COLLECTED WORKS OF

James Wilson

James Wilson

Edited by Kermit L. Hall and Mark David Hall
with an Introduction by Kermit L. Hall
and a Bibliographical Essay by Mark David Hall
Collected by Maynard Garrison

VOLUME 2

This book is published by Liberty Fund, Inc., a foundation established to encourage study of the ideal of a society of free and responsible individuals.

The cuneiform inscription that serves as our logo and as the design motif for our endpapers is the earliest-known written appearance of the word "freedom" (*amagi*), or "liberty." It is taken from a clay document written about 2300 B.C. in the Sumerian city-state of Lagash.

Cover art: James Wilson, etching by Max Rosenthal, 1890.
From Library of Congress, Prints and Photographs Division,
James Wilson Biographical File, LC-USZ62-6065.
Frontispiece portrait of James Wilson by James Barton Longacre, after an original by J. P. H. Elouis, c. 1825, by permission of the National Portrait Gallery, Smithsonian Institution.

Printed in the United States of America

11 10 09 08 07 C 5 4 3 2 1
11 10 09 08 07 P 5 4 3 2 1

Library of Congress Cataloging-in-Publication Data
Wilson, James, 1742–1798.
[Works]
Collected works of James Wilson/edited and with an introduction by Kermit L. Hall with a Bibliographical Essay by Mark David Hall; collected by Maynard Garrison.
p. cm.
Includes bibliographical references and index.
ISBN-13: 978-0-86597-682-5 (hardcover—set: alk. paper)
ISBN-13: 978-0-86597-684-9 (hardcover—vol 1: alk. paper)
ISBN-13: 978-0-86597-685-6 (hardcover—vol 2: alk. paper)
ISBN-13: 978-0-86597-683-2 (pbk.—set: alk. paper)
[etc.]
1. Law—United States. I. Hall, Kermit. II. Title.
KF213.W5H35 2007
349.73—dc22 2006102965

Liberty Fund, Inc.
8335 Allison Pointe Trail, Suite 300
Indianapolis, Indiana 46250-1684

LECTURES ON LAW,

DELIVERED IN THE
College of Philadelphia,

IN THE YEARS ONE THOUSAND SEVEN HUNDRED AND NINETY,
AND ONE THOUSAND SEVEN HUNDRED AND NINETY ONE.

CHAPTER XII.
Of the Natural Rights of Individuals.

We have now viewed the whole structure of government; we have now ranged over its numerous apartments and divisions; and we have examined the materials of which it is formed. For what purpose has this magnificent palace been erected? For the residence and accommodation of the sovereign, Man.

Does man exist for the sake of government? Or is government instituted for the sake of man?

Is it possible, that these questions were ever seriously proposed? Is it possible, that they have been long seriously debated? Is it possible, that a resolution, diametrically opposite to principle, has been frequently and generally given of them in theory? Is it possible, that a decision, diametrically opposite to justice, has been still more frequently and still more generally given concerning them in practice? All this is possible: and I must add, all this is true. It is true in the dark; it is true even in the enlightened portions of the globe.

At, and nearly at the commencement of these lectures, a sense of duty obliged me to enter into a controversial discussion concerning the rights of society: the same sense of duty now obliges me to enter into a similar discussion concerning the rights of the constituent parts of society—concerning the rights of men. To enter upon a discussion of this nature, is neither the most pleasant nor the most easy part of my business. But when the voice of obligation is heard, ease and pleasure must preserve the respectful silence, and show the cheerful acquiescence, which become them.

What was the primary and the principal object in the institution of government? Was it—I speak of the primary and principal object—was it to acquire new rights by a human establishment? Or was it, by a human establishment, to acquire a new security for the possession or the recovery of

those rights, to the enjoyment or acquisition of which we were previously entitled by the immediate gift, or by the unerring law, of our all-wise and all-beneficent Creator?

