Boucher, the Tory exile, would still write with bitterness that historical writings were too often “entirely exculpatory—compiled on purpose to vindicate [the historians’] own characters and conduct.”<sup>40</sup> But precisely by denying that the revolution had been necessary, precisely by arguing that Natural Law had not been violated because traditional American rights and practices had not been abridged, Boucher and the Tories affirmed the revolutionary historians’ new mode of analysis. For by quarreling with the patriot historians’ interpretation of the past, the Tories had to quarrel in a new context. They could no longer question whether abstract, transcendent principles had been violated and, in the absence of revelation or intuition, disagree as a matter of opinion. Henceforth the debate would have to be conducted in the arena of historical fact and historical experience.

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<sup>39</sup> The problems of “necessity” and “inevitability” in the revolutionary histories are too complex to explicate here. See the author’s “The Course of Human Events: American Historical Writings in the Revolutionary Era (Unpub. Ph.D. diss., Yale Univ. 1974), Ch. 4.

<sup>40</sup> Jonathan Boucher, *A View of the Causes and Consequences of the American Revolution* . . . (Repro. of 1797 edit.; New York, 1967), xx.