· 4 ·
The Laws of Nature and of Nature's God

In the first three chapters of this work I have concentrated not only on the contents but also on certain antecedents of a theory of knowledge adopted by many American revolutionaries who accepted Locke's rationalistic theory of self-evident truth. In doing so, I have tried to uncover the older epistemological foundations upon which our founding fathers built their own philosophical houses since they were men of affairs who read famous philosophers but who did not contribute anything original to the theory of moral knowledge.[1] Had they been given to writing extended works in epistemology or ethics, there would be less need to expound what Locke, Burlamaqui, or Hutcheson had said in order to reveal what Jefferson meant or did not mean by "undeniable" or "self-evident" truths, and what Aquinas meant by related expressions.

My need to go back to earlier views will be equally great in

1. Perhaps with undue modesty, Jefferson wrote to Richard Price in 1789, "Is there anything good on the subject of the Socinian doctrine, levelled to a mind not habituated to abstract reasoning?", *Papers,* Volume XV, p. 272.

the next part of this book, where I shall begin with the idea of natural law. Like the idea of self-evident truth, this idea also has its roots in antiquity. But, fortunately, it will not be necessary to trace the American colonists' ideas on this subject all the way back to Plato, Aristotle, or the Stoics because American thinkers were primarily influenced by modern theorists of natural law who had transformed ancient ideas of natural law before bequeathing them to American colonists. This does not mean that it will not be useful to refer to premodern writers, both ancient and medieval, but it does mean that we shall be concentrating on the more proximate illuminators of American thinking whose candles may have been lit by the candles of others. Historians of ideas who wish to give good marks to thinkers who "started it all" would take the reader further back in time, but such a trip is as unnecessary as it is impossible to accomplish in this limited study. We need not revisit Heraclitus to understand what Jefferson and his co-signers meant by "the laws of Nature and of Nature's God."

Although not all of the thinkers whom we have discussed and shall discuss drew an explicit distinction between metaphysics—the science of being—and epistemology—the theory of knowledge, many of them said things which we may profitably assign to one of those disciplines rather than to the other. The statement that some of the "revolution principles," as John Adams called them, are self-evident is an epistemological statement because it tells us how these principles are allegedly *known,* but when the revolutionaries claimed that these same principles were principles of natural law, they characterized them metaphysically in a sense which will become clearer, I hope, as this study progresses. In addition, when the revolutionaries called these principles laws of Nature's *God,*[2] they spoke of them theologically, and therefore

2. Among the many Colonial references to God as the source of natural law, see especially those made by James Otis in his *Rights of the British Colo-*

it is difficult to understand the revolutionaries without taking into account the theology they accepted. For them, the God who created Nature—the universe or totality of all things—*a fortiori* created man's specific nature or essence. The God-ordained laws of man's nature laid certain moral duties upon man which in turn implied certain of his rights. Therefore, the God of theology, and the nature or essence of man, a staple of metaphysics, are crucial entities in the theory of natural law. And the path that led from God to man's essence, to man's ends, to man's duties, and to man's rights will be my concern in the remainder of this book, where I shall analyze that path which led the revolutionaries from theology to metaphysics to ethics.

It will be convenient to begin that analysis with a discussion of the laws of nature as understood by many revolutionaries, a discussion I shall launch by dealing with two questions that might be invited by my remark that the laws of nature laid *duties* on man. The first question it raises might occur to any careful reader of the Declaration of Independence, namely: How can a law of nature express a *duty* when, according to the first paragraph of the Declaration of Independence, laws of nature are said to *entitle* one people to a separate and equal station among the powers of the earth? To say that a law of nature entitles a people to something suggests that the law asserts that the people have a rightful claim or a right to that thing. In short, if the laws of nature are thought to express *duties,* how can they be regarded as asserting rights? A reader of other writings by Jefferson will know that even before drafting the Declaration he referred in his pamphlet, *A Summary View of the Rights of British America* (1774), to "a free people, claiming their rights as

nies Asserted and Proved (1764) and his *Vindication of the British Colonies* (1765), reprinted in Bailyn's *Pamphlets,* Volume I, pp. 438–440; p. 559.

derived from the laws of nature."[3] Those who reply that the answer to this question is obvious I shall ask to wait until we consider the subtleties of what Hobbes had to say on this subject.

The second question that might be invited by the remark that some laws of nature laid moral duties upon man is: How can a law of nature, which supposedly *de*scribes the world, *pre*scribe anything? This might be asked by a reader of philosophical works of the nineteenth and twentieth centuries.

I shall deal with the first question first.

Natural Law and Natural Right

There is an old tradition according to which natural law should be distinguished from natural right. In *Essays on the Law of Nature* Locke holds that "right [*jus*] is grounded in the fact that we have the free use of a thing, whereas law [*lex*] is what enjoins or forbids the doing of a thing."[4] And this distinction is also present in the writings of Francisco Suarez, who says that, strictly speaking, "only that is law [*lex*] which imposes an obligation of some sort," whereas "according to the . . . strict acceptation of *ius* [right], this name is properly wont to be bestowed upon a certain moral power which every man has, either over his own property or with respect to that which is due him."[5]

As von Leyden, the editor of Locke's *Essays on the Law of Nature,* points out, a similar view is to be found in Hobbes's *Leviathan.* But if one examines Hobbes's text, one finds a statement more complex than Locke's, namely, that "RIGHT consisteth in liberty to do, or to forbeare; Whereas LAW,

3. *Papers of Thomas Jefferson,* Volume I, p. 134.
4. *Essays on the Law of Nature,* p. 111.
5. *De legibus, ac deo legislatore,* trans. G. L. Williams et al. (1612; reprint ed., Oxford, 1944), Book I, Chapter I, Section 7, and Chapter II, Section 5.

determineth, and bindeth to one of them: so that Law, and Right, differ as much, as Obligation, and Liberty; which in one and the same matter are inconsistent."[6] This is crucially different from Locke's statement because Locke limits a right to that which is grounded in the fact that we have the free *use* of a thing, whereas Hobbes tells us in more general terms that right is a liberty to *do* or to *refrain from doing* something. Hobbes's definition of a right is such that if I am said to have a certain right with regard to a certain action, I have a right to perform that action *and* a right not to perform it, which is tantamount to regarding "One has a right to do that" as elliptical for "One has a right to do that *and* one has a right to refrain from doing that." A reader of Hobbes's definition of "Right" might complain that Hobbes says that it consists "in the liberty to do, *or* to forbeare," whereas in my explication I have used the word "and"; but this objection can be met as follows. If I tell you that you are at liberty to perform *or* to forbear from performing the act of raising your arm, I do not mean that you have only one liberty, namely that of raising your arm *or* that of refraining from raising it. I am telling you that you are free to raise your arm *and* that you are free to refrain from raising it and hence that you have, so to speak, *two* liberties, that is, that you may raise your arm *and* you may refrain from raising it, even though the performance and the refrainment are mutually exclusive since you cannot at the same time perform *and* refrain from performing the action. It should be clearer now why Hobbes adds that law and right, like obligation and liberty, "in one and the same matter are inconsistent." For Hobbes, having a right with regard to a certain action is expressed in a logical conjunction asserting the liberty to perform *and* the liberty to refrain from performing the action, whereas having an

6. *Leviathan,* ed. A. R. Waller (Cambridge, Eng., 1935), pp. 86–87. See also Hobbes, *Dialogue between a Philosopher and a Student of the Common Laws of England,* ed. J. Cropsey (Chicago, 1971), p. 73.

obligation with regard to the same action must be expressed in just one nonconjunctive sentence like "One must perform the action" or "One must refrain from performing the action."

Hobbes's way of drawing the distinction between natural law and natural right runs directly counter to the temptation to say that having a duty to perform a certain action implies a right to perform that same action. This follows from his definition of "right" and his contention that in asserting a duty, one must either say simply that one has a duty to perform *X* or say simply that one has a duty to refrain from performing *X*. To see this, let us assume that it has been asserted that one has a duty to perform *X*. Now let us recall the Hobbesian assertion of a *right,* namely, "One may perform *X* and one may refrain from performing *X*." Clearly, the simple Hobbesian assertion of a duty does *not* imply the conjunctive Hobbesian assertion of a right because "One has a duty to perform *X*" certainly does not imply "One may refrain from performing *X*," a conjunct of the assertion of a right. Therefore, Hobbes's statement of duty does not imply the corresponding conjunctive statement of right since it would have to imply *both* Hobbesian conjuncts for that to be the case. Moreover, since "One has a duty to perform *X*" not only does not imply the truth of "One has a right to refrain from performing *X*" but implies its falsity, Hobbes holds that obligation and liberty, that is, duty and right, "in one and the same matter are inconsistent."

What is one to say about this view which departs from the views of Jefferson and that other philosophical signer, Dr. Witherspoon, who wrote: "whatever men are in *duty* obliged to do, that they have a *claim* to," meaning a right to do?[7] The nub of the problem is this. If we say "He has a right to do

7. *Lectures on Moral Philosophy* (Philadelphia, 1822), p. 69. The idea that natural rights may be derived from natural laws of duty may also be found in Hamilton. See his *Papers,* Volume I, pp. 87–88.

X," *do* we mean to say something which is more fully expressed by "He has a right to do *X and* he has a right to refrain from doing *X*," as if the first statement were elliptical for the longer one? Couldn't we merely say that the man has a right to do *X* and stop right there, without being required to add that he also has a right to refrain from doing *X*? Clearly, if we reversed the picture and began by saying that the man had a right to *refrain* from murdering someone, we would not feel forced to add that he had a right to murder that person as well. In ordinary language it would seem that statements of the forms "He had a right to do *X*" and "He had a right to refrain from doing *X*" are both complete and distinct, and that only by forcing us to link them in a conjunction of the kind to which he is committed does Hobbes succeed in foiling our inclination to think that the statement that we have a duty to do *X* implies that we have a right to do *X*. What I have called our inclination seems to have been the inclination of Jefferson and Witherspoon, for in no other way, I shall argue later, can we understand how Jefferson supported his belief in some of the statements about rights which he wrote in the Declaration. They are statements about rights to do *X* that he deduces from statements that *explicitly* assert *duties* to do *X*. But if he had adopted Hobbes's view of the inconsistency between right and law, he would not have been able to accomplish this deduction or derivation. I might add that the idea that a duty to do something implies the right to *do the same thing* is not only explicitly present in the minor moralist Witherspoon's writing; it is also to be found in the writing of the much-cited Pufendorf,[8] who also recognized that if we must do something, then we may do it.

8. *Elementorum Jurisprudentiae Universalis,* trans. W. A. Oldfather (Oxford, 1931), Book I, Definition XIV, Section 1. Pufendorf says that a man has the moral power, meaning the right, to do what is enjoined (*praecipiatur*) by the laws.

Of course, the converse is not true. It does not follow from the statement that we *may* do something or *have a right to* do it, that we *must* do it or *have a duty to* do it. Yet the fact that duties imply corresponding rights raises the interesting question whether, if a right is implied by a corresponding duty, we are obliged to make that implication explicit. This is part of a more general problem in the philosophy of language. It is the problem whether, if you know that you may assert the logically stronger of two propositions, you should always assert the stronger. For example, if you know that there are *exactly* three persons in a room, can you not say, under certain circumstances, merely that there are *at least* three—which is logically less, or weaker, than what you think you *could* say? I think that under certain circumstances one is entitled to say less than what one knows about a certain matter; and as I shall argue later, I think the author of the Declaration of Independence did exactly that when he asserted certain rights which were implied by certain duties about which he remained silent.

In the light of this, it is extremely interesting to find an eighteenth-century British commentator on Locke's *Second Treatise,* Thomas Elrington, protesting Locke's tendency to speak of rights to do certain things when he could and should have spoken of duties to do them. Elrington says concerning Section 10 of the *Second Treatise,* where Locke speaks of a man's right in a state of nature to punish a criminal and to seek reparation for the injury: "He not only *may* do so, but it is his *duty* to join in punishing the offender and obtaining reparation for the injury. Throughout the whole of this treatise of Locke's, the attentive reader will perceive that his zeal for liberty has very frequently led him to speak of men's *duties* as *rights* which they might exercise or renounce at pleasure.—There are few distinctions less attended to, and yet perhaps few more important than that between those rights which can be renounced at pleasure and those which

cannot. Of the latter sort, it is obvious, are all those which are connected with duties."[9] And a half century before Elrington made this point, Burlamaqui had remarked that some rights "have a natural connection with our duties, and are given to man only as means to perform them. To renounce this sort of rights would be therefore renouncing our duty, which is never allowed." For example, Burlamaqui continues, a father cannot renounce the right he has over his children, whereas a creditor may forgive a debt which is due him.[10] And, as we shall see later, because a duty to do something implies a right to do it, American revolutionaries were often willing to assert rights when they could have asserted corresponding duties—perhaps for reasons like those that Elrington had attributed to Locke. Furthermore, the revolutionaries called those rights *unalienable* for reasons similar to those which led Elrington and Burlamaqui to say that they could not be renounced: they were implied by corresponding *duties* of those who held the rights.

Two Kinds of Natural Laws

It will be recalled that I began to discuss the phrase "laws of nature" in an attempt to deal with *two* questions that might be prompted by the statement that the laws of nature asserted moral duties rather than moral rights. Having answered the first, I now come to the second question, which I described as likely to be raised by a reader of certain works of the nineteenth and twentieth centuries. Such a reader might be puzzled by the application of the phrase "laws of nature" to a moral principle. The origin of his puzzlement would be

9. Thomas Elrington, in his annotated edition of Locke's *Second Treatise* (Dublin, 1798), note to the passage in which Locke writes that another person *may* join with the injured party and assist him in seeking reparation. See Laslett's edition of Locke (1970), p. 291, note.

10. J. J. Burlamaqui, *Principles of Natural Law,* Part I, Chapter VII, Section VIII.

the tendency to characterize laws of nature as "descriptive" and hence illustrated by, say, Boyle's law of gases, or Galileo's law of freely falling bodies, or Newton's law of universal gravitation, no one of which would be called moral by a contemporary reader because they supposedly tell us of the way in which things *do* behave, whereas some at least of the laws of nature asserted by jurists do not tell us how things *do* behave but rather how men *should* behave.

Before trying to explain why the expression "laws of nature" was applied to *both* kinds of statements, it is only fair to point out that earlier philosophers showed awareness of the problem that troubles certain contemporaries. For example, Bishop Berkeley in a discourse delivered in 1712, wrote: "we ought to distinguish between a twofold signification of the terms *law of nature;* which words do either denote a rule or precept for the direction of the voluntary actions of reasonable agents, and in that sense they imply a duty; or else they are used to signify any general rule which we observe to obtain in the works of nature, independent of the wills of men; in which sense no duty is implied."[11] And in the first book of Richard Hooker's *Laws of Ecclesiastical Polity,* published in 1593, one will also find a distinction like Berkeley's between two *kinds* of laws of nature, a distinction that helps illuminate not only the language of Locke but also that of the American colonists.

Hooker begins his discussion of law in general by saying that all things that exist have some power to operate in a man-

11. *The Works of Berkeley,* ed. A. C. Fraser (Oxford, 1871), Volume III, p. 127. This passage appears in Berkeley's *Passive Obedience,* subtitled *The Christian Doctrine of Not Resisting the Supreme Power, Proved and Vindicated.* Berkeley's clear statement of the distinction shows that it was understood close to two centuries before the appearance of, for example, Karl Pearson's *The Grammar of Science* in 1892. However, in Chapter III, Sections 5 and 6, respectively entitled "The Two Senses of the Words 'Natural Law'" and "Confusion between the Two Senses of Natural Law," Pearson makes some useful general remarks as well as some specific comments on the views of the Stoics and those of Richard Hooker.

ner that is neither violent nor casual, that nothing ever begins to exercise this power "without some fore-conceived end" toward which it operates, and that this end will not be obtained unless the mode of operation is appropriate.[12] In other words, not everything will bring about this end, and therefore Hooker offers a definition of law which reads as follows: "That which doth assign unto each thing the kind, that which doth moderate the force and power, that which doth appoint the form and measure, of working, the same we term a Law."[13] Hooker maintains that a law states some kind of *regularity* which governs the working of a kind of thing toward its fore-conceived end. In effect, then, Hooker regards a law as having the following form: "Everything of kind *A* works to achieve an end of kind *B* in manner *C*." A law, Hooker goes on to say, has as its author a superior, to whom the governed things are subject. This, Hooker holds, is true of all laws that govern *things created by God,* but since God himself works toward an end according to law, Hooker must deny that what he calls the law of God's *internal* workings has a superior author since God has no superior. "The law eternal" which concerns God's internal workings—"the Generation of the Son" and "the Proceeding of the Spirit"—are beyond the compass of Hooker's concern here,[14] but he is very much concerned with that part of "the law eternal" according to which other things operate. Hooker tells us that the part of the eternal law which does not concern God's *internal* workings is called by different names de-

12. *Of the Laws of Ecclesiastical Polity,* Book I, Chapter II, Section 1. The first four books of this work appeared in 1593. In his edition of Locke's *Essays on the Law of Nature,* von Leyden calls attention to the closeness between what Locke says in Essay I of the work and what Hooker says on natural law in the passages I am about to expound, even to the point of Locke's using the same paraphrase of Aquinas as one used by Hooker, p. 116, note 3.
13. *Ibid.*
14. *Ibid.,* Book I, Chapter II, Section 2.