The latter, I presume, was the case: and yet we are told, that, in order to acquire the latter, we must surrender the former; in other words, in order to acquire the security, we must surrender the great objects to be secured. That man "may secure *some* liberty, he makes a surrender in trust of the *whole* of it."—These expressions are copied literally from the late publication of Mr. Burke.[a]

Tyranny, at some times, is uniform in her principles. The feudal system was introduced by a specious and successful maxim, the exact counterpart of that, which has been advanced by Mr. Burke—exact in every particular but one; and, in that one, it was more generous. The free and allodial proprietors of land were told that they must surrender it to the king, and take back—not merely "some," but—the whole of it, under some certain provisions, which, it was said, would procure a valuable object—the very object was security—security for their property. What was the result? They received their land back again, indeed; but they received it, loaded with all the oppressive burthens of the feudal servitude—cruel, indeed; so far as the epithet cruel can be applied to matters merely of property.

But all the other rights of men are in question here. For liberty is frequently used to denote all the absolute rights of men. "The absolute rights of every Englishman," says Sir William Blackstone, "are, in a political and extensive sense, usually called their liberties."[b]

And must we surrender to government the *whole* of those absolute rights? But we are to surrender them only—in *trust:*—another brat of dishonest parentage is now attempted to be imposed upon us: but for what purpose? Has government provided for us a superintending court of equity to compel a faithful performance of the trust? If it had; why should we part with the legal title to our rights?

After all; what is the mighty boon, which is to allure us into this surrender? We are to surrender all that we may secure "some:" and this "some," both as to its quantity and its certainty, is to depend on the pleasure of that

a. Refl. on Fr. Rev. 47.
b. 1. Bl. Com. 127.

power, to which the surrender is made. Is this a bargain to be proposed to those, who are both intelligent and free? No. Freemen, who know and love their rights, will not exchange their armour of pure and massy gold, for one of a baser and lighter metal, however finely it may be blazoned with tinsel: but they will not refuse to make an exchange upon terms, which are honest and honourable—terms, which may be advantageous to all, and injurious to none.

The opinion has been very general, that, in order to obtain the blessings of a good government, a sacrifice must be made of a part of our natural liberty. I am much inclined to believe, that, upon examination, this opinion will prove to be fallacious. It will, I think, be found, that wise and good government—I speak, at present, of no other—instead of contracting, enlarges as well as secures the exercise of the natural liberty of man: and what I say of his natural liberty, I mean to extend, and wish to be understood, through all this argument, as extended, to all his other natural rights.

This investigation will open to our prospect, from a new and striking point of view, the very close and interesting connexion, which subsists between the law of nature and municipal law. This investigation, therefore, will richly repay us for all the pains we may employ, and all the attention we may bestow, in making it.

"The law," says Sir William Blackstone, "which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural, increases the civil liberty of mankind.[c]" Is it a part of natural liberty to do mischief to any one?

In a former part of these lectures, I had occasion to describe what natural liberty is: let us recur to the description, which was then given.[d] "Nature has implanted in man the desire of his own happiness; she has inspired him with many tender affections towards others, especially in the near relations of life; she has endowed him with intellectual and with active powers; she has furnished him with a natural impulse to exercise his powers for his own happiness, and the happiness of those for whom he entertains such tender affections. If all this be true, the undeniable consequence is, that he has a right to exert those powers for the accomplishment of those purposes,

c. 1. Bl. Com. 125. 126.
d. Ante. vol. 1. p. 638.

in such a manner, and upon such objects, as his inclination and judgment shall direct; provided he does no injury to others; and provided some publick interests do not demand his labours. This right is natural liberty."

If this description of natural liberty is a just one, it will teach us, that selfishness and injury are as little countenanced by the law of nature as by the law of man. Positive penalties, indeed, may, by human laws, be annexed to both. But these penalties are a restraint only upon injustice and overweening self-love, not upon the exercise of natural liberty.

