

RIGHTS ¹

The notion that there are such things as “natural” rights is due to the fact that rights originate in the mores, and may remain there long before they can be formulated (because it requires some mental development to be able to formulate them) in philosophical propositions, or in laws. The notion of “natural” rights is the notion that rights have independent authority in absolute right, so that they are not relative or contingent, but absolute.

The interests of men always clash in the competition of life. It is inevitable, on account of the organization of society, that this should be so. Even in the lowest form of the division of labor, that between the sexes, independent interests clash in the distribution of the products. The man there carries his point, if necessary, with the help of the other men, and a precedent is established by force, which through subsequent repetition becomes a law, and carries in itself a definition of rights between men and women.

The question of right or rights can arise only in the in-group.² All questions with outsiders are settled by war. It is meritorious to rob outsiders of property or women, or to invade any of their interests; it is meritorious also to repel and punish any efforts of theirs to invade the interests of one’s group-comrades. War with group-comrades is “wrong,” because it lessens the power of the in-group for war with outsiders. Here, then, is

¹ For approximate date, see Preface.

² Sumner, W. G., *Folkways*, §§15 ff.

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where other devices must be invented. Chiefs and medicine-men imposed decisions which were laws by precedent; they were inculcated by ritual; sanctioned after a few generations by the ghosts of ancestors; enforced by all members of the in-group. The right thing to do was to obey the tradition or "law." Obedience was duty. The notion of societal welfare was taught by the tradition, for the usage of ancestors admitted of no doubt as true and right. Thus law, order, peace, duty, and rights were all born in the in-group at the same time, and they are all implicit in the interest of war-power. The rights were most deeply implicit, and it took the longest time to draw them forth. They came out in proverbs, maxims, and myths — as rules of action in classes of cases, as dicta of the gods, in whose name the shamans spoke. The usual form of a law was a taboo — "thou shalt not." The reason or motive of the taboo needed not to be understood; it was mystic and ritual, because it came from ancestors and was sanctioned by them. There was no reflection on it, for it was authoritative. It was the most imperative form of the mores, because the whole society would enforce it with the highest sanctions. There was no discussion about it; the rule was: obey or perish.

The earliest taboos probably were about religious rites and duties. In any primitive code the things forbidden range from things of primary and unlimited importance to trivial matters of ritual; in the ten commandments in the twentieth chapter of Exodus, the second, third, and fourth concern matters of little social importance compared with the last five. When taboos are analyzed, and their spirit is developed in a positive form, we get a proposition in the doctrine of rights. For instance, the taboo in the sixth commandment is on murder. The

right of the murdered man to live is a positive proposition, capable of some ethical discussion and elaboration, but not capable of enactment in the form of a statute. The right to property is a positive proposition implicit in the prohibition of stealing, but no legislature could enact the right of property in a modern statute. It follows that the "rights" are philosophical propositions implicit in the taboos, and to the modern way of thinking, they seem to be assumed in them; but they were never formulated or thought by anybody before the taboo was started. Hence the modern philosophers invented the notion of "natural" rights to bring in the jural notions in advance of the law. In the American Declaration of Independence, the first paragraph is made up of propositions in political philosophy to serve as a basis of right for the secession of the colonies from the British Empire; they might all be admitted and yet not justify the secession. The Southerners clung to the dogmas and were led by them to believe that secession could be proved in debate, or deduced rationally in logic, but it is entirely impossible to establish rationally a right of revolution; it would be establishing a state on the prime doctrine of anarchy. So it seems that the notions of rights, which are logically antecedent to laws, never can be put into laws. They must remain in the mores, and may be discussed in philosophy, but can be reduced to formulas not at all, or only very imperfectly.

In our times, the phraseology of rights is so current in the mores and in political discussion, that almost every proposition drops into that form. Every civilized state now contains groups who are recalcitrant and protesting, expressing their pain in terms of violated rights. They were the weaker parties in some collision of interests. There had to be a decision at last because life must go

on; and the decision was enforced by the society. This was a use of force, just as men settled disputes with women by force. All the great fabric of what we now prize so highly and justly as rights, has come out of such acts of force against some defeated parties; the only difference is that, in thousands of years, the dictates of law and the adjustment of interests have been modified and revised by better views of life. Rights have come to be expressions of the rules of the game in the competition of life. The in-group has become stronger, especially in the higher civilization, as the contentment and satisfaction of all members have become greater. This has depended very much on the economic power of members of the group. If they could work and earn, save and enjoy in security, they have not cared to dispute about rights; but if the struggle for existence has been hard, they have been apt to think that a readjustment of the social conventions which governed the competition of life might be to their advantage. Hard times, therefore, have produced civil conflicts and re-definition of rights.

If in any state the civil power becomes weak, as in Turkey or Central America, rights become insecure, that is, non-existent. A man is heard declaiming and denouncing; he talks about his "rights" as if they floated in the atmosphere, and ought to come floating to him by a divine spirit in them, independently of all physical or conventional conditions. This is the modern mythology and political metaphysics which we have inherited from the eighteenth century. A defeated litigant comes out of the best court in the most civilized state, angry, denouncing injustice and violation of rights, and declaiming solemn "doctrines" of justice and liberty and, above all, of "rights." A legislative minority also propounds doctrines of rights in order to establish its case against votes;

and when it fails, it hugs its great principles of rights. The philosophers, publicists, reformers, and agitators always argue in terms of rights (especially natural rights); they become rebels, revolutionists, anarchists, dynamiters, in the name of rights, and, if they come to prison or the scaffold, they still declaim in terms of the same vocabulary. A criminal becomes a martyr if he can put his crime under some great generalization about rights. We have all been educated by the modern civil mores to think of rights as something metaphysical, above and behind laws and institutions, greater than they, and with some inherent power to transmute themselves out of oratory and resolutions into facts.

It is certainly far wiser to think of rights as rules of the game of social competition which are current now and here. They are not absolute. They are not antecedent to civilization. They are a product of civilization, or of the art of living as men have practised it and experimented on it, through the whole course of history. They must be enjoyed under existing circumstances, that is, subject to limitations of tradition, custom, and fact. To be real they must be recognized in laws and provided for by institutions, but a great many of them, being inchoate, unsettled, partial, and limited, are still in the mores, and therefore vague and in need of further study and completion by courts and legislatures. This further work will be largely guided by the mores as to cognate matters, and by the conceptions of right and social welfare which the mores produce.