pending on the different kinds of things which are subject to it. Thus nature's law orders "natural agents"; the celestial or heavenly law is that which angels clearly behold and observe without swerving; the law of reason is that which binds "creatures reasonable in this world, and with which reason they may most plainly perceive themselves bound"; the divine law is what binds the same individuals but is known to them only by special revelation from God; and the human law is what men extract from the law of reason or divine law and make positive law because they gather it to be probably "expedient."[15]

It will have been observed that Hooker distinguishes between "natural agents" and "creatures reasonable in this world," and that the former are said to be governed by the law of nature, whereas the latter are said to be governed by the law of reason. He is aware, however, that sometimes the phrase "the law of nature" is applied to *all* created things. And so this prompts him to say that "those things are termed most properly natural agents, which keep the law of their kind unwittingly," for example, the heavens and elements of the world. Planets "can do no otherwise than they do," and they are to be distinguished from "creatures reasonable" or "intellectual natures" called "*voluntary* agents." For this reason, it will be expedient, he goes on to say, to "sever the law of nature observed" by natural agents like planets from that which is observed by voluntary agents.[16] What this shows is a

15. *Ibid.,* Book I, Chapter III, Section 1.
16. *Ibid.,* Book I, Chapter III, Section 2. It should be noted that Aquinas asserts, as translated by Pegis, *Basic Writings,* Volume II, p. 743, that "Law is a rule and measure of acts, whereby man is induced to act or is restrained from acting; for *lex* [*law*] is derived from *ligare* [*to bind*], because it binds one to act," *Summa Theologica,* First Part of the Second Part, Question 90, First Article. Suarez comments on this in his *De legibus, ac deo legislatore,* Book I, Chapter I, Section 1, where he says a number of interesting things. To discuss them here would take me too far afield, but I cannot resist remarking that Suarez criticizes Aquinas's definition. Suarez contends that it is too broad because it is applicable to creatures other

terminological variation of which Hooker is quite aware. There is a broader sense of "natural agents" which includes both planets and men, but then there is a narrower sense which applies only to planets and other things which keep the law of their kind unwittingly. Analogously, therefore, there is a broader sense of "natural law" which governs things in the broadly conceived class of natural agents and a narrower sense which governs things in the more narrowly conceived class. But what must be remembered is that Hooker applies the word "law" univocally in both cases: a law concerning planets governs created things which seek a God-ordained end in a God-ordained manner just as a law concerning men governs created things which seek a God-ordained end in a God-ordained manner. The difference between the two kinds of laws is that one kind is followed unwittingly, whereas the other is followed by creatures who may use their reason to see that they are bound by the law. Moreover, when Hooker refers to *the* law of nature in the singular, he usually has in mind the set of all the different manners of working, or laws, which God has decreed for the different kinds of agents he has created, whether they be agents that act "unwittingly" or "voluntary agents." According to Hooker, God dictates the laws of motion of heavenly bodies insofar as he dictates the manner in which a heavenly body should seek a goal he has set for it. And he also dictates the manner in which voluntary agents should seek their goals, but—and this is crucial—voluntary agents may depart from the laws decreed for them by God.

It is true, of course, says Hooker, that there are occasional departures of "non-intellectual" agents from the course of behavior decreed for them by God. But these departures are

than men, "since everything has its own rule and measure, in accordance with which it operates and is induced to act or is restrained therefrom."

brought about by "divine malediction, laid for the sin of man upon these creatures which God had made for the use of man";[17] and in spite of these "swervings" it is obvious, Hooker holds, that nonintellectual natural agents observe their laws quite constantly. By contrast, man resembles God in manner of working because he is made in the image of God. Therefore, whatever we do as men, we "do wittingly and freely." We are not tied as nonintellectual natural agents are, and therefore we are not constrained to do what we do. "Choice there is not," Hooker declares, "unless the thing which we take be so in our power that we might have refused and left it." On the other hand, "if fire consume the stubble, it chooseth not so to do, because the nature thereof is such that it can do no other."[18] Once men are said to have the power of choice, we begin to see why Hooker held that a law of nature may be a precept for the direction of the voluntary actions of reasonable agents—a law asserting a duty. We are now in a position to understand why Hooker thought that men often violate the law of nature and thereby differ from nonintellectual agents, who are always or almost always "obedient" to the law to which they are subject. The explanation of the possibility of violation is that there is in the will of man "naturally that freedom, whereby it is apt to take or refuse any particular object whatsoever being presented to it," and that man may exercise that freedom in action even in the face of reason's conclusion that he should act otherwise.

This almost completes my discussion of Hooker's *Ecclesiastical Polity* on the laws of nature, offered mainly to show how he tried to differentiate laws of natural science and moral laws while placing them in one genus. I want to em-

17. Hooker, *op. cit.*, Book I, Chapter III, Section 3. This "truth," Hooker adds, is a revealed one and therefore above the reach of merely natural capacity and understanding.
18. *Ibid.*, Book I, Chapter VII, Section 2.

phasize that all laws of nature are conceived by Hooker as laws decreed by God and that they all describe the operations whereby created things of different kinds exercise their powers. But as Hooker runs over the scale of being starting with what he calls "*mere* natural agents," like rocks, up through man—I omit his discussion of plants, animals, and angels—Hooker finds that men, who are voluntary and intellectual creatures, are ordered by God to operate in a manner which they can understand because they have reason, and in a manner from which they can depart because they have free will. Having reason, men have the power to see the truth of the propositions which express duties and also to see that they express what God has decreed as modes of operation appropriate to their kind. Thus the law of nature as applied to men is the law of reason in a triple sense: it is decreed by God, who is a rational being; it is *applicable* to men, who are rational beings, and it is *knowable* by them through the use of their reason.[19]

Hooker's view, which placed the laws of natural science and the laws of morality in one genus, was advocated by someone who believed that *all* of God's creatures worked toward God-ordained ends. Although he acknowledged differences among rocks, plants, fish, fowl, and beasts, saying that some of these subhumans do not work "altogether unwittingly" because fish, fowl, and beasts have some weak degree of understanding, and even holding that beasts, though they are "otherwise behind men, may notwithstanding in actions of sense and fancy go beyond" men,[20] Hooker nevertheless "severed" two species of natural laws, those moral laws which governed humans and those nonmoral laws which governed rocks, plants, fish, fowl, and beasts. In this respect, he shared many Christian theorists' view of the moral species of natural

19. *Ibid.*, Book I, Chapter VIII, Section 4. See R. B. Perry, *Puritanism and Democracy* (New York, 1944), p. 162.
20. *Ibid.*, Book I, Chapter VI, Section 2.

law and rejected the idea that it applied to beasts, an idea sometimes identified with the Justinian Code.[21]

Hooker's effort to differentiate between laws of nature that govern human beings and laws of nature that govern other beings while keeping both species in one teleologically viewed genus was not shared by thinkers who denied that the planets were moved by final causes. And it was mainly through their influence that a law of *physics* continued to be called a natural law but in a sense different from that in which a moral law was called a natural law. Yet Jefferson's *moral* laws of nature and of nature's God were still viewed at the end of the eighteenth century very much as Hooker had viewed them. They were thought to be decreed by God; they were regarded as precepts for the direction of the voluntary actions of reasonable agents; and some of them were thought to be discoverable by intuitive reason. That is why Jefferson called moral laws "Laws of Nature and of Nature's God."

Before concluding this section, I want to comment on the idea, advanced by Carl Becker, Edward S. Corwin, and other writers, that Newton's *Principia* encouraged thinkers of the seventeenth and eighteenth centuries to regard both moral laws of nature and the laws of mechanics as rational truths in the same category as "$2 + 2 = 4$." I find this hard to believe on the basis of the evidence presented by Corwin. He argues that "the vast preponderance of deduction over observation in Newton's discoveries" and Newton's demonstration that the force which brings an apple to earth is the same as that which holds planets in their orbits stirred Newton's contemporaries to think that the universe "was pervaded with the same reason which shines in man and which is accessible in all its parts to exploration by man." And this, as I understand

21. *"Jus naturale est, quod natura omnia animalia docuit," Institutes,* Book I, Title 2. Cicero, however, said that we do not speak of justice, equity, or goodness in the case of horses and lions, *De officiis,* Book I, Chapter XVI. Grotius agreed, *De jure belli ac pacis,* Book I, Chapter I, Section XI.

Corwin, encouraged adherents of the doctrine of moral natural law to regard their task as similar to that of Newton. They concluded, Corwin appears to say, that Newton had lent support to Grotius's idea that the principles of natural law were like "$2 + 2 = 4$" and that therefore both mechanics and morals were mathematical sciences which began with self-evident axioms and which terminated in deduced theorems.[22]

One of the difficulties in this view is that Locke himself doubted that so-called natural "philosophy" could ever become a "science" in Locke's sense precisely because it could not present truths that would be perceived by intuitive reason, axioms from which theorems would be deduced by discursive reason. Yet, by contrast, we have seen that Locke thought that this *could be* accomplished in morals, even though he failed to accomplish it himself. In other words, one of the most devoted admirers of Newton did not adopt the view that Corwin regards as so common in the seventeenth and eighteenth centuries. Locke distinguished epistemologically between a law of nature that laid a duty on man and a law of nature like the law of gravitation. He did *not* think that one could see *by intuition* that all bodies attract each other directly as the product of their masses and inversely as the square of the distance between them, whereas he often said that a moral law of nature could be seen in that way. So if it be true—and I doubt that it is—that "with Newton's achievement at their back men turned confidently to the formulation of the inherently just and reasonable rules of social and political relationship,"[23] such confident men did not understand the achievement at their back. If they believed that Newton's *physical principles* were like the principles of natural law as the latter were viewed in Locke's epis-

22. E. S. Corwin, *The "Higher Law" Background of American Constitutional Law* (Ithaca, New York, 1955), pp. 58–59. This work originally appeared in the *Harvard Law Review* XLII (1928–1929).
23. *Ibid.*, p. 59; Locke, *Elements of Natural Philosophy, Works,* Volume III, p. 304.

temology or in Grotius's, they might have done so under the misapprehension that Newton's physical axioms, because they *contained* mathematical expressions, were self-evident mathematical truths in Locke's sense. Such a misapprehension *might* have led to the idea that theorists of natural law were engaged in an enterprise like Newton's, but, as I have said, Corwin does not support this point with convincing evidence.

Instead, Corwin relies on the supposed authority of Carl Becker who in turn rests his case on what I think is a misinterpretation of Colin Maclaurin's *Account of Sir Isaac Newton's Philosophical Discoveries* (1748). Becker correctly perceives that Maclaurin viewed Newton's achievement as laying a sure foundation for natural religion and moral philosophy by leading us to knowledge of the author and governor of the universe, but I think Becker misunderstands Maclaurin's point when the latter speaks of the philosopher being "excited and animated to correspond with the general harmony of Nature."[24] If one reads just beyond that passage in Maclaurin, one finds that all that he is saying is that we must avoid "false schemes of natural philosophy" which *may* "lead to atheism," so that when he speaks of being excited and animated to "correspond" with the general harmony of nature, he is *not* giving an argument for the doctrine of natural law and rights as defended, for example by Locke or Jefferson. He means by "correspond with" something like "giving a true account of."[25] Therefore, when Becker, while speaking of Locke, refers to Maclaurin's excitement and animation about corresponding with the general harmony of nature as if it supported Locke's doctrine that "morality, religion, and politics ought to conform to God's will *as revealed in the essential nature of man,*"[26] Becker is simply mistaken. Mac-

24. Becker, *Declaration of Independence,* pp. 49–52.
25. Maclaurin, *An Account of Sir Isaac Newton's Philosophical Discoveries* (London, 1748), pp. 4–10.
26. Becker, *op. cit.*, p. 57. The emphasis is mine.

laurin is *not* trying to give direct support to the doctrine that we may determine man's duties by discovering, as Grotius says, what "is or is not in conformity with rational nature," meaning man's nature or essence. He is merely praising those who study the phenomena of Nature with a capital "N" in order to describe it truly. This is a far cry from supporting Aquinas's, Locke's, and Grotius's notion that we can find man's duties by studying *man's* nature or essence. It is not surprising, therefore, to find Maclaurin dismissing philosophers who "indulged themselves too much in abstruse fruitless disquisitions concerning the hidden essences of things." If Newton did encourage theorists of natural law, it was not by encouraging them to use their intuition or to penetrate man's essence in search of his duties. It was rather by buttressing the argument from design, which allegedly showed that there is a God who is author and governor of the universe and who therefore issues moral decrees. In the next section I shall try to show how Burlamaqui appealed to a God of this kind in defense of a doctrine that many revolutionaries accepted.

God's Will and Natural Law

So far we have seen that a freely violable moral law which expresses a duty is, according to Hooker, a law established by God which orders *men* to behave in a certain way. And we have also seen how a philosopher could, by declining to accept Hobbes's definition of "right," hold that a law of nature which expresses a *duty* to perform a certain action *implies* a principle which expresses a *right* to perform the same action. It is now time to use what I have presented both in the epistemological chapters and at the beginning of the present chapter in order to show that when in the Rough Draft Jefferson applied the term "undeniable" to certain philosophical truths he may have represented his intentions more

accurately than he did when he later applied the word "self-evident" instead, or when he consented to that change. I shall argue that since the word "undeniable" is broader in scope than "self-evident" because "undeniable" is applicable to axioms *and* theorems, whereas "self-evident" does not apply to theorems, and since Jefferson probably believed that many of his truths were theorems, he should not have made this change nor acquiesced in it from a philosophical view. I know, of course, that there are those who speak with admiration of "this famous and altogether felicitous change,"[27] but I am not thinking now of rhetoric or style but of philosophy and theology since I believe that Jefferson, under the influence of Burlamaqui, appealed to more fundamental truths than those that in the Declaration are finally called "self-evident." Having published on natural law in 1747, Burlamaqui was, as I have already remarked, much closer to Jefferson in time than Hooker, publishing in 1593, or than Locke, publishing in 1690, and hence more likely to be thought of by Jefferson as uttering "the last word" on the matters that concerned the author of the Declaration with regard to natural law as it affected individuals.[28]

Burlamaqui thinks that God is an omnipotent, wise, and beneficent creator of man who has given man a certain nature or constitution and placed him in different "states." Burlamaqui also holds that from man's nature, essence, or constitution and these states, there follow laws of nature which prescribe his duties. The states in which man may be considered and which embrace all his particular relations, according to

27. Boyd, *The Declaration of Independence,* p. 22.

28. Vattel, who published his major work after Burlamaqui's, in 1758, was much more concerned with the law of nations than with the law of nature as applied to individuals. This is evident even in the title of his work, *The Law of Nations, or the Principles of Natural Law, Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (*Le Droit des gens, ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains*).

Burlamaqui, are three in number. First of all, man is a creature of God, from whom he has received his life, his reason, and all the advantages he enjoys. Secondly, he is a being composed of body and soul who naturally loves himself and desires his own felicity. And, thirdly, he is a member of a species, all of whose members live with him on earth in society. Burlamaqui further maintains that paralleling this trio of states there is a trio of different sorts of duties: duties toward God, duties toward oneself, and duties toward other human beings.[29] These duties are inferable by reflection on the *nature* and *states of man,* which indicate the intentions of God with respect to man. Beginning with the nature of man as an individual—without attention to man's relationships to others—we can certainly infer, according to Burlamaqui, that God, "by creating us, proposed our preservation, perfection, and happiness."[30] Since God gave us *life,* he must have proposed the preservation of our life. Since he gave us *reason,* he must have proposed for us the perfection of our reason. And since he created us with a *desire for our own happiness,* he must have proposed for us the pursuit of that happiness. In his wisdom and beneficence and power, he would have created us in this way only if he had proposed these as ends for us to attain. Moreover, having proposed these as ends for man, God *wills* that man *should* labor for his own preservation and perfection in order to obtain all the happiness of which he is capable according to his nature and estate.[31] Here we see the final link in the chain which begins with man's God-created essence, moves to the ends God proposed for him, and from *that* to what God wants man to do, namely, to man's duties. But once we have shown that we have the *duty*

29. Burlamaqui, *Principles of Natural Law,* Part II, Chapter IV, Section VI. Burlamaqui cites Cicero's *Tusculan Disputations,* Book I, Chapter 26, as distinguishing duties in this tripartite way.
30. Burlamaqui, *op. cit.,* Part II, Chapter IV, Section IX.
31. *Ibid.*

to preserve our lives, it is easy to deduce that we have the *right* to preserve them; once we have shown that we have the *duty* to pursue happiness, it is easy to deduce that we have the *right* to pursue it; and once we have shown that, having been created members of the same species who are equal by nature and therefore mutually independent, we can know, first, that each of us has a *duty* not to dominate the other and, secondly, that each of us has a *right* to preserve this freedom from domination.

In my opinion, Burlamaqui reveals more explicitly than any other writer read by Jefferson the logical substructure upon which Jefferson built when he wrote in the Rough Draft: "We hold these truths to be sacred and undeniable; that all men are created equal & independent, that from that equal creation they derive rights inherent & inalienable, among which are the preservation of life, & liberty & the pursuit of happiness; that to secure these ends, governments are instituted among men." The use of "sacred" is characteristically Burlamaquian because of its religious connotation; the reference to "inherent" rights, like John Adams's equivalent reference to "essential" rights,[32] is reminiscent of Burlamaqui's constant harping on the fact that the laws of nature follow from the essence of man and his states as created by

32. See Adams's reference to "essential" rights in the *Report of a Constitution or Form of Government for the Commonwealth of Massachusetts, Works,* Volume IV, p. 220. John Adams adopts a view very much like Burlamaqui's when he says that self-love is implanted in us by God and hence that we "can annihilate ourselves, as easily as root out this affection"—which shows that for Adams self-love is a part of our essence or nature. Adams also says that, by the laws of nature, self-love is *our duty and our right.* See *Legal Papers of John Adams,* eds. L. K. Wroth and H. B. Zobel (Cambridge, Mass., 1965), Volume III, p. 244. The passage appears in *Adams' Argument for the Defense* in *Rex* v. *Wemms,* one of the Boston Massacre Trials in December 1770. See also Adams's *Dissertation on the Canon and Feudal Law* (1765), in *Works,* Volume III, p. 456, where Adams argues that since God, "who does nothing in vain," has given men understanding and a desire to know, they have a right to knowledge. He would have also said, with Burlamaqui, that they have a duty to seek knowledge.