In a state of natural liberty, every one is allowed to act according to his own inclination, provided he transgress not those limits, which are assigned to him by the law of nature: in a state of civil liberty, he is allowed to act according to his inclination, provided he transgress not those limits, which are assigned to him by the municipal law. True it is, that, by the municipal law, some things may be prohibited, which are not prohibited by the law of nature: but equally true it is, that, under a government which is wise and good, every citizen will gain more liberty than he can lose by these prohibitions. He will gain more by the limitation of other men's freedom, than he can lose by the diminution of his own. He will gain more by the enlarged and undisturbed exercise of his natural liberty in innumerable instances, than he can lose by the restriction of it in a few.

Upon the whole, therefore, man's natural liberty, instead of being abridged, may be increased and secured in a government, which is good and wise. As it is with regard to his natural liberty, so it is with regard to his other natural rights.

But even if a part was to be given up, does it follow that *all* must be surrendered? "Man," says Mr. Burke,[e] "cannot enjoy the rights of an uncivil and of a civil state together." By an "uncivil" contradistinguished from a "civil" state, he must here mean a state of nature: by the rights of this uncivil state, he must mean the rights of nature: and is it possible that natural and civil rights cannot be enjoyed together? Are they really incompatible? Must our rights be removed from the stable foundation of nature, and placed on the precarious and fluctuating basis of human institution? Such seems to be the sentiment of Mr. Burke: and such too seems to have been the sentiment of a much higher authority than Mr. Burke—Sir William Blackstone.

e. Refl. on Fr. Rev. 47.

In the Analysis of his Commentaries,[f] he mentions "the right of personal security, of personal liberty, and of private property"—not as the natural rights, which, I confess, I should have expected, but—as the "civil liberties" of Englishmen. In his Commentaries, speaking of the same three rights, he admits that they are founded on nature and reason; but adds[g] "their establishment, excellent as it is, is still human." Each of those rights he traces severally and particularly to magna charta, which he justly considers as for the most part declaratory of the principal grounds of the fundamental laws of England.[h] He says indeed,[i] that they are "either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to publick convenience; or else those civil privileges, which society has engaged to provide, in lieu of the natural liberties so given up by individuals." He makes no explicit declaration which of the two, in his opinion, they are; but since he traces them to magna charta and the fundamental laws of England; since he calls them "civil liberties;" and since he says expressly, that their establishment is human; we have reason to think, that he viewed them as coming under the latter part of his description—as civil privileges, provided by society, in lieu of the natural liberties given up by individuals. Considered in this view, there is no material difference between the doctrine of Sir William Blackstone, and that delivered by Mr. Burke.

If this view be a just view of things, the consequence, undeniable and unavoidable, is, that, under civil government, individuals have "given up" or "surrendered" their rights, to which they were entitled by nature and by nature's law; and have received, in lieu of them, those "civil privileges, which society has engaged to provide."

If this view be a just view of things, then the consequence, undeniable and unavoidable, is, that, under civil government, the right of individuals to their private property, to their personal liberty, to their health, to their reputation, and to their life, flow from a human establishment, and can be traced to no higher source. The connexion between man and his natural rights is intercepted by the institution of civil society.

f. B. 1. c. 1. s. 8.
g. 1. Bl. Com. 127.
h. Id. 128.
i. Id. 129.

If this view be a just view of things, then, under civil society, man is not only made *for,* but made *by* the government: he is nothing but what the society frames: he can claim nothing but what the society provides. His natural state and his natural rights are withdrawn altogether from notice: "It is the *civil social* man," says Mr. Burke,[k] "and *no other,* whom I have in my contemplation."

If this view be a just view of things, why should we not subscribe the following articles of a political creed, proposed by Mr. Burke.

"We wished, at the period of the revolution, and we now wish to derive all we possess, *as an inheritance from our forefathers.* Upon that body and stock of inheritance, we have taken care not to innoculate any cyon alien to the nature of the original plant. All the reformations we have hitherto made, have proceeded upon the principle of reference to antiquity; and I hope, nay I am persuaded, that all those, which possibly may be made hereafter, will be carefully formed upon analogical precedent, authority, and example."

"Our oldest reformation is that of magna charta. You will see that Sir Edward Coke, that great oracle of our law, and indeed all the great men who follow him, to Blackstone, are industrious to prove the pedigree of our liberties."

