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"MARTIAL Law in Colorado," by my good friend Frazer Arnold in the February RECORD, suggests the above question.

Resident citizens of the United States and of Colorado have been arrested and confined for weeks without warrant, charge (formal or informal), trial or hearing of any nature.

Officers, whose only business in the vicinity was to maintain order, have attended meetings and listened to speeches (without interruption because there was apparently no legal reason nor excuse to interrupt) and thereafter, in absence of disorder, or threat or suspicion thereof, have arrested and confined the speakers (for what reason was not stated but very apparently to prevent further speaking because the speakers were publicly offered their release on condition that they refrained from speaking).

Persons who were simply directing distribution of food and clothing to men, women and children have been arrested and confined (or spirited away) in like manner without charge or warrant.

Many other infringements of civil rights occurred.

All this has happened while the courts have been open and functioning as usual for the prosecution of law violators.

Brother Arnold presents a brief in justification of such a state of affairs.

His argument is based on what I believe to be an utter misconception (all too prevalent) of those principles and objects for which this union, and governments both national and state, were created and which constitute the principal (if not the only) reason for the continued existence of these or any government.

Taking that misconception as a premise, his conclusions may or may not be correct. I consider the questions raised and suggested by the premise of so much more importance than the arguments and conclusions based thereon that I shall deal only with those parts of the article which, to me, clearly show the error of the premise and therefore, the immateriality of the arguments and conclusions.

I shall try to confine myself to excerpts which fairly set forth the premise—the point of view—from which Mr. Arnold starts.

He says: "The primary duty of the state is self-defense and self-preservation."

One respectable expounder of the law apparently has a different idea, "For (says he) the principal aim of society is to protect individuals in the enjoyment of those absolute rights which are vested in them by the immutable laws of nature." (Cooley's Blackstone, Book 1, page 124.)

A document which has been charged with American parentage and with having something to do with Americanism (of the true, not percentage, type) states "That to secure these rights (life, liberty and the pursuit of happiness, among others) governments are instituted among men * * * (and) whenever any government becomes destructive of these ends it is the right of the people to alter or abolish it." (I chance the omission of citation notwithstanding the apparent common unawareness of such a document.)

"This country with its institutions belongs to the people who inhabit it. Whenever they shall grow weary of

the existing government they shall exercise their constitutional right of amendment or their *revolutionary right to dismember or overthrow it.*" (Lincoln's Inaugural Address, March 4, 1861.)

A few years later the Supreme Court of the United States said that "A country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation." (Ex-parte Milligan, 71 U. S. 107 at 126.)

I submit that there is very respectable precedent for asserting that the primary duty of a state is not self-preservation but is preservation of the natural rights of the individual.

Mr. Arnold says that "The error into which enthusiasts for the civil guaranties fall is that they ignore other articles of the fundamental law of equal dignity. There are more things in a constitution than a bill of rights. All constitutional provisions must be construed together and harmonized. A workable government *could* be established without a bill of rights."

Very true, a workable government could be established without a written bill of rights but the constitution of the United States could not have been ratified without the assurance of the adoption of the bill of rights and even with that assurance, it took very smooth political work and even trickery to accomplish it. Beveridge brings this out very clearly in his "Life of Marshall."

If the federal constitution was ratified only on the assurance of a bill of rights, then the bill of rights became, in substance and in fact (even if not chronologically) a condition precedent to the constitution and, therefore, the provisions of the bill of rights are not "to be construed together and harmonized" with the provisions of the constitution, but are prior and superior to, and are limitations upon, the constitution itself.

Moreover, the primary and fundamental American document is, not the constitution but the Declaration of Independence, which was made by and in the name of the United States of America and declared those inalienable and natural rights and principles because of the violation of which our forefathers became revolutionists and for the preservation and protection of which this union was originally formed. Twelve years later a "more perfect union"—form of government—a new instrument—was provided by the constitution for the purpose of better accomplishing this preservation and protection. The bill of rights was adopted in order to reaffirm (and in part specify) those rights and principles of the Declaration of Independence and to make sure that the newly provided instrument of preservation and protection should not be subverted into an instrument of limitation or destruction of those rights and principles.

Some may say that these remarks, pertinent to a government of delegated and limited powers, are not pertinent to the government of a state which is not so limited.

Mr. Arnold shows this to be his point of view when he says that the Colorado bill of rights in providing "that no law shall be passed impairing the freedom of speech * * * imposes a limitation on the legislative and not on the executive department" and he concludes that the executive may impair freedom of speech.

In a debate for points this statement could be disposed of (a) by reading further, in the same sentence of this guaranty, that "Every person shall be free to speak, write or publish whatever he will on any subject," a broad all-inclusive guaranty, clearly not limited to any one department of govern-

ment, and (b) by pointing out that the executive is, what the term implies, an officer to execute the laws, not to substitute himself or his judgment therefor. Executive power to do a thing which the legislature itself has no power to do or to provide for by law, is unthinkable.