God; the reference to the "preservation" of life and liberty; and the reference to the pursuit of happiness and to "ends" as the entities to which men have rights—all of these suggest a telescoping of Burlamaqui's argument. And because they suggest this I think that Jefferson was more deliberate in his use of "undeniable" than one might first suppose.

Even if Jefferson and Burlamaqui were both prepared to maintain that the statement "all men are created equal" is not only "undeniable" but "self-evident," it was not easy to regard as self-evident the statement that "from that equal creation they *derive* rights inherent & inalienable, among which are the *preservation* of life, the *preservation* of liberty, and the *pursuit* of happiness"—in spite of Locke's linking of equal creation and the right to *liberty* in a self-evident proposition. That statement of Jefferson's might be called at most undeniable by a cautious arguer precisely because of the steps that Burlamaqui was forced to take in order to get from the essence of man to his duties since it will be recalled that an undeniable statement may be one which is demonstrated rather than self-evident. For example, the proposition that since man was created, that is, given life by God, man had a duty to preserve his life, is one that Burlamaqui tried to *prove* and not one that he regarded as self-evident. And the proof required certain premises which emerge when we state his argument in full.

In showing that since God created man, he is bound to preserve his own life, Burlamaqui proceeds in the following manner. He first asserts that God made life *part of the essence of man*—that being his version of the statement that God created man. He next asserts that God is good, wise, omnipotent, and does nothing in vain. Therefore, Burlamaqui is able to assert that since God made life part of the essence of man, God must have proposed the preservation of life as an end of his creature, man, because God *would* have given man life in vain if God had not proposed man's preservation of

that life as one of man's ends. Burlamaqui's next step is to assert that since God proposed the preservation of life as an end of man, God *wills* that man should preserve his life, a step which is also justified by appealing to God's attributes. So we can now collect the following supposedly *demonstrated* propositions: (1) Since God made life part of the essence of man, God proposed the preservation of life as an end of man, and (2) Since God proposed the preservation of life as an end of man, God wills that man should preserve his life. From them we can infer by elementary logic the proposition: (3) Since God made life part of the essence of man, God wills that man should preserve his life. And the next step in this argument is to the proposition: (4) Since God made life part of the essence of man, man has a duty to preserve his life. It is unclear whether (4) follows from (3) by a definition of a "duty" as that which is willed by God or by asserting a new premise, namely, that what God wills that man should do, man has a duty to do. In any case, we are now at a point where we may assert that since man has been created as an essentially living being, he has the duty to preserve his life. And once we take the trifling step from a *duty* to preserve life to a *right* to preserve life, we have arrived at Jefferson's belief that the right to preserve life is "derived" from the *creation* of man.

Let me now repeat that since Burlamaqui's statement (4) above has been deduced from premises which are supposedly self-evident, it becomes undeniable, along with the corresponding statement about the *right* to pursue happiness. And that is why I think that Jefferson may have used the phrase "sacred and undeniable" in his Rough Draft. Now I wish to show that Jefferson's view that equally created men have the two other rights mentioned in the Rough Draft may be illuminated similarly. To show this, it is necessary to construe the phrase in the Rough Draft which reads, with Jefferson's characteristically unsettling punctuation, "the preservation

of life, & liberty & the pursuit of happiness," as meaning the same as "the preservation of life, the preservation of liberty, and the pursuit of happiness." And this reading is easily defended. For one thing, it is in accord with the language of Locke, who speaks of the *preservation* of life and the *preservation* of liberty as ends of government in Chapter IX of the *Second Treatise;* and Jefferson in the very next "sacred and undeniable truth" of the Rough Draft refers to "the preservation of life, & liberty & the pursuit of happiness" as ends to be secured by government. For another, there is a plausible grammatical parallelism in the phrase when construed as I construe it: two "preservations" of things, followed by a "pursuit" of a third thing. We have seen how the view in the Rough Draft that every human creature has the right to *preserve* life can be derived by focusing carefully on Burlamaqui's argument and then deriving a Jeffersonian right from a corresponding Burlamaquian duty, so now we may turn to the other rights in the Rough Draft. The right of every human creature to pursue happiness may be derived in the same way that the right to preserve life was derived because Burlamaqui made the desire for happiness part of the created essence of man. To make a long story less long, we state only the conclusion: since God made the *desire* for happiness a part of man's essence, man has a duty and right to *pursue* happiness.

The right to preserve *liberty* introduces an interesting complication when we try to link the author of the Rough Draft and Burlamaqui because it is a right which is deduced from a duty to *others,* whereas the right to preserve life and the right to pursue happiness are deduced from two Burlamaquian duties to *ourselves.* The complication simply involves dividing the notion of being equally created into its two components: (1) being a creature of God and (2) being equal to all others of the same species. A human *creature* is one who has been given the essential attribute of life by God,

and from this Jefferson may derive the *self-regarding* duty and right to preserve one's life. A human *creature* of God is also one who has been given the essential desire for happiness, and from this Jefferson may derive the *self-regarding* duty and right to pursue one's happiness. On the other hand, a human creature of God who is *equal* with his fellow creatures therefore has a *duty to others* not to put them under his dominion. And it is from this duty to others which each of us has that Locke derives the God-given right of all of us to liberty.[33] All of this is in keeping with a doctrine of natural law which is based on the created essence of man developed in the manner of Burlamaqui and some of his predecessors. Moreover, it shows that when in the Rough Draft Jefferson spoke of the rights to *preserve* life and to *preserve* liberty he was speaking of rights which were easily incorporated into the system of Burlamaqui, whereas the successors of these rights in the final version—the right *to* or *of* life and the right *to* or *of* liberty—could not be derived by the kind of argument we have been examining. Therefore, in my opinion,

33. See Chapter 2 above, section entitled "Self-evidence and Equality in Locke." In attributing to Jefferson this distinction between duties to oneself and duties to others, and hence a parallel distinction among rights, I am aware that there is one passage, written in 1822, where he writes: "To ourselves, in strict language, we can owe no duties, obligation requiring . . . two parties" (*Writings,* Volume XIV, p. 140). On the other hand, in 1810 he writes that one of our highest duties is self-preservation (*ibid.,* Volume XII, p. 418); in 1803 he praises the ancient moralists for being great in stressing our duties to ourselves though defective "in developing our duties to others" (*ibid.,* Volume X, pp. 381–382); and in 1782, he says that "if we are made in some degree for others, yet, in a greater, are we made for ourselves" and also that it would be ridiculous to suppose "that a man has less rights in himself than one of his neighbors, or indeed all of them put together" (*ibid.,* Volume IV, p. 196). All of which leads one to suppose that as he grew older, Jefferson changed, but that in the days closest to the Declaration he was quite prepared to speak of a duty to ourselves in the manner of Burlamaqui and other writers on natural law. In this connection, see Burlamaqui's explicit rejection of the doctrine that nobody can oblige himself, *Principles of Natural Law,* Part II, Chapter VII, Sections IX–XII.

the change of the Rough Draft in this respect was more serious than most commentators seem to recognize.[34]

I also want to stress Burlamaqui's dependence in his argument on man's essence as *created by God* because I believe that Jefferson in the Declaration leaned heavily on that aspect of Burlamaqui's view of natural law.[35] If one carefully attends to Burlamaqui's argument, one sees that he does not try to extract man's duties merely from man's essence alone but rather from man's essence as created by God. Strictly speaking, he does not typically assert something like "It follows from the fact that man is a living being that he has a duty to preserve his life." He rather asserts, for example, "Since God *made* life a part of the essence of man, God *wills* that man should preserve his life." And this approach is fundamentally different in a certain respect from what we find in other theorists of natural law who, although they believed that God created man and laid duties on him, tried to derive the *content* of those duties from his essence or nature without reference to what may be called God's psychology. Burlamaqui argues that since God *gave* us certain essential features, he must have *imposed* certain duties upon us, and that is Burlamaqui's way of answering a man who asks why he should do certain things. Burlamaqui does not wish to answer that question bluntly by saying: "Because God willed that you do them." But when he tries to be less blunt, Burlamaqui merely gives a causal explanation of why God *willed* that the man do those things by pointing out that God—who does nothing in vain—willed the creation of man with a certain essence. Consequently, Burlamaqui never really infers the content of the duties from the essence itself but rather from the fact that God *gave* man that essence. Burlamaqui's entire argument remains, therefore, on the level of God's thought and action: *Since God did or thought so-and-so, then he did or thought such-and-such.* So therefore, if we accept the statement that God did make something part of man's essence or that God did create men as equals, and if we also accept the various "since"-statements which purport to tell us how God behaves, we are led by way of a causal chain to the proposition that God did indeed command or prohibit certain actions. But notice that although the person who prompted this explanation asked for a *demonstration* of why he should do or refrain from doing certain things, he is not given any more than an account of how God came to will that he should do or refrain from doing those things. He is not given a *proof* of why certain things should be done or should not be done which God himself might have provided in justification of his own actions. He is not shown by Burlamaqui how the very essence of man entails certain duties but rather that God's *creation* of man with a certain essence caused God to *impose* certain duties on man. And for this reason he is certainly not shown that these *duties* are essential to man. He has been shown that God gave man certain essential attributes and that since it would have been pointless for God to have given man these essential attributes without laying certain duties on him, God laid those duties on him. But since this does not logically imply that the *duties* are essential to man, it also does not imply that the corresponding rights are essential to man or "inherent," as Jefferson called them in

34. See Becker, *Declaration of Independence,* p. 199.

35. There is no doubt that Jefferson believed in essences. I say this with full awareness that at a certain period in his life Jefferson rejected the doctrine of essence in no uncertain terms by saying: "We must dismiss the Platonists and Plotinists, the Stagyrites, and Gamalielites the Eclectics, the Gnostics and Scholastics, their essences and emanations, their Logos and Demiurgos, Æons and Daemons, male and female, with a long train of etc., etc., etc., or, shall I say at once, of nonsense," Letter to John Adams, October 13, 1813, *Writings of Thomas Jefferson,* Volume XIII, p. 389. It should also be noted *a propos* of Jefferson's supposed aversion to abstract entities that we find him in his *Notes on Virginia* of 1781 believing in the existence of *faculties,* which he contrasts with material *substances,* and saying that a faculty "eludes the research of all the senses," whereas a material substance may be subjected to the anatomical knife, and to analysis by fire and solvents, *Writings,* Volume II, p. 200.

the Rough Draft. Of course, Jefferson *thought* they were inherent because he may have reasoned—fallaciously—that since God gave man *life* as part of his essence, God must also have laid on man a duty to preserve his life, a duty which also formed part of his essence or inhered in it.

Natural Law and the Essence of Man

In order to show that the derivation of the principles of natural law that I think Burlamaqui bequeathed to Jefferson was not the only one available to him and his comrades, I want to turn to the version of those theorists who tried to demonstrate substantive moral propositions of the form, "Every man ought to preserve his own life," and who did not view their task as that of explaining how God came to *will* certain things by appealing to other acts of God. In effect, they tried to maintain propositions like "Since life is part of the essence of man, every man has a duty to preserve his life," without resorting to the psychology of God, and they seemed to think that from this proposition they could infer that the duty to preserve life was as essential to man as life was. Grotius and the early Locke seem to hold that man has certain duties because he has a certain essence, and that having this essence implies having essential duties quite independently of the fact that God created it. But even if one were to grant that, for example, the attribute of being a living being was part of the essence of man, the only ground on which one could conclude that the *duty to preserve life* is also part of the essence of man would be by asserting that the duty to preserve life is part of the essence of *life*. But, plainly, the attribute of life does not contain as part of *its* definition or essence the attribute of having a duty to preserve life. The situation is entirely different from that in which it might be argued: "Since it is part of the essence of a whale to be a mammal and it is part of the essence of being a mammal to

be an animal, it is part of the essence of being a whale to be an animal." Furthermore, the proposition, "Since life is part of the essence of man, man has a duty to preserve his life," not only fails to show that having a duty to preserve life is part of the essence of man but also turns out to be a very dubious proposition quite apart from that because it seems to depend on the highly debatable premise that man *should* preserve all or part of his essence.

This goes to the heart of the difficulties that have been felt by many philosophers about the doctrine of natural law not only in its Christianized form but also in the form which it takes in Aristotle's *Nicomachean Ethics,* where he holds that "the function of man is the active exercise of the soul's faculties in conformity with rational principle" after coming to the conclusion that man's rationality is what is specific to him, what distinguishes him from all other things.[36] Assuming for argument's sake that man has certain essential attributes, why, we may ask, should man *act to preserve* those attributes? Even in the face of this difficult question, certain theorists of natural law were determined to defend their doctrine without using an argument like Burlamaqui's, which made what they thought was an avoidable appeal to theological beliefs. They wanted to show that there is some sense in which the attribute of having a duty and a right *to do* certain things *follows from the nature of* man in a way that would allow them to persuade a *non-Christian* of the truth of the doctrine of natural law, and therefore they persisted in their effort to give a rational defense of the doctrine of natural law. In this spirit Grotius had held that "the law of nature is a dictate of right reason, which points out that an act, according as it is or

36. Aristotle, *Nicomachean Ethics,* Book I, Chapter VII, 1098 A. I use Rackham's translation in the Loeb edition. It is of some interest to note that Locke, in his *Essays on the Law of Nature,* cites this passage of Aristotle while presenting his first argument for the existence of a law of nature. See Essay I, pp. 112–113 of von Leyden's edition.

is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God."[37] He emphasized that "the acts in regard to which such a dictate exists are, *in themselves* [my emphasis], either obligatory or not permissible, and so it is understood that necessarily they are enjoined or forbidden by God."[38] Pufendorf stated the point more pithily: "Things forbidden by natural law are not improper because God forbade them, but God forbade them because they were of themselves improper; while in the same way things commanded by the same law are not proper or necessary because they are commanded by God, but they were commanded because they are of themselves proper."[39] And Locke was prompted by ideas like this when he tried to establish morality as a demonstrative science, even though he, like Grotius and Pufendorf, thought that the principles of natural law were decreed by God. Since these thinkers held that God himself decreed only what was a dictate of right reason and therefore proper, they virtually behaved as though they themselves could provide the argument that God would have given for the *truth* of his precepts if he had deigned to do so. Such an argument by God would, of course, not be an introspective explanation in which God said: "I gave man life with the intention of his preserving it; and since I had that intention, I commanded him to preserve it." It would have been a demonstration of *the truth* that man ought to preserve his life and not an autobiographical account of how God had come to command that he do so.

To get a clearer picture of this approach, it is useful to turn to Locke's early *Essays on the Law of Nature,* not published until the twentieth century. Locke wrote: "It seems to me to follow just as necessarily from the nature of man that, if he is a man, he is bound to love and worship God and also to fulfil other things appropriate to the rational nature, i.e. to observe the law of nature, as it follows from the nature of a triangle that, if it is a triangle, its three angles are equal to two right angles, although perhaps very many men are so lazy and so thoughtless that for want of attention they are ignorant of both these truths, which are so manifest and certain that nothing can be plainer."[40] The reader will observe that Locke tells us that a certain theorem of geometry contains a predicate which expresses an attribute that "follows from the nature of a triangle" and that this theorem is so manifest and so certain that nothing can be plainer than it. Here Locke regards a geometrical *theorem* as self-evident since he says that nothing could be plainer than it, and he also seems to say that this theorem attributes a property to all triangles which follows from the nature or essence of triangularity. But both of these statements are incompatible with what Locke maintains in the *Essay,* where he explicitly states that this proposition about triangles is *not* self-evident and where he regards essential predications, or those which are the results of definition, like "Every triangle has three sides," as trifling and uninstructive. In the light of Locke's later and greater wisdom on this matter in his *Essay,* it is fair to complain that when Locke says in the *Essays on the Law of Nature* that it follows necessarily from the *nature* of a triangle that its three angles are equal to two right angles, he cannot mean that this attribute of all triangles is part of the *essence* of being a triangle in the sense of being an attribute which is mentioned in its definition.

What else could he have meant? Probably something akin

37. *De jure belli ac pacis,* Book I, Chapter I, Section X.
38. *Ibid.*
39. Pufendorf, *De jure naturae et gentium,* Book II, Chapter III, Section 4.
40. *Essays on the Law of Nature,* pp. 198–201.

to what Scholastics meant when they said that having its angles add up to two right angles is a *proprium* of triangles.[41] Consequently, whereas *being part of the nature or essence* is *relatively* clear because it may be explained as an attribute which must be mentioned in a definition, *following necessarily from the nature or essence* is not. By the time Locke asserts, as he often does in the *Essay,* that statements like "The angles of every triangle add up to two right angles" are *theorems,* and must be deduced from self-evident propositions, he has come to see that they must be proven or demonstrated by means of an argument which will require reference to axioms. Therefore, the attribute of being a triangle certainly does not contain the attribute of having angles which add up to two right angles. One cannot move from "This figure is a triangle" to "The angles of this figure add up to two right angles" without the mediation of the other premises to which one appeals in the proof. That is why it is difficult to know what Locke means when he says in the *Essays on the Law of Nature* that the attribute of having its three angles add up to two right angles follows necessarily from the *nature* or *essence* of a triangle. True, all and only triangles have this property, and one may demonstrate that they do; but that is not enough to justify the claim that the attribute expressed by its predicate follows necessarily from *the nature* of a triangle.