Let us observe, by the way, that the only position, relating to this subject, for which I find the authority of my Lord Coke quoted,[l] is a position, to which every one, who knows the history of the common law, will give his immediate and most unreserved assent: the position is—"that magna charta was, for the most part, declaratory of the principal grounds of the fundamental laws of England." But Mr. Burke proceeds.

"They endeavour to prove, that the ancient charter, the magna charta of King John, was connected with another positive charter from Henry the first: and that both the one and the other were nothing more than a reaffirmance of the still more ancient standing law of the kingdom. In the matter of fact, for the greater part, these authors appear to be in the right; perhaps not always: but if the lawyers mistake in some particulars, it proves my position still the more strongly; because it demonstrates the powerful prepossession towards antiquity, with which the minds of all our

k. Refl. on Fr. Rev. 47.
l. 1. Bl. Com. 127. 128.

lawyers and legislators, and of all the people whom they wish to influence, have been always filled; and the stationary policy of this kingdom in considering their most sacred rights and franchises as an *inheritance*."[m]

It is proper to pause here a little.—If, in tracing the pedigree of our "most sacred rights," one was permitted to indulge the same train of argument and reflection, which would be just and natural in the investigation of inferiour titles, we should be prompted to inquire, how it happens, that "mistakes in some particulars" would prove more strongly the general point to be established. Would mistakes in some particulars respecting a title to land, or the genealogy of a family, prove more strongly the validity of one, or the antiquity of the other?

But I must do Mr. Burke justice. The reason, which he assigns, why the making of those mistakes proves his position the more strongly, is, because it proves the "powerful *prepossession* towards antiquity." Of this prepossession I will controvert neither the existence nor the strength: but I will ask—does it prove the point in question?—Does it prove the truth and correctness of even the *civil* pedigree of the liberties of England? Is predilection an evidence of right? Is property or any thing else, which is in litigation, decided to belong to him, who shows the strongest affection for it? If, in a controversy concerning an inferiour object, the person, who claims it, and who undertakes to substantiate his claim, should own, that, in deducing his chain of title, some mistakes were made; but should urge even those mistakes as an argument in his behalf, because his perseverance in his suit, notwithstanding those mistakes, demonstrates his powerful attachment for the thing in dispute; what would a discerning court—what would an unbiassed jury think of his conduct? I believe they would not think that it paid any extraordinary compliment, either to their impartiality or to their understanding.

I begin now to hesitate, whether we should subscribe the political creed of Mr. Burke. Let us, however, proceed and examine some of its other articles.

Some one, it seems, had been so hardy as to allege, that the king of Great Britain owes his crown to "the choice of his people." This doctrine, says Mr. Burke, "affirms a most unfounded, dangerous, illegal, and

m. Refl. on Fr. Rev. 24.

unconstitutional position." "Nothing can be more untrue, than that the crown of this kingdom is so held by his majesty."[n] To disprove the assertion, "that the king of Great Britain owes his crown to the choice of his people," Mr. Burke has recourse to the declaration of rights, which was made at the accession of King William and Queen Mary. "This declaration of right," says he, "is the corner stone of our constitution, as *reenforced,* explained, improved, and in its fundamental principles *for ever* settled. It is called an 'act for declaring the rights and liberties of the subject, and for *settling* the succession of the crown.' These rights and this succession are declared in one body, and bound indissolubly together."[o] "It is curious," adds he, "with what address the *temporary* solution of continuity in the line of succession"—for it was impossible for Mr. Burke not to admit that from this line a temporary deviation was made—"it is curious with what address this *temporary* solution is kept from the eye; whilst all that could be found in this act of necessity, to countenance the idea of an *hereditary succession* is brought forward, and fostered, and made the most of by the legislature." "The legislature," he proceeds, "had plainly in view the act of recognition of the first of Queen Elizabeth, and that of James the first, both acts strongly declaratory of the inheritable nature of the crown; and, in many parts, they follow, with a nearly literal precision, the words and even the form, which is found in these old declaratory statutes."[p] "They give the most solemn pledge, taken from the act of Queen Elizabeth, as solemn a pledge as ever was or can be given in favour of an hereditary succession. 'The lords spiritual and temporal, and commons, do, in the name of all the people aforesaid, most humbly and faithfully submit *themselves, their heirs and posterities for ever;* and do faithfully promise, that they will stand to, maintain, and defend their said majesties, and also the *limitation of the crown, herein* specified and contained, to the utmost of their power."[q]