41. A *proprium* is said to be predicated accidentally of the species because it is not the essence, but it is said to follow necessarily from the essence. It is also thought to be convertible with the species in the sense that everything in the species has the *proprium,* and everything which has the *proprium* is a member of the species. In other words, the *proprium,* though not of the essence of the species, is peculiar to it. I might add that the notion is also present in Aristotle, from whom Locke may have gotten it directly. See Aristotle's *Topics,* Book I, Chapter 5, 102 A on "property." I think that "property" or *"proprium"* comes very close to what Locke has in mind particularly because it is logically convertible with the attribute of being a man, since all *and only men* are bound to love and worship God once we forget about angels.

If anyone should disagree with what I have said about Locke's statement about the geometrical truth he uses as an illustration in the *Essays on the Law of Nature,* I doubt whether many would disagree with me when I say something similar about Locke's illustration from the theory of natural law. Even one who believes in God has no good reason for saying that the property of being obliged to love and worship God follows necessarily from *the nature or essence* of man. The property in question is not part of the *nature or essence* of man (as being a living animal is) simply because it need not be mentioned in the definition of man. Furthermore, even though, angels aside, one might hold that all and only human beings should love and worship God, this proposition, unlike the proposition about triangles, was never deduced by Locke from axioms. Indeed, we know that he abandoned the effort to carry out that deduction and repaired to revelation when asked to demonstrate the moral counterparts of his proposition about triangles.

However, before Locke retreated to revelation in his letters to Molyneux and in the *Reasonableness of Christianity,* he said a number of things in the *Essay* which help us understand why he might have later criticized what he had said in his earlier *Essays on the Law of Nature.* As we have seen in an earlier discussion of the *Essay Concerning Human Understanding,* Locke dismissed trifling propositions like "right is right" and "wrong is wrong" as well as propositions which are true merely by virtue of definitions because, he held, they were incapable of conveying any kind of knowledge. But then he added, as he tried to characterize *instructive* as opposed to trifling propositions: "We can know the truth, and so may be certain in propositions, which affirm something of another, which is a necessary consequence of its precise complex idea, but not contained in it: as that the external angle of all triangles is bigger than either of the opposite internal angles. Which relation of the outward angle to either of the

opposite internal angles, making no part of the complex idea signified by the name triangle, this is a real truth, and conveys with it instructive real knowledge."[42] Here we see the crucial connection which, according to Locke, must exist between the complex idea which is the subject of a universal proposition and the predicate if we are to avoid asserting a trifling proposition. The predicate must not be *contained* in the subject but it must be a *necessary* consequence of it. Therefore, instructive moral propositions must not resemble "Every triangle has three sides" but rather the proposition that the external angle of every triangle is bigger than either of the opposite internal angles or the proposition that the angles of all triangles add up to two right angles.

I realize that this later doctrine of Locke's resembles his earlier one insofar as he continues to think of the predicate of the geometrical theorem as a *necessary consequence* of the subject, but he no longer speaks of the predicate as following necessarily from *the nature of* the subject, and he no longer treats this geometrical theorem as if it were a self-evident truth by saying that it is so manifest and certain that nothing could be plainer than it. My guess is that his failure to speak about the predicate's following necessarily from *the nature* of the subject—triangle—is the result of his coming to hold that whatever is contained in the nature or essence of the subject is linkable with the subject only in a trifling proposition. There still remains a question, of course, about what Locke meant by the necessary connection between a predicate not contained in a subject and the subject. Some have interpreted this as an anticipation of Kant's notion of a synthetic necessary proposition,[43] and I have already wondered whether Locke might have had in mind the Scholastic notion of a *proprium*. On the other hand, he might have meant that since

42. *Essay,* Book IV, Chapter VIII, Section 8.

43. For example, Locke's editor, A. C. Fraser. See his note to Locke's *Essay,* Book IV, Chapter VIII, Section 8.

geometrical theorems are deducible from self-evident necessary truths, they too must be necessary truths, and I am inclined to think that this is what he did mean unless it can be shown that he regarded them as necessary quite independently of their being deduced.

In any event, I think that Locke, by ceasing to speak of man's duties as following necessarily from man's nature or essence on the ground that speaking in that way would turn principles of natural law into trifling propositions, effectively doomed the whole idea of logically extracting man's duties merely from his essence or nature. In this way he undercut a version of natural law which was an alternative to that advocated by Burlamaqui. As soon as he acknowledged that an essential predication of ethics was trifling, he distinguished his view from that of Culverwel, who, as we have seen in Chapter 1, thought that the principles of natural law were virtually tautologous, and from that of Grotius when Grotius likened the principles of natural law to statements like "Murder is evil," which, for him, were like "Every man is a living being," that is to say, statements which were true by virtue of their predicates being contained in their subjects. Unfortunately, Locke failed to heed his own strictures on this subject when he maintained that the proposition "Where there is no property, there is no injustice" would be a theorem in the demonstrative science of morality[44] that he never produced, since Hume[45] pointed out that this so-called theorem was sim-

44. *Essay,* Book IV, Chapter III, Section 18.

45. *An Enquiry Concerning Human Understanding,* Section XII, Part III, ed. L. A. Selby-Bigge (Oxford, 1902), p. 163. Also see my *Science and Sentiment in America,* p. 60. It is of interest to note that Berkeley, in his *Philosophical Commentaries,* wrote "Lockes instances of Demonstration in Morality are according to his own Rule trifling Propositions." See *The Works of George Berkeley,* eds. A. A. Luce and T. E. Jessop (London, 1948), Volume I, p. 84. This was written before Hume published his comment on the same subject and could not have been known to Hume since it had not been published in Hume's lifetime. I am grateful to Professor George Pitcher for locating this passage for me.

ply the result of using definitions of "property" and "injustice" and was therefore not a theorem of morality but what Locke himself should have called a trifling and uninstructive proposition. Given this blunder, given Locke's own statement in one neglected part of the *Essay* that there could be no self-evident practical principles,[46] and given Locke's admission that he had not constructed a demonstrative science of morality, it is not surprising that the American revolutionaries did not turn to him for a straightforward exposition of the doctrine of natural law. In his writings they *could* find a description of what a science of morality might look like, they *could* find elaborate discussions of intuitive knowledge and self-evident truth, and they *could* find the allegedly self-evident truth in the *Second Treatise* that "creatures of the same species . . . should also be equal one amongst another without subordination or subjection"—a declaration which was easily incorporated into Burlamaqui's system when he argued that since God made us fellow members of the same species, he must have imposed upon us a duty to others not to put them under our dominion. But the revolutionaries found much more than a metaphysical and epistemological prolegomenon to a system of natural law in Burlamaqui's textbook. He tried to use the method recommended by Locke and claimed that he had deduced the principles of natural law from the nature and states of man, even though he did not deduce substantive propositions of natural law and therefore did not carry out the same program that Locke, with characteristic honesty, said he could not carry out. But the revolutionaries did not seem to worry about that. They were quite content to follow a man who boldly announced:

> We shall therefore lay down two general propositions, as the foundation of the whole system of the law of nature.

46. *Essay,* Book I, Chapter II, Section 4; also my *Science and Sentiment in America,* pp. 20–21.

> *First Proposition.*
>
> Whatever is in the nature and original constitution of man, and appears a necessary consequence of this nature and constitution, certainly indicates the intention or will of God with respect to man, and consequently acquaints us with the law of nature.
>
> *Second Proposition.*
>
> But, in order to have a complete system of the law of nature, we must not only consider the nature of man, such as it is in itself; it is also necessary to attend to the relations he has to other beings, and to different states thence arising. Otherwise it is evident we should have only an imperfect and defective system.
>
> We may therefore affirm, that the general foundation of the system of natural law is the nature of man, considered under the several circumstances, that attend it, and in which God himself has placed him for particular ends; inasmuch as by this means we may be acquainted with the will of God. In short since man holds from the hand of God himself whatever he possesses, as well with regard to his existence, as to his manner of existing, it is the study of human nature only, that can fully instruct us concerning the views, which God proposed to himself in giving us our being; and consequently with the rules we ought to follow, in order to accomplish the designs of the Creator.[47]

Burlamaqui believed that if we see a trait in the nature of man, we can conclude that God must have *willed* something with respect to man, and that was enough. It was also enough for his American admirers, who were not bent on proving the substance of God's decrees but content with Burlamaqui's explanation of how God had come to issue them. By this I do not wish to suggest that Burlamaqui held that the mere fact that God willed that man do something was

47. *Principles of Natural Law,* Part II, Chapter IV, Section V.

sufficient to prove it obligatory without attention to God's qualities. I have already indicated that God was assumed by Burlamaqui to be not only powerful but also good and wise. That is why we find Burlamaqui arguing that God's supreme power "is not alone and of itself sufficient to establish the right to command, and the obligation of obeying. But if to the idea of the Creator we join . . . the idea of being perfectly wise and sovereignly good, who has no desire of exercising his power, but for the good and advantage of his creatures; then we have every thing necessary to found a legitimate authority."[48] What I mean to emphasize is that once Burlamaqui has assumed or tried to prove that God is perfectly wise and sovereignly good, then, when he shows that God has willed something, that is enough. After that, there is no need, he thinks, for his readers to examine each decree of God and to determine whether its content is true or false. We examine the essence God has given man and the states into which he has put man, infer his intentions with respect to man, and then infer what God was led to decree, using along the way the premise that God, by his nature, can do nothing but good and nothing in vain. In this way, we do not go through the Lockean process of proving the truth of moral theorems as we would prove the truth of geometrical theorems. Students of the history of natural law may well ask whether, because his argument terminates in a statement about what God wills, Burlamaqui is a "voluntarist" or one who thinks that the essence of natural law is God's will rather than his reason.[49] I do not think so, but on the other hand,

48. *Ibid.*, Part I, Chapter IX, Sections VI–VII.

49. See von Leyden's Introduction to Locke's *Essays on the Law of Nature*, pp. 40, 43, and 50–54, for a discussion of the connections between Locke's so-called *voluntarist* theory of natural law, according to which God is the ultimate source of morality, and his search for a purely rational foundation of ethics. Locke's apparent shifting on this subject in his *Essays* is linked by von Leyden with a medieval controversy on the nature of law which is described in O. Gierke, *Political Theories of the Middle Age*, trans. F. W. Maitland (Cambridge, Eng., 1951), pp. 172–173, note 256, a controversy over the question whether the essence of law is will or reason, though "in any case God himself appeared as being the ultimate cause of Natural Law." To this note the translator, Maitland, adds another from Gierke's book on Althusius, in which Gierke associates the view that the law of nature was a mere divine command with nominalism, whereas realists held the view that law was a dictate of reason "grounded in the being of God but unalterable even by him." A third or "mediating view" Gierke describes as "inclined to the principles of realism," and he mentions Aquinas and Suarez as its supporters. "It regarded the substance of natural law as a judgment touching what was right, a judgment necessarily flowing from the Divine Being and unalterably determined by that nature of things which is comprised in God; howbeit, the binding force of this law, but only its binding force, was traced to God's Will" (p. 173).

Burlamaqui cannot be called a rationalist or intellectualist if that means that he tries to prove principles of natural law by reason and without *any* reference to God's will. His position is a mixture of voluntarism and rationalism since he tries to use reason to show that God must have willed certain things because he willed others. Because Burlamaqui uses as a premise the proposition that God is good and wise as well as supremely powerful, he thinks that he has avoided that form of voluntarism according to which law is *merely* the will of a supremely powerful being. It is the will of a good and wise powerful being, but nonetheless his will.

On the basis of this reading of Burlamaqui and my belief that he influenced Jefferson very strongly, I have argued that Jefferson, by applying the phrase "sacred and undeniable" to his main moral truth in the Rough Draft, may have been acknowledging that it was not self-evident but rather deduced from other self-evident truths. In other words, Jefferson's assertion in the Rough Draft that it was *undeniable* that the right to *preserve* life, the right to *preserve* liberty, and the right to *pursue* happiness were *derived* from equal creation had the status it had in Burlamaqui's system. It was the Swiss jurist's conclusion from what he regarded as two self-evident propositions: (1) that since God gave us life as part of our es-

sence, put us into the same species and into society with our fellow-men, and gave us as part of our essence a desire for happiness, God proposed at least three ends for us: the preservation of life, the preservation of liberty, and the pursuit of happiness; and (2) that since God proposed these three ends for us, he imposed on us three corresponding duties to attain these ends. From these two statements Burlamaqui inferred that from God's equal creation of man as a being with a certain nature and in a certain state, man derived the duty to preserve life, the duty to preserve liberty, and the duty to pursue happiness. And by what Locke might have called a trifling step, I suggest that Jefferson deduced his statement in the Rough Draft that from equal creation man derives his *rights* to preserve life and liberty, and to pursue happiness.

When we see all of this, we see more clearly, I hope, the metaphysics and theology by means of which the revolutionaries thought they derived from equal creation the rights that we shall examine from a different angle in the next chapter. But before we turn our attention in that direction, I think it worth noting to what extent the appeal to the essence or nature of man was indispensable in their argument as well as the extent to which that concept could be what I have called an intellectual joker. The point is that philosophers have not always agreed as to what the essence of man is, and therefore, since so many arguments in the history of the doctrine of natural law have taken the form of deriving duties and therefore rights from the essence of man, a different view of his essence could easily lead to a different conception of what duties and rights man has by nature. I believe that one of the most important divisions within the history of the doctrine of natural law probably derives from what might be regarded as an ambiguity in Aristotle's conception of the essence of man. On the one hand, we find frequent assertions by him that man is by nature a rational animal, on the other that he is by nature a political or social animal. And, interestingly

enough, one finds that there are some theorists of natural law, like Locke in his *Essays on the Law of Nature,* who appeal to what may be called the rationalistic strain in Aristotle's conception of man's nature rather than to what, Franco Venturi tells us, was called the socialistic strain by an Italian writer of the Enlightenment.[50] Grotius, Pufendorf, and the Cambridge Platonists—as von Leyden points out[51]—held that sociability is the origin of the law of nature. And what is of even greater interest to us in this connection is that Burlamaqui criticized Pufendorf for "establishing sociability alone, as the foundation of all natural laws."[52] This, Burlamaqui maintains, would not allow us to derive duties to God and ourselves and would therefore, if I am correct, make it impossible to provide a foundation for two of the rights in the Rough Draft, the preservation of life and the pursuit of happiness.

It is therefore of the utmost importance for an argument like that of Burlamaqui and of the American revolutionaries that the essence or nature of man be what they take it to be, and my point in connection with a more general thesis of this book is that the essence of man is so obscure a notion that it could easily be identified by different thinkers in different ways. Thus, if Jefferson had not held, under the influence, as I think, of Burlamaqui, that a desire for happiness is part of the created essence of man, he could not have defended by means of a Burlamaquian argument the various rights he defended. Furthermore, given the obscurity of the notion of essence, other thinkers might easily have "seen" things in the essence of man that might have led by Burlamaquian arguments to duties which would have been most

50. Venturi tells us that Appiano Buonafede applied the word "socialist" to Grotius, Pufendorf, and Cumberland because of their view that *sociality* or *sociability* was the basis of natural law, *Italy and the Enlightenment: Studies in a Cosmopolitan Century,* trans. S. Corsi (London, 1972), p. 59.

51. *Op. cit.,* p. 53.

52. Burlamaqui, *Principles of Natural Law,* Part II, Chapter IV, Section XIX.

objectionable from the revolutionaries' point of view. Therefore, the revolutionaries' reliance upon the concept of essence is, in a certain respect, the metaphysical counterpart of their reliance on self-evident truth. It would take very little effort to turn the concept of essence or nature to uses that the revolutionaries would have abhorred. After all, Aristotle believed that some men were slaves by their nature or essence, and he was one of the most inveterate employers of the concept of essence in the history of philosophy—some would say its inventor. And we have seen that whatever worries Jefferson might have had about treating blacks equally with whites seem to have been based on worries about whether they possessed enough rational power to warrant inclusion in the species *man,* that is to say, whether blacks and whites shared the same essence.

• 5 •

The Nature of Rights

So far I have said a fair amount about rights but have not tried to define the concept of a right as it was understood by the revolutionaries, nor have I discussed some of the characteristics of certain rights, like the unalienability of which the Declaration speaks. I have also spent comparatively little time discussing some of the particular rights mentioned in the literature of the Revolution. However, the reader has seen that a right was understood to be some kind of power and that expressions like "You have the right to do so-and-so," "You may do so-and-so," and "You have the liberty to do so-and-so" meant roughly the same thing to eighteenth-century moralists and revolutionaries. On the other hand, the expression, "You have the power to do so-and-so," though it was used on occasion as an equivalent of the expressions just listed, created a problem for the revolutionaries because they were very much concerned to distinguish the right to do something from the "*mere physical* power" to do something. They thought that a right was a physical power but that it was a special kind of physical power, whose *differentia,* as

Aristotelian logicians would say, had to be mentioned in the definition of a right. Therefore, my first task in this chapter will be to clarify the Revolutionary conception of a right with special attention to the relationship between a right and a physical power. After that, I shall turn to one of the most important *kinds* of rights for the revolutionaries, namely, *unalienable rights,* in order to discuss not only the meaning of the word "unalienable" but also to consider certain rights which were often said by the revolutionists to be unalienable, for example, the right to preserve life, the right to preserve liberty, the right to pursue happiness, and the right to judgment or belief, as it was sometimes called. In the course of this discussion I shall deal with a number of questions concerning such rights, for example, with questions raised by certain critics who wondered why the revolutionaries, after saying that the right to life is unalienable in the beginning of the Declaration, *pledge* to each other their lives at the end of the document. Another kind of right I shall consider is the so-called *adventitious right;* and by the time I have done so, it will be easier to understand why the adventitious and alienable right to property in goods and estates was not listed by the signers of the Declaration as one of their sacred trinity of rights.

Rights, Powers, and John Adams

The question to which I first address myself is: How did Jefferson and his fellow-revolutionaries understand the noun "rights" as used in the Declaration and in other kindred documents? When in the Rough Draft Jefferson said that men have a *right* to preserve life and liberty, and a right to pursue happiness, and when the final version asserted that men are endowed by their Creator with the rights more simply named "life" and "liberty," what was meant by the noun

"rights"? Let me say very quickly that it will not do to dispose of this question by writing, as one eminent student of Jefferson has written, that "we can get at the heart of the matter if we regard the word 'rights' as merely the plural of the word 'right' and think of it in the moral sense. Rights, as the people in all ages understand them, are simply what is right."[1] First of all, the moral word "right" whose plural we are advised to form in order to get the Declaration's noun "rights" is an adjective and therefore, strictly speaking, has no plural. The adjective is a word which is normally applied to an action, as when we say that Brutus's stabbing of Caesar was right. Consequently, I do not think, as Dumas Malone does, that according to the Declaration "rights are simply what is right," and my reasons for objecting are more than grammatical. For one thing, "*a* right" refers to an entity that *may be exercised* in actions, whereas the adjective "right" characterizes actions themselves. For another, in exercising *a* right we do not necessarily do what *is* right because on *some* occasions it may not be right to exercise that right. Thus the right to rebel might be exercised prematurely or without reason, and hence the rebellion be condemned as not right.

In addition, we must remember that a statement that every man has a certain right is connected in several ways with the laws of nature, which express duties. First of all, the statements in the Declaration of *our* rights are deducible from statements of *our corresponding* duties, or duties to do that which *we* are said to have a right to do. Secondly, each such statement of a right implies that *every other* man has at least a duty not to prevent our exercise of the right in question. And, thirdly, our right to do something cannot conflict with our duties as expressed in natural law. Consequently, a reader who wishes to understand what the signers of the Declaration

1. See Dumas Malone, writing in *The Story of the Declaration of Independence* (New York, 1975), p. 88.

meant when they said that every man has a certain right to do something, must understand what the signers understood by a duty of natural law.

What, then, *are* rights and how are they connected with powers? When we probe in this direction, we discover that the American revolutionaries were influenced by writers who distinguished sharply between *natural* power and *moral* power. In this context the word "natural" is treated as equivalent to "physical," and so Pufendorf tells us: "In man the power to act is twofold. One is the *natural* power to act (*potentia*), through which he is able by his natural strength to perform an action, or to neglect it, without considering whether it be right or not."[2] Consequently, Pufendorf adds that natural power consists in being "able in fact to do things forbidden by laws, and to neglect their precepts."[3] By contrast, Pufendorf continues, "*moral* power in man is that whereby he is able to perform a voluntary action legitimately and with a moral effect, that is to say, so that this action shall harmonize with the laws, or at least be not repugnant to them, and be able to produce moral effects in others. Now a man is judged to have authority to do all that which can be done by him through the exercise of his natural power, whatever, namely, is not forbidden by the laws, or is also enjoined by the same, or else left indifferent."[4] Pufendorf was so preoccupied with the distinction between moral power conceived as a right and mere natural power (*potentia*) that he made a further distinction between having authority (*potestas*) and having a right (*ius*) by pointing out that when we are said to have authority over persons or things, it is not always clear how we have acquired the things. On the other hand, when we speak of having a right over them, this

2. *Elementorum Jurisprudentiae Universalis,* Book I, Definition XIV, p. 168 of Oldfather's translation.
3. *Ibid.*
4. *Ibid.*

"clearly indicates that this authority has been acquired properly and is now also properly held." Therefore, when Pufendorf says of a right that it is a "moral quality by which we properly either command persons or possess things, or by which things are owed to us," he conceives of a right as something that is doubly removed from mere natural or physical power but which does not for this reason cease being a physical power. It is a species of power to use one's strength in a manner which is morally approved.[5]

The idea that a right is a moral power is also emphasized by Burlamaqui, who may have had more influence on some American revolutionaries than Pufendorf had.[6] Burlamaqui defines a right as a power or a faculty which a man has to use his liberty and strength (*ses forces naturelles*) in a particular manner either in regard to himself or in respect to other men, so far as this exercise of his liberty and strength is approved by reason.[7] Because Burlamaqui emphasizes a distinction between physical power and right which will help us clarify what some of the colonists said about rights and dispel some confusion that commentators on Colonial writings may sometimes create, I shall quote a passage from the *Principles of Natural Law* in which he reveals basic agreement with Pufendorf:

> We must not therefore confound simple power with right. A simple power is a physical quality; it is a power

5. Pufendorf, *op. cit.,* p. 58. It may be helpful to note that Pufendorf uses "*potentia*" for natural power, "*potestas*" for a moral power to do something (*potentia moralis activa*), and "*ius*" for a moral power properly acquired. The logical path from "*potentia*" to "*ius*" is by way of adding two moral differences to the genus of natural power.
6. I have in mind here the disappointment which James Otis felt when he read Grotius and Pufendorf on the rights of colonists in general. See B. Bailyn, ed., *Pamphlets of the American Revolution, 1750–1776,* Volume I (1750–1765), p. 436. The passage appears in Otis's *The Rights of the British Colonies Asserted and Proved* (1764).
7. *Principles of Natural Law,* Part I, Chapter VII, Section II.

> of acting in the full extent of our natural strength and liberty; but the idea of right is more confined. This includes a relation of agreeableness to a rule, which modifies the physical power.[8]

It is imperative to observe, therefore, that although a right conceived as a power is distinguished from power understood as unqualified physical strength, it is distinguished from it because a moral right is a power to use physical strength in conformity with, or not in violation of, natural law. When we view it in this way, we may distinguish physical strength as a morally neutral thing from its use in a morally acceptable way and from its use in a morally *un*acceptable way. Physical strength may, to put the matter simply, be used to good effect or ill effect. And from this it follows that many colonists who spoke of rights realized that a right was a power to effect something by the use of physical strength in what Burlamaqui calls a manner approved by reason. Consequently, they were not critical of the use of physical strength *as such*. Those who had studied *Cato's Letters* by Trenchard and Gordon would have read in Letter 25 that power conceived as physical strength is like fire because it warms, scorches, or destroys, according as it is watched, provoked, or increased. When such *physical* strength or power is used in certain morally objectionable ways by one man or by a few, it is called *despotic* power, *arbitrary* power, or dominion over other men. When it is used in morally objectionable ways by the many it is called "license."[9]

8. *Ibid.*, Part I, Chapter VII, Section III. Burlamaqui's reference to Pufendorf is to the latter's *De jure naturae et gentium,* Book I, Chapter I, Section 20, where he says almost exactly what I have quoted above from his *Elementorum Jurisprudentiae Universalis.*
9. John Trenchard and Thomas Gordon, *Cato's Letters: Essays on Liberty, Civil and Religious, and Other Important Subjects,* 6th ed., corrected (London, 1755). I have used a reprint edition published in New York, 1971, of which see Volume I, pp. 184–194. See also Locke, *Second Treatise,* Section 6, where he contrasts liberty and license. For some Colonial references to morally objectionable uses of power, see, for example, Jonathan Mayhew, *A Discourse Concerning Unlimited Submission and Nonresistance to the Higher Powers* (1750), Bailyn, *Pamphlets,* Volume I, pp. 240–241, where "absolute uncontrollable power" and "arbitrary power" are mentioned; also James Otis, *Rights of the British Colonies,* Bailyn, *ibid.,* p. 468, where "unlimited power of taxation" is condemned; also Oxenbridge Thacher, *The Sentiments of a British American* (1764), Bailyn, *ibid.,* p. 495, where there is a reference to "exorbitant wanton power." It should be clear that these qualifications of power are what grammarians call "attributive" rather than "predicative" since the authors do not intend by the use of an expression like "exorbitant wanton power" to assert that *all* power is exorbitant and wanton. They merely wish to specify some uses of power which are exorbitant and wanton. Furthermore, when we find an expression like "power and liberty ever being *opponents,*" *A Letter to the People of Pennsylvania* (1760), Bailyn, *ibid.,* p. 257, we must understand that the word "power" is here being used elliptically for something like "arbitrary power" or "despotic power" because, as we have seen, "liberty" is itself defined as a species of power.

This is quite evident in the Rough Draft of the Declaration, where the second occurrence of the word "powers" appears in the reference to the "*just* powers" that governments derive from the consent of the governed, where the third occurrence refers to the right, which the people may exercise after abolishing one form of government, to organize the new government's "powers in such form, as to them shall seem most likely to effect their safety and happiness," and where the fourth occurrence refers to the fact that a long train of abuses, etc., has evinced "a design to subject them to *arbitrary* power."[10] Clearly, this shows that powers could be *just,* that they could be organized in forms that would seem likely to effect the people's *saftey and happiness,* and that they could be *arbitrary.* Furthermore, it is noteworthy that the phrase "subject them to arbitrary power" was ultimately replaced by "reduce them under absolute despotism."[11]

As soon as one realizes that the American revolutionaries thought that physical power was neutral and that it was not

10. Boyd, *Declaration of Independence,* p. 19.
11. For an interesting account of the steps by which this change came about see Boyd, *ibid.,* pp. 22–23.

evil as such, one can see why it would have been impossible for them to have held—as Professor Bernard Bailyn says they held—that "the sphere of power" and "the sphere of right" were "innately opposed."[12] No Colonial revolutionary who accepted the main tenets of his moral and juristic mentors could have believed this. How could he if he wished to defend the right of armed revolution? The very right to abolish a bad government which is advocated in the Declaration is plainly a right or a moral power to exercise physical strength if necessary.

In reporting what the colonists and their mentors believed, I have quoted the Declaration, the widely read *Cato's Letters,* Pufendorf, and Burlamaqui. Now let me add that John Adams once wrote: "It is a maxim, that in every government there must exist somewhere, a supreme, sovereign, absolute, and uncontrollable power; but this power resides always in the body of the people."[13] The same Adams asserted many years later, in words that are quite in keeping with those he uttered before the Revolution, that "All that men can do, is to modify, organize, and arrange the powers of human society, that is to say, the physical strength and force of men, in the best manner to protect, secure, and cherish the moral, which are all the natural rights of mankind."[14] It should be noted that Adams explicitly allows that physical strength may be used in a morally beneficial manner. And in 1776 Adams had asserted: "Government is a frame, a scheme, a system, a combination of powers for a certain end, namely, —the good of the whole community."[15] He also said once that

12. Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass., 1967), pp. 57–58.
13. J. Adams, "Proclamation of the Great and General Court" (Winter 1775–1776?), *Works,* Volume I, p. 193.
14. Letter to John Taylor in 1814, *ibid.,* Volume VI, p. 458.
15. *Ibid.,* Volume III, p. 479. This passage appears in a letter written by Adams to the *Boston Gazette,* January 27, 1766, under the pseudonym, "The Earl of Clarendon." For the obvious idea that unobjectionable forms of government exercise powers, see also Daniel Dulany, *Considerations on the Propriety of Imposing Taxes in the British Colonies* (1765), Bailyn, *Pamphlets,* pp. 618–620.

he agreed with Butler rather than Hobbes[16] on the nature of man, with the Bishop Butler who summed up one of the most important parts of his *Sermons on Human Nature* by writing: "All of this is no more than the distinction, which everybody is acquainted with, between *mere power* and *authority.*"[17] And Butler did not think that it was always wrong to exercise physical power.

It is absurd, therefore, to suppose that Adams regarded power conceived as physical strength as necessarily or intrinsically in conflict with the rights of man, with natural law, or with liberty conceived as a natural right. On the other hand, *despotic* power, *arbitrary* power, and other varieties of abused and immoral uses of physical strength or power *were* thought by Adams and by other colonists to be in conflict with natural law and with natural rights. To say so, however, would be trifling, to use Locke's term. By definition, a morally reprehensible use of physical strength or power would violate moral law and invade moral rights. It would be a use of physical strength of which reason would disapprove. And so how could it *fail* to clash with natural law and natural right? In reading even the most emotional and rhetorical pamphleteers one sees that they grasped some of the fundamental definitions of the eminent jurists and philosophers

16. Adams, *Works,* Volume IV, p. 406.
17. Joseph Butler, *Fifteen Sermons Preached at the Rolls Chapel* (1726; London, 1949), Sermon II, Section 14, p. 57. In Otis's *Rights of the British Colonies,* Bailyn, *Pamphlets,* Volume I, p. 476, see the following sentence: " 'Tis hoped it will not be considered as a new doctrine that even the authority of the Parliament of *Great Britain* is circumscribed by certain bounds which if exceeded their acts become those of mere *power* without *right,* and consequently void." Here, as in Butler, "mere power" is used in condemnatory fashion because the power is not rightful. However, the English word "mere" is ambiguous and may sometimes carry no pejorative implication. "Mere power" is then understood as "neutral power."

whom they read, so in fairness to these pamphleteers, one should not saddle them with trifling, self-contradictory, or patently false views. Yet it *is* trifling to assert that a morally condemnable use of physical strength is in conflict with natural law; it *is* self-contradictory to suppose that the use of morally approved strength is in conflict with morality; and it *is* patently false that the use of physical strength is *inevitably* in conflict with natural law. In the light of this, I cannot agree with Bailyn's statement that the colonists saw the public world "divided into distinct, contrasting, and innately antagonistic spheres: the sphere of power and the sphere of liberty or right. The one was brutal, ceaselessly active, and heedless; the other was delicate, passive, and sensitive. The one must be resisted, the other defended, and the two must never be confused."[18]

Is there no way of interpreting this statement so that it represents the colonists' views on power more accurately? Let me answer this by returning to the figure of fire in the twenty-fifth of *Cato's Letters*. Power is there said to resemble fire in being both useful and dangerous. It is dangerous because it has a tendency to break bounds, and perhaps this conveys the element of truth in the statement that power was regarded by the colonists as "brutal, ceaselessly active, and heedless." Like everyone else, the colonists were acutely aware of what might happen if fire—and, in general, physical power—were placed in the hands of fallen, biased, unchecked human beings. But this does not mean that the colonists held that all power to use physical strength was brutal, despotic, arbitrary, or opposed to liberty and right, which are themselves powers to use physical strength in a reasonable way.

Since I believe that the colonists on the whole tended to regard power as morally neutral physical strength, as Pufendorf's *potentia,* I have grave doubts about the following statement by Bailyn: "The essence of what they meant by

18. Bernard Bailyn, *Ideological Origins,* pp. 57–58.

power was perhaps best revealed inadvertently by John Adams as he groped for words in drafting his *Dissertation on the Canon and Feudal Law*. Twice choosing and then rejecting the word 'power,' he finally selected as the specification of the thought he had in mind 'dominion,' and in this association of words the whole generation concurred. 'Power' to them meant the dominion of some men over others, the human control of human life."[19] I fail to see that Adams's twice choosing and then rejecting "power" in favor of "dominion" shows that he *identified* power and dominion over men. It could more plausibly be argued that it shows his refusal to identify them, a refusal made all the more understandable by some of the passages from Adams I have quoted above and by some of the passages I have quoted from Pufendorf and Burlamaqui. I agree with Bailyn that the colonists believed that a physical power and a right should never be "confused," but it does not follow from this that they regarded them as "antagonistic." They viewed a natural right as a moral species of power, but a species, though *distinct* from the genus of which it is a species, is not *antagonistic* to it. Let me now consider certain moral powers, or rights, that occupied a central position in the philosophy of the revolutionaries, namely, unalienable rights.

Is the Right To Believe Unalienable?

Many older treatises on natural law contain classifications of rights. For example, rights are described as perfect, imperfect, alienable, unalienable, or external; and some are said to be held by man in a state of nature because they come from the hand of God, whereas others are said to exist in adventitious states of society which are the products of man's own acts. I begin by discussing the notion of an unalienable right not only because it is mentioned in the Declaration but also be-

19. *Ibid.,* pp. 55–56. See Adams, *Diary and Autobiography,* Volume I, p. 255.

cause unalienable rights play a particularly important part in the argument for rebellion, which I shall consider in a later chapter. But before I discuss the notion of unalienable right in some detail, I want to dispose of the misconception that it is a right which "no man can *take* away."[20] Let me say at once, therefore, that the term "unalienable" does not refer to what cannot be *taken away* but rather to what cannot be *transferred* to another. "Alienable" is equivalent to "communicable" in one of Pufendorf's statements on the subject.[21] And Rousseau said "To alienate is to give or sell" in a passage[22] cited by James Otis.[23]

I shall begin my discussion of how the revolutionaries viewed *alienable* rights by turning first to the writings of Francis Hutcheson. What he has to say about rights and about their alienability and unalienability is, naturally, influenced by his special views in moral philosophy and to that extent cannot be attributed in its entirety to all of the revolutionaries. But in spite of that, most of what he says is quite illuminating for our purposes primarily because he is clearer and more philosophical than most American writers on the subject.[24] He treats this subject in at least three places: (1) in the

20. Malone, *op. cit.*, p. 88. The emphasis is mine.

21. *De jure naturae et gentium,* Book I, Chapter I, Section 19. In one of Jefferson's first legal arguments—that in the case of Howell vs. Netherland—he uses the verb "alien" rather than "alienate" in referring to the transferring of a black. In this same argument, Jefferson writes: "Under the law of nature, all men are born free, every one comes into the world with a right to his own person, which includes the liberty of moving and using it at his own will." He also appeals to Pufendorf, *op. cit.,* Book VI, Chapter III, Sections 4 and 9, on certain aspects of the subject of slavery. This argument of Jefferson's appears in P. L. Ford's edition of the *Writings of Thomas Jefferson,* Volume I (New York, 1892), pp. 373–381.