I have mentioned above, that tyranny, at some times, is uniform in her principles: I have done her full justice: she is not so at all times. Of truth, liberty, and virtue, it is the exclusive prerogative to be always consistent.

n. Refl. on Fr. Rev. 9.
o. Refl. on Fr. Rev. 12.
p. Id. 13.
q. Id. 14.

Let us, for a moment, adopt the statement, which Mr. Burke has given us. Upon that statement I ask—if the humble and faithful submission of the parliament, in the name of all the people, was sufficient, in the time of Elizabeth, to bind themselves, their heirs and posterity for ever, to the line of hereditary succession; how came it to pass, that, in the time of William and Mary, the parliament, in the name of all the people, was justified in deviating, even for an instant, from the succession in that hereditary line? I ask again—if the humble and faithful submission of the parliament, in the name of all the people, was, in the sixteenth century, insufficient to bind their heirs and posterity in the seventeenth century; how comes it to pass that, in the seventeenth century, the humble and faithful submission of the parliament, in the name of all the people, could bind their heirs and posterity in the eighteenth century? Such a submission was either sufficient or it was not sufficient for that binding purpose: let the disciples of the doctrine, which rests on this dilemma, choose between the alternatives.

I have now no hesitation whether we should or should not subscribe the creed of Mr. Burke: that creed, which is contradictory to itself, cannot, in every part, be sound and orthodox.

But, to say the truth, I should not have given myself the trouble of delivering, nor you, of hearing these annotations upon it; unless it had derived the support, which it claims, from the Commentaries on the laws of England. The principles delivered in those Commentaries are never matters of indifference: I have already mentioned,[r] "that when they are not proper objects of imitation, they furnish excellent materials of contrast."

Government, in my humble opinion, should be formed to secure and to enlarge the exercise of the natural rights of its members; and every government, which has not this in view, as its principal object, is not a government of the legitimate kind.

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

r. Ante. vol. 1. p. 444.

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. From his peculiar relations, as a husband, as a father, as a son, he is entitled to the enjoyment of peculiar rights, and obliged to the performance of peculiar duties. These will be specified in their due course. From his general relations, he is entitled to other rights, simple in their principle, but, in their operation, fruitful and extensive. His duties, in their principle and in their operation, may be characterized in the same manner as his rights. In these general relations, his rights are, to be free from injury, and to receive the fulfilment of the engagements, which are made to him: his duties are, to do no injury, and to fulfil the engagements, which he has made. On these two pillars principally and respectively rest the criminal and the civil codes of the municipal law. These are the pillars of justice.

Of municipal law, the rights and the duties of benevolence are sometimes, though rarely, the objects. When they are so, they will receive the pleasing and the merited attention.

You now see the distribution, short, and simple, and plain, which will govern the subsequent part of my system of lectures. From this distribution, short, and simple, and plain as it is, you see the close and very interesting connexion between natural and municipal law. You see, to use again my Lord Bacon's language, how the streams of civil institutions flow from the fountain of justice.

I am first to show, that a man has a natural right to his property, to his character, to liberty, and to safety.

His natural right to his property, you will permit me, at present, to assume as a principle granted. I assume it for this reason; because I wish not to anticipate now what will be introduced, with much greater propriety and advantage, when I come to the second great division of my lectures, in which I am to treat concerning things.

To his character, every one has a natural right. A man's character may, I think, be described as the just result of those opinions, which ought to be formed concerning his talents, his sentiments, and his conduct. Opinions, upon this as upon every other subject, ought to be founded in truth.