22. *The Social Contract,* Book I, Chapter IV.

23. *Rights of the British Colonies* in Bailyn, *Pamphlets,* Volume I, p. 436.

24. In general, I have also found Hutcheson's discussion of the various kinds of rights more helpful than those of the jurists. Except for Burlamaqui's treatment of the *adventitious* right of property, to which I shall soon come, he is much less probing than Hutcheson in his discussion of the different

second treatise of his *Inquiry into the Original of Our Ideas of Beauty and Virtue* (1725), the second treatise being entitled *An Inquiry Concerning the Original of Our Ideas of Virtue or Moral Good;* (2) in his *Philosophiae moralis institutio compendiaria* (1742, first translated into English in 1747 under the title *A Short Introduction to Moral Philosophy*); and (3) in his posthumous *System of Moral Philosophy* (1755). The first treatment is more extended than the others so I shall concentrate on it.

Hutcheson says that in order to determine what rights are alienable we must ask two questions. First: Is the alienation within our natural power, meaning, is it "possible for us in fact to transfer our right"? If so, then we must ask whether it will "serve some valuable purpose" to transfer that right. And, Hutcheson holds, a right is said to be alienable if and only if both of these questions are answered in the affirmative.[25] It seems clear, then, that the first question is nonmoral insofar as it concerns what is possible, whereas the second might be called a moral question if "valuable" is construed as a moral term. Because Hutcheson's distinction between two kinds of unalienability—natural and moral—raises some difficult questions, I want to discuss the two kinds at some length. I begin with the notion of natural unalienability, which in the eighteenth century affects the whole idea of the right to believe.

Hutcheson points out that because alienability involves

kinds of rights (*Principles of Natural Law,* Part I, Chapter VII, Section 8), as are Pufendorf (*De jure naturae et gentium,* Book I, Chapter I, Section 19) and Grotius (*De jure belli ac pacis,* Book I, Chapter I, Sections 4–7). Locke presents no systematic discussion of the various kinds of rights, though, as we shall see, he says some very relevant things, especially on matters pertaining to belief and life.

25. *Inquiry Concerning the Original of Our Ideas of Virtue or Moral Good,* sometimes referred to as *Inquiry Concerning Moral Good and Evil,* 2nd ed., corrected and enlarged (London, 1726), Section VII, Part VII, pp. 282–283.

the passing of these two tests, a right may be said to be unalienable (incidentally, he uses that spelling and not "*in*alienable") if it fails the first test alone. Thus he maintains that "the right of private judgment, or of our inward sentiments, is unalienable" because "we cannot command ourselves to think what either we ourselves, or any other person pleases."[26] The basic idea here seems to be that one's judging truth or falsity is caused by what appears to be relevant evidence and therefore that one cannot judge as one pleases. *A fortiori,* one cannot judge as another person pleases and hence cannot transfer one's right of judgment. What Hutcheson says about the right to judgment is of special concern to us because it is closely related to what Jefferson says at the beginning of his "Bill for Establishing Religious Freedom," namely, that he is *"well aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds."*[27] I suspect that Jefferson would have agreed with Hutcheson that the right to judgment or belief is unalienable because Jefferson says in his bill *"that the opinions of men are not the object of civil government, nor under its jurisdiction"* and that the civil magistrate should not "intrude his powers into the field of opinion."[28] But if Jefferson agreed with Hutcheson, both of them created a puzzle which is best introduced by returning to what Hutcheson says about the unalienability of the right of judgment.

In the course of trying to show that this right is unalienable according to his first mark, Hutcheson says—and we have seen Jefferson agreeing—that one cannot judge as one pleases because one's judgment is caused or determined by the evidence as it appears to one. But if Hutcheson holds that one's judgment is caused in this way, one might well wonder whether he can also hold that one *has* a right of judgment.

26. *Ibid.,* p. 283.
27. *Papers of Thomas Jefferson,* Volume 2, p. 545.
28. *Ibid.,* p. 546.

If one's judging takes place without any willing or choosing on one's part because it is caused by what strikes one as evidence—in short, if one lacks what William James called "the will to believe"—then how can one be said to *do anything voluntarily* when one judges? And if one doesn't *do anything voluntarily* when one judges, how can one be said to have a *right* to judge? Hutcheson regarded a right as a faculty to perform a voluntary action,[29] which suggests that any so-called right that is said to be unalienable on Hutcheson's first count is not a right at all. In other words, when a man is said not to have what Hutcheson calls the natural power to alienate a right, it would seem that this means that he *has no right* which he can alienate. The logic is that of the following exchange: (A): "You can't give that man the chicken"; (B); "Why?"; (A): "Because you don't have the chicken." This view of the logical situation is confirmed by Locke's statement in his first *Letter Concerning Toleration:* "It is absurd that things should be enjoined by laws which are not in men's power to perform; and to believe this or that to be true does not depend upon our will."[30] This clearly implies that it is not in men's *power* to believe because believing does not depend on their wills. But if they have no natural power to believe, Locke quite properly says that they should not be commanded to believe, which means that they have no duty to believe. But the very consideration which leads Locke to say that they have no duty to believe should also lead one to say that they have no *right* to believe. Yet Hutcheson does not say that they have *no* right to judge: he says that they have a right to judge which is unalienable. And Jefferson does not say that they have *no* right to believe, he says that they are free to believe, which means that they have a right

29. Pufendorf defines a moral power as one whereby a person is able to perform a *voluntary* action, namely, one which it pleases him to perform. See the passage cited in note 4 above.
30. Locke, *Works,* Volume VI, pp. 39–40.

to believe. So there is no doubt in my mind that Jefferson succeeded in confusing some of his most careful and sympathetic readers, one of whom maintains that Jefferson's bill "asserted the natural right of a person to choose his beliefs and opinions free of compulsion."[31] But this does not square with Jefferson's own previously quoted statement that "the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds." Obviously, if the opinions and belief of a man do not depend on his will then he *cannot* choose his beliefs and opinions, and it is hard to see how he has a *right* to choose them. The dictum, usually attributed to Kant, that "ought" implies "can" has a counterpart in the case of rights, for if a man has a right to perform a certain action, then it is also true that he can perform the action.[32] Therefore, if we deny that a man can perform an action, we should deny that he has a right to perform it. And if he has no right to perform it, he *lacks* a right which he can alienate or transfer to another.

Hutcheson does not seem to be able to escape this predicament, but Jefferson seems to have tried to escape it.[33] After he

31. Boyd, *Papers of Thomas Jefferson,* Volume 2, p. 547.

32. Hutcheson writes: ". . . There can be no *right, claim,* or *obligation* to impossibilities," *Inquiry Concerning Moral Good and Evil,* p. 293.

33. It is interesting that Jefferson does not seem to have availed himself of some of Burlamaqui's views on this question. Although Burlamaqui held that when the mind was forced by the evidence to believe a proposition, the will could play no part, he added that "the same cannot be affirmed in regard to things, that have less perspicuity and evidence for in these things the use of liberty displays itself in its full extent," by which he meant that "the obscurer things are, the more we are at liberty to hesitate, to suspend, or defer our determination," *Principles of Natural Law,* Part I, Chapter II, Section IV. Burlamaqui went even further and held that even in the case of so-called evident propositions, the will may play a part because "we are always at liberty to open, or to shut our eyes to the light; to exert, or relax our attention," *ibid.,* Section V. Had Jefferson taken this more seriously, he would not have accepted without qualification the view of Locke and Hutcheson.

asserts that the opinions of men do not depend on will but follow involuntarily the evidence proposed to their minds, he declares "that Almighty God hath created the mind free, *and manifested his Supreme will that free it shall remain by making it altogether insusceptible of restraint.*"[34] According to Jefferson, then, God did at least two things in this area. First, he created the human mind free in the sense of making its opinions not depend on the will, and secondly, he manifested his supreme will that the mind *should* remain free by so arranging things that all attempts to influence the mind by temporal punishments, burdens, or "civil incapacitations" would tend to produce habits of hypocrisy and meanness. Now God's willing that the mind *shall remain* free is crucial for Jefferson's escaping what I have called his predicament because God's willing—however it is manifested—means that God has imposed a duty on men to desist from *trying* to alter the fact that human opinions are necessarily brought about by what is taken to be evidence. And that duty implies a *right* on the part of all men to continue without punishments, burdens, or civil incapacitations in that state of forming their opinions only on the basis of what they regard as evidence. The effect of God's imposing this duty is not to endow man with a right to do the impossible, namely, perform a voluntary act of belief, or an act of belief which he chooses to perform. Rather, God wills that one man, *A,* has a duty not to *try* to get another man, *B,* to *try* to form his opinions by appealing to anything but the evidence as *B* sees it. However, the fact that we all have a right not to be molested by such attempts by *A* does not contradict my earlier statement that *we have no right* of private judgment if our belief or judgment is caused directly by the evidence and is not dictated by our will. And if we have no such right, then the only sense in which this so-called right could be said to be

34. *Papers of Thomas Jefferson,* Volume 2, p. 545.

naturally unalienable would be that in which it is impossible to give what we do not have.

But what about the Jeffersonian right not to be molested by those who would *try* to get men to adopt beliefs not supported by evidence? Is this naturally unalienable? Although I find no discussion of this point in Jefferson, it is hard to see how such a right could be naturally, or non-morally, unalienable. *B*'s complicated right *not* to be subjected to *A*'s effort to get *B* to believe propositions not supported by what *B* regards as evidence is what we must wrestle with. Does *B* have the natural power to transfer that right to another person? We must remember that the whole notion of a naturally alienable right is obscure, so we must proceed warily. We must ask, if I understand Hutcheson, whether *B*'s right not to be subjected to any effort like *A*'s can be transferred by *B*'s letting *C* rather than *B* himself be the beneficiary, so to speak, of the mentioned right not to be bothered by *A* and all other men or governments. I must confess that I am inclined to think that *B* does have the *natural* power to transfer this right to another, so we may now ask whether the right is *morally* alienable. The answer, I think, is that the right is *not* morally alienable according to those who speak in these terms. Since God imposed a duty on all men not to make an attempt like that of *A*, *B*'s right to be free of *A*'s intrusions would seem to be morally unalienable. Conversely, *A* has a similar right to be free of *B*'s intrusions. No man, as I shall explain later, can alienate or renounce a right which derives from a duty imposed by God on all men. I hope this will become clearer when I deal in greater detail with rights said to be unalienable on moral grounds, especially with rights whose names contain the word "life"—not only the direct right over one's life but the right to preserve one's life, the right to hazard one's life under certain circumstances, and the right to pledge one's life—all of which figure in eighteenth-century juristic and moral discussions.

Which Rights Involving Life Are Unalienable?

In "A Bill for Establishing Religious Freedom," Jefferson was not primarily concerned to establish the freedom of religious *belief* but rather the freedom of religious *worship,* and this makes all the more interesting the fact that in illustrating rights which are unalienable because they fail to satisfy what Hutcheson calls the "second mark"—the one I have called moral—Hutcheson presents "our right of serving God in the manner in which we think acceptable." However, it is important to observe that this right passes Hutcheson's first test. According to Hutcheson's view, the right to worship God in the manner in which we think acceptable is without doubt naturally alienable. Hutcheson's basis for distinguishing between our right to serve or worship God in the manner which we think acceptable and our right of private judgment in religion is that he thinks of the act of worship as one we *can* command ourselves to perform, whereas he thinks of believing as something we *cannot* command ourselves to perform. And since he thinks that we have the natural power to transfer our right to worship, he must go on to his second test in order to declare this right unalienable by claiming that it would serve no valuable purpose to alienate it. Hutcheson also says that "a direct right over our lives and limbs, is not alienable to any person" on the second, or moral, count.

Before I go on to consider the unalienability of this as well as some other rights which have something to do with life, I want to try to clarify what Hutcheson says about rights which he regards as unalienable on his second count by focusing on the unalienability of the right to worship God. This right would best be labeled in full as "the right to serve God in the manner in which *we* think acceptable." In that case, one may ask what transferring this right would amount to if it *were* transferred. It looks as though it would amount to tell-

ing another person that, beginning at a certain time, *his* judgment of what was an acceptable manner of worship *for us* would dictate the manner of *our* worship. In that case, of course, the overt act of worship would still be ours to perform. The other person or alienee would not be *doing* our worshipping after the alienation but would simply be dictating the manner of our worship. On the other hand, when Hutcheson says that our "direct right over our lives and limbs, is not alienable to any person, so that he might at pleasure put us to death or maim us," he seems to be saying that transferring *this* right would involve not only putting the transferee or alienee in a position to *choose* that we should be put to death or maimed but also in a position to perform the overt act of killing or maiming us. In general, then, it looks as though one's right to perform an action as one pleases may be alienated to another either in the case where one continues to perform the overt action but where the other person is the dictator of it, or in the case where the other person receives *both* the right to perform the overt action *and* the right to dictate its performance. I might add that although Hutcheson does not pursue the matter any further, I suspect that he would have allowed for a mode of alienating our direct right over our lives and limbs which would bring it closer to the mode in which he thinks of our alienating our right to worship. That might take place when the transferee receives the right to command the transferor to kill or maim himself. Here the transferor continues to perform the overt act while the transferee does the commanding.

We must remember, of course, that all of these modes of alienation are ruled out by Hutcheson on moral grounds. But our direct right over our life and limbs is so close to the right of preservation of life in the Rough Draft that we can profitably discuss the unalienability of the latter in the light of what has already been said about the former. Would the

right to preserve one's life have passed Hutcheson's first, nonmoral test? That is, did Jefferson think it within man's natural power to preserve his own life? It would seem that he did if he held with Burlamaqui and Locke that man has a moral *duty* to preserve his own life and that anyone who is obliged to do something *can* do it. Therefore, we must go on to test the right by using Hutcheson's second or moral mark of alienability. Would it serve a valuable purpose to transfer our right of self-preservation to another? I think that Jefferson would have rejected this version of the moral mark because it would have been at odds with his view that the right of self-preservation is derived from a duty of man which is established by Lockean reason and not by a Hutchesonian inquiry into whether anything served a valuable purpose. If it is our duty to preserve our life and therefore our right to preserve it, we would be violating that duty in transferring the right to another—that is how I think Jefferson would have formulated the moral argument for the unalienability of the right to preserve our life. In other words, he would have taken a view resembling that of Burlamaqui and of Locke's editor, Elrington, who, as we have seen, regarded a right that is derived from a duty as one that should not be renounced. Jefferson would have said that a right which is derived from a duty cannot be alienated because if God wills that a man should do something, that man can no more alienate the *right* to do that thing than he can renounce it.

The argument for this conclusion is as follows. If I alienate a right to someone else, then I no longer have the right to perform a certain action. But if I no longer have the right to perform that action because someone else now has the right to perform it, then I have a duty *not* to perform the action. Therefore, if I have a duty to *perform* the action, I will violate that duty if I put myself under a duty not to perform it. That is why having a duty to perform an action implies that

I *should not* alienate the right to perform that action. That is why a right to do something which is derived from a duty to do it is morally unalienable and unrenounceable.

Let me now turn to the right *of* life, which emerged in the final version of the Declaration as the successor to the *preservation* of life in the Rough Draft. It would appear from Boyd's[35] discussion that this substitution was made by Jefferson himself, a view which is compatible with the fact that Jefferson himself referred to the "rights of life and liberty" in what Adams called his philippic against slavery, the philippic that Congress omitted from the final version.[36] In my opinion, this was not a desirable change if, as I have argued earlier, Jefferson had, under the influence of Burlamaqui, believed that life was made part of the essence of man by God in creating him. We have seen that it is Burlamaqui's view that the *duty to preserve* life is derived from the fact that God made life an essential characteristic of man, in which case the *right to preserve* life would, he held, emerge from man's essence. And had Jefferson allowed "preservation of life" to stand, he might have avoided a certain anonymous criticism which appeared in *The Scots Magazine* in 1776.[37]

The critic in *The Scots Magazine* points out that since life or animation is of the *essence* of human nature, it is hard for him to understand what it means to say that every human being has the *right* of life because it is hard for him to understand the statement that a being which *has* life by definition also has a *right* to life. The point might be made by saying that if a man *must* be a living being, then it makes no sense to say that he has a moral *right* to be a living being; and that is why I believe that the Rough Draft was superior at this

35. Boyd, *Declaration of Independence*, pp. 29–31.
36. *Ibid.*, p. 20, p. 33.
37. *The Scots Magazine*, XXXVIII (August 1776): 433–434; reprinted in *A Casebook on the Declaration of Independence*, ed. R. Ginsberg (New York, 1967), pp. 6–8.

point to the final version. It is easier, even though one holds that man is by definition a living being, to make sense, à la Burlamaqui, of the statement that a man has a right to *preserve* his life. In that case one does not assert that one has a right to *have* an attribute that one has of necessity. One rather asserts that one has a right to *preserve* an attribute that has been put into one's essence by God. On the other hand, an alternative interpretation of the statement that every living being has a right to live would be that every living being has a right to *continue to be* a living being. This is a more generous interpretation because even though life be of the essence of humanity, *continuing to live* is not logically necessitated by being alive. Its relation to being alive is like the relation of *preserving life* to being alive. A living being is not *logically* required to continue living just as a living being is not *logically* required to preserve its life. And, therefore, if one interprets the right to, or of, life in this way, one may fend off certain objections to it of the kind dealt with above. Additionally, speaking of the right to *preserve* one's life is not subject to those objections and is therefore not in need of the interpretation that one must offer in order to fend off the objection we have been considering.

I will make one more comment about a related argument used by the critic in *The Scots Magazine*. He writes: "Prior to my having any right at all as a man, it is certain *I* must be a man, and such a man *I* certainly cannot be if I have no life; and therefore if it be said that *I* have a right to life, then the word *I* must signify something without life; and, consequently, something without life must be supposed to have a property, which without life it is not possible it can have." This argument rests on the premise, supposedly established, that the statement "Every living being, as a living being, has a right to life" is defective. So the critic imagines that the defender of the Declaration will retreat in the face of the critic's attack and will cease to make that statement. In that case,

the defender must attribute the right to life to a being *without* life and therefore to a being who cannot be supposed to have that right *as a man.*

My own view, in keeping with what I have already said, is that the defender of the Declaration's final version should assert that one who is necessarily alive has, as a man, a right to life in the sense of a right to continue to live. Interestingly enough, another British critic of the Declaration, one John Lind, credits the revolutionaries when they speak of the rights of life, liberty, and the pursuit of happiness with meaning the right to *enjoy* life, to *enjoy* liberty, and to *pursue* happiness.[38] And this emendation, I think, goes a long way in the direction of Jefferson's original reference to the *preservation* of life and of my proposal that the revolutionaries should have referred to the right to *continue* to live rather than to the right of life. The point is that such an approach treats the right as a power to *do* something about one's life and thereby removes the kind of objection leveled by the anonymous critic in *The Scots Magazine.* For once we think of a right as a right to do something about one's life, or more specifically as a right to do something voluntarily about one's life, we diminish the force of the argument that the right of life is absurdly attributed in the Declaration because man is necessarily a living being and therefore one who may not be said without absurdity to have a right *or a duty* to *be* that which he is necessarily.

I come now to another criticism of the reference to the right to life in the Declaration which merits our attention. In dealing with it we may clarify the document by appealing to ideas current in the eighteenth century. The gist of this criticism is that there is a contradiction between the statement that the right to life is unalienable and the statement made by the signers at the end of the Declaration that "we mu-

38. J. Lind, *An Answer to the Declaration of the American Congress* (London, 1776), p. 120; reprinted in part in Ginsberg, *op. cit.,* pp. 9–17.

tually pledge to each other our lives, our fortunes, and our sacred honor."[39] This complaint is not without force if directed against the final version of the Declaration when that is read in a certain way. For, after all, if we are said to have a right to life which is unalienable, a reader might infer that we cannot give our lives away. And if we cannot give them away, how can we *pledge* them if that is thought to be tantamount to giving them away? In this connection it might be helpful to point out that Hutcheson maintained, in spite of holding that our "direct right over our lives and limbs" is unalienable, that "we have indeed a *right* to hazard our lives in any good action which is of importance to *the public;* and it may often serve a most valuable end, to subject the direction of such perilous actions to the prudence of others in pursuing a *public good;* as *soldiers* do to their *general,* or to a *council* of *war:* and so far this *right* is *alienable.*"[40]

Therefore, if we identify the right to life with Hutcheson's *direct right over our lives* or with the Rough Draft's *right to preserve life,* it becomes easier to see why we may nevertheless have a *right to risk our lives* in a good cause and why *that* right may be alienated to others by pledging our lives in the manner described at the end of the Declaration. We may have an unalienable right to preserve our lives and yet not only have a *right* to risk them but an *alienable* right to risk them and therefore to pledge them to our fellow-revolutionaries who might be viewed by us as Hutcheson viewed the general and the council of war in his illustration. However, although I think that the reference in the Rough Draft to an unalienable *right* to *preserve life* comports more easily with the pledge at the end of the Declaration than does the reference in the final version to a right to, or of, life, even the final

39. This criticism was made in R. E. Selden, *Criticism on the Declaration of Independence as a Literary Document* (New York, 1846), p. 17; reprinted in part in Ginsberg, *op. cit.,* pp. 37–56.

40. Hutcheson, *Inquiry Concerning Moral Good and Evil,* p. 283.

version may be defended against the above criticism. For we may have an unalienable right to our lives and still have an alienable right to hazard them by putting ourselves under someone else in a battle or by mutually pledging our lives in the manner of the signers.

As I approach the end of my discussion of the unalienability of certain rights, I should like to say a few words about Locke's treatment of some of the matters with which I have been dealing. First, I want to remind the reader that in his first *Letter Concerning Toleration,* Locke was aware that if belief does not depend on will, then it is absurd to command belief. In that context he was not explicitly discussing the question whether the right to believe was alienable, but in other places he says things which make it reasonable to assume that, if asked whether the so-called right to believe were alienable, he would have replied that there was no such right to alienate. And in these other places, he is discussing a right involving life. I have in mind a passage in his *Second Treatise* where he tells us that "a man, not having the power of his own life"—by which he means a power or right *over* his own life which would imply a power or right to destroy his life—"cannot, by compact, or his own consent, *enslave himself* to any one, nor put himself under the absolute, arbitrary power of another, to take away his life, when he pleases."[41] I take Locke to mean here *not* that man *has* a power or right over his own life which he is obliged *not to alienate* but rather that man has *no* such power or right. "No body," Locke continues, "can give more power than he has himself; and he that cannot take away his own life, cannot give another power over it."[42] Thus, for Locke, a man does not *have* the "power of his own life" and therefore does not have it to alienate because only God, man's maker and owner, has the power of man's life.

41. Locke, *Second Treatise,* Section 23.
42. *Ibid.*

Having said this, I must quickly point out that Locke distinguishes between what he calls the power *of his own* life—a right which man does not have—and what he calls the power *to preserve his* life, a right which man most certainly does have. This second right Locke would have called "unalienable" had he used that term in this context because he holds that the right to preserve one's life follows from one's duty to preserve one's life. Moreover, preserving one's life is interpreted by Locke as including the defense of oneself against attack by attacking those who attack or threaten one. He says in this connection that I "have a right to destroy that which threatens me with destruction. For *by the fundamental law of nature, man being to be preserved,* as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred."[43] Now since a right is a power, "the power of his own life" must be equivalent, according to Locke, to "the right of his own life." And since Locke implies that we do not have this right, we may say that if Jefferson had followed Locke more closely (as well as Burlamaqui), he would not have eliminated the right of *preservation* of life from his Rough Draft in favor of the right of life. For the right of, or to, life was said by Locke to be unalienable only in the peculiar sense in which a right we do not have is unalienable, whereas for him "the right of preservation of life" unambiguously refers to a morally unalienable right, indeed, to a right which follows in a trifling way from what Locke regards as the fundamental law of nature.

Having said all of this, I do not wish to imply that Jefferson was persuaded or bullied into transforming "preservation of life" into "life." We not only have evidence that he may have made this change himself but we also know that he spoke of the "sacred rights of life and liberty" in that part of the Rough Draft in which he inveighed against slavery. Besides, even though Locke and Hutcheson distinguished be-

43. *Ibid.,* Section 16. Note the gerundive, "*to be* preserved."

tween different rights involving life, eighteenth-century writers on this subject were not usually given to great precision. Hutcheson, in the Latin original of his *Short Introduction to Moral Philosophy,* spoke of a *"Jus ad vitam, et corporis integritatem,"* which his translator rendered as "a right *to* life, and to retain their bodies unmaimed," and this right seems to be the counterpart of Hutcheson's "direct right *over* our lives or limbs" in his *Inquiry Concerning Moral Good and Evil.* However, in the same so-called Latin *Compend* he distinguishes the *"Jus ad vitam"* from the *"Jus . . . in vitam suam,"* which his translator rendered as "a right *over* life." After that the translator rendered Hutcheson's explanatory Latin as follows, "so far that each one, in any honorable services to society or his friends, may expose himself not only to dangers, but to certain death, when such public good is in view as overbalances the value of his life."[44] Thus the translator's "right *to* life" seems to be the counterpart of Hutcheson's "right *over* lives" in the latter's *Inquiry* of 1725, whereas the translator's "right *over* life" seems to be the counterpart of Hutcheson's "right *to hazard* our lives" in the *Inquiry.* Nevertheless, in spite of this eighteenth-century indifference to the use of nicety in discussions of rights, I cannot help feeling that what Jefferson *intended* in the so-called philosophical part of the Declaration on the subject of life was better expressed in the Rough Draft than in the final version.

He meant that the right to preserve life was morally unalienable even though it was naturally alienable. And the same might be said for the right to preserve one's liberty. It too could, in the natural or physical sense of that word, be transferred to another, but once again the moral argument for its unalienability would, I think, have been the same as that used in the case of preserving life. But what about the right to pursue happiness? That is a more difficult matter.

44. Hutcheson, *Short Introduction to Moral Philosophy,* Book II, Chapter IV, Section III.

Consistency, of course, would demand that Jefferson argue for its unalienability in the same way, but that would require holding that it is naturally possible for a man to transfer his right to pursue his happiness to another. The argument would have to proceed as it did in the case of other rights. The assumption would be that the pursuit of happiness is like the pursuit of one's dog from a logical point of view, meaning that a man has a right to pursue happiness if he pleases and therefore that he is not caused or determined by something external to pursue it—as he is, according to Hutcheson, caused to judge that the sky is blue. In that case the right to pursue happiness would be regarded as alienable by Hutcheson's first test on the assumption that it is naturally possible for one to transfer to another one's right to pursue one's happiness just as it is naturally possible to transfer one's right to pursue one's dog. Therefore, I think Jefferson would have to treat it as unalienable on moral grounds, arguing that since it is our duty and therefore right to pursue happiness, we would be violating that duty in transferring that right to another.

Property as an Adventitious Right

Having discussed at length the philosophico-theological path which I think Jefferson used in arriving at the rights of individuals enumerated in the Rough Draft and in the final version of the Declaration, and having also discussed the unalienability of these rights, I now want to contribute something to the explanation of why the right to property in goods and estates is mentioned in no version of the Declaration. This was called an adventitious right—I shall explain that term soon—by many theorists of natural law, and the fact that it was so described will help us understand why it may not have been listed among those listed in the different versions of the Declaration. The absence of the right to prop-

erty from Jefferson's list is conspicuous not only because it is so central in Locke's *Second Treatise,* upon which Jefferson drew so heavily in other respects, but also because several of Jefferson's American contemporaries were given to employing what V. L. Parrington has called the classical enumeration of "life, liberty, and property" when they were expounding "revolution principles." Parrington was so struck by Jefferson's failure to subscribe to this classical trinity of rights and by his substitution of the "pursuit of happiness" for "property" that he regarded Jefferson's approach as marking "a complete break with the Whiggish doctrine of property rights that Locke had bequeathed to the English middle class."[45]

Before I introduce the notion of an adventitious right in explaining this omission, I should like to make a few preliminary comments. One is that Jefferson could hardly have regarded the right to property in goods or estates as *unalienable.* Therefore, if Jefferson had been concerned to list only unalienable rights in the Declaration, that alone would have forced him not to include the right to property in his trio because the idea that one may alienate what one owns is at least as old as Aristotle,[46] who is cited by Grotius as his chief authority on this point.[47] Although R. F. Harvey has performed a service in stressing the likely influence of Burlamaqui on Jefferson in explaining his failure to mention the right to property in the Declaration, I think that it is incorrect to say, as Harvey does, that "the inalienable rights of man as enumerated by Locke were life, liberty and property," where "property" signifies a right to goods and estates.[48] Laslett is

45. V. L. Parrington, *Main Currents in American Thought* (New York, 1927, 1930), Volume I, p. 344.
46. *Rhetoric,* Book I, Chapter V, 1361 A.
47. See Supplementary Notes, Property and the Doctrine of Natural Law, p. 284.
48. R. F. Harvey, *Jean Jacques Burlamaqui: A Liberal Tradition in American Constitutionalism* (Chapel Hill, 1937), p. 121.

quite justified in saying what he says in the first—the fully comprehensible—sentence of the following passage: "The conventional judgment of Locke's view of property, that it described a natural, inalienable right, seems . . . to be exactly wrong. Property is precisely that part of our attributes (or, perhaps to be pedantic, that attribute of our attributes) which we can alienate, but only of course by our own consent."[49] And if it be asked *why* Jefferson wanted to list only unalienable rights, the answer is, as we shall see in the next chapter, that it was the British government's invasion of unalienable rights that gave the colonists one of their strongest arguments for resistance and rebellion. But leaving these preliminaries aside, I now come to a more complex argument for the view that the right to property—construed as the right to goods and estates—could not be listed as one of the trinity by Jefferson. The point is that it was not a *primitive* right but rather an *adventitious* right.

A distinction was made by some theorists of natural law between what is called the primary or primitive natural law, which, Burlamaqui says, "immediately arises from the primitive constitution of man, as God himself has established it, independent of any human act," and secondary natural law, which "supposes some human act or establishment."[50] The three states we spoke of earlier, namely, those which involved man's relation to God, to himself, and to other humans, are all called by Burlamaqui "primitive and original states . . . in which man finds himself placed by the very hand of God, independent of any human action." But, Burlamaqui goes on to say, "man, being naturally a free agent, is capable of making great modifications in his primitive state, and of giving, by a variety of establishments, a new face to human life. Hence those adventitious states are formed, which are

49. P. Laslett, Introduction to *Two Treatises of Government,* 2nd ed. (Cambridge, 1970), p. 102, note.
50. *Principles of Natural Law,* Part II, Chapter IV, Section XXIV.

properly the work of man, wherein he finds himself placed by his own act and in consequence of establishments, whereof he himself is the author."[51] One of these adventitious states is produced or constituted by the property of goods, says Burlamaqui. In general, such an adventitious state is established because man in his natural, original state is in a "state of indigence and incessant wants, against which he would be incapable of providing in a suitable manner, were he not to exercise his industry by constant labor," labor that is invited by his original, natural wants. It would appear from this that Jefferson in his letter to Dupont de Nemours was adopting some such doctrine as Burlamaqui's when Jefferson said that a right to property is founded in our natural wants and in the means with which we are endowed to satisfy these wants.[52] In turn, Burlamaqui seemed to adopt a doctrine of Locke when Burlamaqui wrote that the establishment of property "modifies the right, which all men had originally to earthly goods; and, distinguishing carefully what belongs to individuals, ensures the quiet and peaceable enjoyment of what they possess; by which means it contributes to the maintenance of peace and harmony among mankind. But, since all men had originally a right to a common use of whatever the earth produces for their several wants, it is evident that, if this natural power is actually restrained and limited in divers respects, this must necessarily arise from some human act; and consequently the state of property, which is the cause of those limitations, ought to be ranked among the adventitious states."[53]

We can now see what might have prompted Jefferson *not* to list the adventitious right to property in goods as one of his three in the Declaration: it did not immediately come from the hand of God. It could not be derived from *mere*

51. *Ibid.*, Part I, Chapter IV, Section II and Section VI.
52. *Ibid.*, Part I, Chapter IV, Section V. Jefferson, *Writings*, Volume XIV, p. 490, written in 1816.
53. *Principles of Natural Law*, Part I, Chapter IV, Section VII.

creation nor could it be derived from *equal* creation by way of corresponding duties. Although for Burlamaqui the *primitive* states and their attendant duties are annexed to the nature and constitution of man, "such as he has received them from God," and are "for this very reason, common to all mankind," the "same cannot be said of the adventitious states; which, supposing an human act or agreement, cannot of themselves be indifferently suitable to all men, but to those only, who contrived and procured them."[54] In short, any obligation which might arise in an adventitious state would have to arise only after the performance of a free human act, like the picking up of the acorns in Locke's *Second Treatise*.

Nevertheless, this is not to say that the right to property was not *natural* for Jefferson or for Burlamaqui. Nor is it to say that it was not, according to Jefferson, a right protected by civil government if Jefferson agreed with Burlamaqui, as I think he did. For Burlamaqui held that "the property of individuals is prior to the formation of states, and there is no reason, which can induce us to suppose, that those individuals entirely transferred to the sovereign the right they had over their own estates; on the contrary, it is to secure a quiet and easy possession of their properties, that they have instituted government and sovereignty."[55] The adventitious state of property and its corresponding right is *natural* for Burlamaqui, but it is a natural right which is derived from what Burlamaqui calls a *secondary* natural law. Such a natural law is only a *consequence* (*une suite*) of the primary natural law, "or rather," he says in a manner reminiscent of Aquinas, "it is a just application of the general maxims of natural law to the particular states of mankind and to the different circumstances, in which they find themselves by their own act."[56]

The fact that Burlamaqui distinguished between a natural

54. *Ibid.*, Part I, Chapter IV, Section XII.
55. *Principles of Politic Law*, Part III, Chapter V, Section IV, Item 3.
56. *Principles of Natural Law*, Part II, Chapter IV, Section XXIV.

right and a *primitive* natural right has not been sufficiently noticed by commentators. Thus Harvey confines himself to quoting what Burlamaqui says about natural rights in only one passage of *The Principles of Natural Law,* namely: "rights are natural, or acquired. The former are such as appertain originally and essentially to man, such, as are inherent in his nature, and which he enjoys as man, independent of any particular act on his side. Acquired rights, on the contrary, are those, which he does not naturally enjoy, but are owing to his own procurement. Thus the right of providing for our preservation is a right natural to man; but sovereignty, or the right of commanding a society of men, is a right acquired."[57] Unfortunately, Harvey does not seem to have noticed that even though the right to property is not natural in the sense of primitively natural for Burlamaqui, it is a *natural* right for him insofar as it is a right which is protected by the *secondary* natural law.[58]

Moreover, Harvey does not recognize that a distinction like Burlamaqui's between these two kinds of rights had been made by a number of theorists of natural law.[59] Burlamaqui's

57. *Ibid.,* Part I, Chapter VII, Section VIII.

58. Wiltse, in his *Jeffersonian Tradition in American Democracy* (p. 74), also fails to see that, according to Burlamaqui, the adventitious state of society in which property first exists antedates civil society. He also fails to point out that in such an adventitious state the right to property is regarded as natural by Burlamaqui. These failures may lead him to suppose that Jefferson denied that property was a natural right.

59. Harvey writes that, excepting what he calls a "rather vague statement by Lord Kames," "Burlamaqui was the only recognized authority who had advanced an idea similar to that of Paine and Jefferson" (*op. cit.,* p. 123), meaning the idea that natural and acquired rights are to be distinguished. The fact is that not only Grotius and Pufendorf, as we shall see below, distinguished between natural and adventitious rights but so did Hutcheson in his *Short Introduction to Moral Philosophy* (Book II).

Harvey's reference to Paine requires some comment. He reproduces on pp. 122–123 part of a passage by Paine, which is quoted in full by Gilbert Chinard in the second, revised edition of the latter's *Thomas Jefferson: The Apostle of Americanism,* paperback ed. (Ann Arbor, 1957), pp. 80–82. According to Harvey, the doctrine there espoused by Paine was similar to that of Burlamaqui in advocating a distinction between natural and adventitious rights. It should be noted, however, that Paine never uses the word "adventitious" and that he is discussing the distinction between natural rights and civil rights. Burlamaqui, I repeat, regarded the right to property in estates as natural in spite of being adventitious because it existed in a state of society which antedated civil government, was governed by the secondary natural law, and was a right which civil government was instituted to protect. I therefore think that Paine was making a distinction that was not identical with Burlamaqui's.

remarks about property being both adventitious and protected by natural law are based, it would seem, on similar remarks by Grotius and Pufendorf. Grotius maintains that "the law of nature deals not only with things which are outside the domain of the human will, but with many things also which result from an act of the human will. Thus ownership, such as now obtains, was introduced by the will of man; but, once introduced, the law of nature points out that it is wrong for me, against your will, to take away that which is subject to your ownership."[60] And Pufendorf, while commenting on this passage in Grotius, says that "the ownership of things does not come directly from nature, nor can any express and determinate command be alleged for its introduction, yet it is said to spring from natural law."[61] So, although it might be argued that the omission of property from Jefferson's famous trio might be traced to earlier theorists of natural law, I am inclined to agree with Harvey that Burlamaqui was the more direct source of Jefferson's ideas on this subject. I say this primarily because Burlamaqui did *two* things which seem to have influenced Jefferson's "replacement" of the right to

60. *De jure belli ac pacis,* Book I, Chapter I, Section X. It is significant that the law of nature is represented by Grotius as saying that it is wrong to take away what is owned by another. It might also be represented as prohibiting such an act, in which case we may think of a *natural adventitious right* to what one owns as inferable from a *natural adventitious duty* on the part of others not to take it away. See Burlamaqui, *Principles of Natural Law,* Part I, Chapter VII, Section 6, where he says that "right" and "obligation" are correlative.

61. *De jure naturae et gentium,* Book II, Chapter III, Section 22.

property by the right to pursue happiness: (1) Burlamaqui denied that the right to property was expressed in a primary natural law and hence denied that it was an inherent natural right given directly by God to man (and here he was in accord with Grotius and Pufendorf); (2) Burlamaqui also thought that the duty to pursue happiness *was* expressed in a primary natural law and therefore implied an inherent right to pursue happiness. It is true that Burlamaqui held that we have no reason to suppose that individuals entirely transferred to the sovereign the right they had over their own estates when civil government was formed, but he also held that the right of property was not in the same exalted position as the rights which are mentioned either in the Rough Draft or the final version of the Declaration. The latter Jefferson also put on a pedestal; they were preeminently the rights which, when invaded by a government, gave people the right to make a revolution. They were God-given, inherent, unalienable, and not adventitious. They were moral powers that no man *should* transfer to any person or any government.

The fact that these rights belonged to men essentially and as originally created by God meant that the violation of them should, in the revolutionaries' view, offend *all* mankind and not merely those parts of it which happened to be in some adventitious state of society. That is why the signers had such a "decent respect to the opinions of mankind" as to declare the reasons for their rebellion to *them* in their first paragraph. And that is why Jefferson could have consistently asserted what he did assert in the very first words of the passage on slavery that Congress omitted from the final version of the Declaration. Those words were: "He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither."[62] Here we see Jefferson treating the blacks as possessed of human nature and therefore of two rights which were primitively natural and sacred by virtue of having been given to them by God. Here we see no hesitancy of the kind that Jefferson came to express in his *Notes on Virginia* about whether blacks possess the essential features of human nature.

The Status of the Right to Property: More Significant Ambiguity

So far all major parts of this work have revealed what I have called, for want of a more felicitous word, "jokers" in the philosophy of the revolutionaries, and the present chapter is no exception. The epistemology of self-evident truth might permit some to "principle" others by claiming that only they themselves had the qualifications to see self-evidence, and even the allegedly democratic epistemology of the doctrine of moral sense required that the moral judge have certain qualities that could give title to the favored few who wished to establish superiority over others in making moral judgments. The concept of essence in Revolutionary metaphysics was also susceptible to this kind of treatment since, by regarding one attribute rather than another as the essence of man, a philosopher could "derive" one duty rather than another as essential; and when one sees that so-called essential rights were derived in turn from essential duties, it is obvious that one could set one's favorite rights upon a pedestal simply by fixing upon appropriate attributes as essential to man. In calling attention to these potentialities of certain ideas in epistemology and metaphysics, I am not accusing their advocates of deliberate intent to dominate by exploiting language which could be turned to the interest of one social group

62. See above, notes 35 and 36.

rather than another. But, believing as I do, that the concept of self-evident truth is obscure and that the qualifications for perceiving it are obscure, believing something similar about the operations of the moral sense as described by some of its advocates, and believing that almost any attribute of all and only men could be regarded as the essence of man, I also believe that these ideas were more *capable* of political manipulation than most concepts are. But what, one may ask, is the comparable idea that emerges in the present chapter? I think it will come as no surprise if I should answer that it is the idea of a natural right which can be either original or adventitious. For once the theorist of natural rights is armed with that bit of logomachy, he can say, in effect, that all natural rights are natural but that some are more natural than others. And once having arrived at that conclusion, the theorist of natural law is faced with the question: Where shall I put property in material goods or estates? Is it an original natural right given directly to man by God or is it an adventitious natural right? For, certainly, if the right to property in material goods or estates were to be listed in a trinity that included two unalienable rights involving life and liberty, property would hold a more important position in the system of natural law. It would be viewed as a direct gift from God rather than as the product of some human act. And once it is thought to be a primary, primitive, or original gift of God, it assumes an aspect of eternality, necessity, and immutability which it can never have if it is thought to be the outgrowth of a mere human act. So a lot hinged on the proper placement of property among natural rights.

We have already seen where Jefferson probably stood on this issue, but I should point out that he did not represent the only Colonial position on it. In fact, if one were to make a statistical study of how colonists concluded lists of rights that began with "life" and "liberty," one would find that most of them put "property" in third place rather than "the

pursuit of happiness." Yet even when they did put "property" in third place, they could find themselves in an ambiguous position, especially if they relied on Blackstone's *Commentaries,* as James Otis did in 1765. In his *Vindication of the British Colonies,* he lists "the right of personal security, personal liberty, and private property"[63] as absolute, *primary* natural rights, and after doing so refers us to the authority of Blackstone, who characterizes these three rights as follows: "By the absolute *rights* of individuals we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it."[64] So far, then, it would appear that Otis and his mentor Blackstone think of all three of these rights as "primary." When we read Blackstone further we find that, according to him, life is the immediate gift of God and that this gift is the main basis for the right of personal security.[65] He also tells us that the right of personal liberty is "strictly natural."[66] But when he comes to property, although he begins bravely enough by saying that "the third absolute right, inherent in every Englishman, is that of property," he finds it necessary to make the qualified statement that "the original of private property is *probably* [my emphasis] founded in nature."[67]

When Blackstone elaborates on this statement in a later passage that is reminiscent of Locke and Burlamaqui, Blackstone asserts that the earth and all things in it were immediately given by God to man as his "general property" or as something to be held in common by all men. Blackstone adds that this communion of goods in the earliest of ages was ac-

63. Bailyn, *Pamphlets,* Volume I, p. 558.
64. Blackstone's *Commentaries on the Laws of England,* reprint of Philadelphia edition of 1803 (New York, 1969), Volume II, p. 123.
65. *Ibid.,* p. 129.
66. *Ibid.,* p. 134.
67. *Ibid.,* p. 138.

companied by a transient right on the part of an individual to possess a given thing only so long as he used it. But this transient individual right and the original right of *common* ownership are the only Blackstonian rights which stand on a par with the rights to personal security and personal liberty.[68] They are, therefore, the only Blackstonian rights of ownership in material things which could also be called primary in the Burlamaquian sense. Otis would have known this had he read on in Blackstone and therefore, since he probably did read on, it is fair to infer that he was not, to say the least, eager to expound in full Blackstone's distinction between the right of property and the other two personal rights. In fact, Otis misrepresented Blackstone when Otis called the right to property a primary right without adding Blackstone's explanation that what was primary, or immediately from the hand of God, was the right of common ownership, and a transient individual right only during use or occupancy. The point is that Otis was not interested in urging the primacy of those examples of property rights. *He* was interested in what Burlamaqui would have called the non-primary, adventitious right to one's land, to one's house, and to one's gold watch.

I grant, of course, that Blackstone was partly responsible for all of this misrepresentation because Blackstone did list the right to property as one of the absolute rights of individuals in the "primary and strictest sense," meaning that it was "such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it." And it was, admittedly, several hundred pages later in his *Commentaries* before Blackstone began to make the qualifications that revealed his attachment to something like Burlamaqui's idea that the right to a gold watch was not a primary natural right. Indeed, Blackstone's views were so close to Burlamaqui's that Sir Henry Maine

68. *Ibid.*, Volume III, pp. 2–4.

once claimed that the central statements about natural law "may be read in the introductory chapters of our own Blackstone, who has transcribed them textually from Burlamaqui."[69] Maine, however, should have added that, on the subject of property, Blackstone's transcription of Burlamaqui was much more evident in Book II of the *Commentaries* than in the opening chapters of Book I.

By contrast to all of those thinkers who put "property" where Jefferson put "the pursuit of happiness" when they believed that the right to property was an adventitious right, Jefferson appears as a more honest and more precise thinker: more honest because he must have known that if he had written "property" in that controversial third place, he would have been construed as meaning material property in goods and estates; more precise because he was committed to listing only what Burlamaqui called primitive rights, which were given immediately to man by God. Yet one cannot deny that there were some thinkers who, even though they accepted the distinction between primary and adventitious natural rights, fought their hardest to put the ownership of goods into the former category. For example, an editor of Blackstone believed that "the notion of property is universal, and is suggested to the mind of man by reason and nature, prior to all positive institutions and civilized refinements" and went on to say that he knew of "no other criterion by which we can determine any rule or obligation to be found in nature, than its universality; and by inquiring whether it is not, and has not been, in all countries and ages, agreeable to the feelings, affections, and reason of mankind." From this statement it is clear that the author was aware of the distinction between a

69. H. S. Maine, *Ancient Law,* reprint of the 10th ed. (London, 1924), pp. 123–124. See Harvey, *op. cit.*, p. 124, for references to other writers, for example, S. G. Fisher and E. S. Corwin, who have noted similarities between Blackstone and Burlamaqui; also Chapter 5 of the same work for a discussion of the impact of Burlamaqui's ideas on Revolutionary America and for references to a number of authors who have described this impact.

primary and an adventitious right and that he was flatly opposing Burlamaqui and Blackstone. For Burlamaqui had said at the conclusion of a discussion of the distinction between primitive and adventitious states "that the former being annexed as it were, to the nature and constitution of man, such as he received them from God, are for this very reason, common to all mankind. The same cannot be said of the adventitious states." It is hard to avoid the conclusion, then, that being primitive or immediately received from God was thought to be a virtue by some theorists of natural law simply because they regarded such rights as more firmly established. And for them the universal prevalence and approval of such a right would be evidence of its primitiveness in Burlamaqui's sense. By contrast, if a right were adventitious and hence the outgrowth of a free human act, it must have seemed to that extent shaky and insecure. All the more reason, from such a point of view, to show that the right was primitive. For, after all, if an adventitious state was the product of a free human act, a free human act could destroy that state. And if the very existence of an adventitious right presupposed a human act or agreement, another act or the undoing of that agreement might be thought to destroy the right. I have pointed out that Grotius, Pufendorf, and Burlamaqui all insisted that an adventitious right was also protected by the natural law and hence by God's will. Indeed, the very social contract which formed civil society was the product of free acts of will that established certain obligations. But nevertheless, other things being equal, if one thought one had a natural right in the eighteenth century, one would rather that it be a direct gift of God than adventitious no matter how many times one might be told that adventitious rights were also rights by the secondary natural law. For this reason, then, I regard the distinction between a primitive and an adventitious right as the ethical counterpart of self-evidence in Revolutionary epistemology and of essence in Revolutionary metaphysics. If one really wished to be sure of a right, it was advisable to show that it came directly from the hand of God; and therefore it would be worth a lot of intellectual effort to show that one had a primitive right to property in goods.

Moreover, it is not surprising that James Wilson, one of the ablest Revolutionary lawyers and a disciple of Burlamaqui, should have tried to accomplish this with very little intellectual effort. In his *Lectures on Law,* while repeating most of what he had learned from his master, Wilson blandly disregarded what the master had said about property. Wilson did this in the course of a statement about natural rights, every sentence of which but the last might have been written by Burlamaqui:

> Those rights result from the natural state of man; from that situation, in which he would find himself, if no civil government was instituted. In such a situation, a man finds himself, in some respects, unrelated to others; in other respects, peculiarly related to some; in still other respects, bearing a general relation to all. From his unrelated state, one class of rights arises: from his peculiar relations, another class of rights arises: from his general relations, a third class of rights arises. To each class of rights, a class of duties is correspondent; as we had occasion to observe and illustrate, when we treated concerning the general principles of natural law.
>
> In his unrelated state, man has a natural right to his property, to his character, to liberty, and to safety.[70]

Had Burlamaqui been alive when the lecture containing these words had been delivered and if he had heard them, he might well have criticized his admirer for listing the right to property along with the right to safety and liberty without pointing out that property appears in an adventitious state of society and that it is not a right which comes immediately

70. Wilson, *Works,* Volume II, p. 592.

from the hand of God. Burlamaqui might also have reminded Wilson that even Jefferson, a more wayward pupil of Burlamaqui's, had taken care not to put property on a par with liberty and safety in the Declaration.[71]

71. Those concerned with the history of what I have called the sacred trinity of rights might be interested in a remark by C. F. Mullet on p. 47 of his *Fundamental Law and the American Revolution, 1760–1776* (New York, 1933) about Francis Bacon's views. Mullet cites a passage in Bacon's *Works*, eds. J. Spedding et al. (Boston, 1861), Volume XV, p. 225, in which Bacon lists three things that "flow from the law of nature," namely, "preservation of life, natural; liberty, which every beast or bird seeketh and affecteth, natural; the society of man and wife, whereof dower is the reward, natural." Upon this passage Mullet comments: "Students of constitutional history and political theory may find in those phrases of Bacon more than a fanciful resemblance to Jefferson's 'life, liberty, and the pursuit of happiness.'" Pressing this resemblance fancifully would require an identification of the pursuit of happiness with sexual intercourse or with marriage—a rather narrow view of happiness—but it is interesting that Bacon should speak of "dower" as the *reward* of the society of man and wife, since Jacob Viner reports in his review of Macpherson's *Political Theory of Possessive Individualism* that "dower" often appears in the history of this subject as a replacement for "estate" in the stock phrase "life, liberty, and estate," *Canadian Journal of Economics and Political Science* 29 (1963): 554. I might add that for Burlamaqui marriage is an adventitious state, just as property is, so that the Baconian trio would, by Burlamaqui's standards, consist of two primary natural rights and one secondary or adventitious one. Of course, Burlamaqui holds that nature "invites" human beings to form marriages, but marriage is nonetheless an adventitious state.

· 6 ·

"Rebellion to Tyrants Is Obedience to God"

I have analyzed the basic epistemological, theological, metaphysical, and moral ideas of the leading American revolutionaries, and so it remains for me to present the moral argument that they offered for their rebellion against Britain and the moral criteria which they thought any government, especially a new government, would have to meet. Having retraced the path they followed from their belief in God to their belief in unalienable rights, I now come to the ultimate step on that path, the one that brought the signers from their belief in the individual's unalienable rights mentioned in the Declaration to their belief that they, as a people, had a right—in fact a duty—to alter or abolish the government under which they had been living. The notion that they had a *duty* to rebel is extremely important to stress, for it shows that they thought they were complying with the *commands* of natural law and of nature's God when they threw off absolute despotism. This was in keeping with the strong language of the Virginia Bill of Rights of June 1776, according to which a majority of the community has, under certain circumstances, "an indubi-