Ex-parte Milligan (supra) involved a trial by a military commission the acts of which commission were sought to be justified. On this point the United States Supreme Court said "They cannot justify on the mandate of the president; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws."

Moreover, when the state follows the example of the union in attaching a similar bill of rights to its constitution, the natural conclusion is that it intends that bill of rights to be a similar reaffirmance of and to provide similar broad and substantial preservation and protection for the inalienable and natural rights and principles of the Declaration of Independence.

While this statement of Mr. Arnold might be disposed of in the above manner, its real importance lies in the fact that though it expressly relates only to the subject of freedom of speech, it, in substance, clearly shows the error in Mr. Arnold's premise—his misconception of the purpose and objects, and justification for the continued existence of, any and all government—his assumption that the state constitution and bill of rights are the source and origin of the rights of individuals and that there are no natural and inalienable rights which a state government is bound to respect.

The rights and principles enunciated in the Declaration of Independence were already established and "self evident" as therein stated. If that document added anything new it was the statement that governments derive "their just powers from the consent of the governed." Section 1 of the Colorado Bill of Rights expressly adopts this principle and Section 3 says "That all *persons* (not simply citizens) have certain natural, essential and *inalienable* rights," etc. An inalienable right is one which cannot be transferred to or taken away by anyone—even the state.

Cooley's Constitutional Limitations, Eighth Edition, page 876, quotes from the freedom of speech clauses of the bills of rights from forty or more of the states and then, at page 880, says "It is to be observed of these several provisions, that they recognize certain rights as now existing, and seek to protect and perpetuate them, by declaring that they shall not be abridged or that they shall remain inviolate. *They do not assume to create new rights, but their purpose is to protect the citizen in the enjoyment of those already possessed.*"

While this is said of the freedom of speech clauses, it very obviously relates to the natural, fundamental, inalienable rights of the individual in general as well as to the right of freedom of speech.

In his "Suggestions for the Study of the Law," Cooley's Blackstone, Vol. 1, page XI, Cooley says: "But in all our inquiries concerning what the law is, and how the written constitution affects the rights of individuals, we are in danger of being led to false conclusions if we do not keep in mind the *primary and fundamental fact that 'written constitutions sanctify and confirm great principles, but the latter are prior in existence to the former.'* Those instruments have for one of their chief ends the protection of the rights of minorities: they seek the establishment of a *government of laws which shall be restrained in its operation within the proper sphere of government, and shall protect the pre-existent rights, not take them away.*"

And Blackstone himself says "And therefore the principal view of human law is, or ought always to be, to explain, protect and enforce such rights as are absolute." (Cooley's Blackstone, Vol. 1, page 124.)

When any government becomes so weak and inefficient that it cannot accomplish the primary purpose of its organization—the protection of the natural, inalienable individual rights of its citizens—it has no right to convert itself into an instrument for the suppression of the exercise of those rights and for its self-preservation. Its justification for existence has ceased. It becomes the "right of the people to alter or abolish it." "It is their right —it is their duty—to throw off such government and to provide new guards for their future security" for "A country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation."

I shall not go into a discussion of the writ of habeas corpus and the suspension thereof. Since Mr. Arnold delivered his address, Judge Symes has handled that question in a very effective and wholesome manner. I shall content myself with adding one quotation from "An Old Master."

> "Of great importance to the public is the preservation of this personal liberty; for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, (as in France it is daily practiced by the crown,) there would soon be an end of all other rights and immunities. Some have thought that unjust attacks, even upon life or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; *but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.* And yet sometimes, when the state is in real danger, even this may be a necessary measure. *But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient; for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the crown, by suspending the habeas corpus act for a short and limited time, to imprison suspected persons without giving any reason for so doing.*" (1 Cooley's Blackstone, p. 135.)

Are we in Colorado in 1928 to have less protection for our personal liberty than the Englishman had nearly two centuries ago?

Due process of law is a subject too large for full discussion here. One of Mr. Arnold's conclusions is that "Any measures they (the military officials) in good faith adopt are due process of law."

The spirit and substance of that conclusion appear to me to be very different from the spirit and substance of the following from the United States Supreme Court in Fayerweather vs. Ritch, 195 U. S. 276, at 298, which quotation I submit as food for thought on this subject: "But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form. This Court referring to the Fourteenth Amendment has said, 'Can a state make anything due process of law which, by its own legislation it chooses to declare

such? To affirm this is to hold that the prohibition to the state is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' (Davidson vs. New Orleans, 96 U. S. 97, 102.) The same question could be propounded and the same answer should be made in reference to judicial proceedings inconsistent with due process of law."

If this be true of legislative enactment and of judicial proceeding, should it still be argued that "Any measures which they (military officials) in good faith adopt are due process of law"?

Our great men have learned and have freely acknowledged the fundamental error, the futility, the absolute danger of repressive measures whether legislative, judicial or executive.

The late Senator Beveridge in an address to the American Bar Association at the annual meeting in 1920, entitled "The Assault Upon American Fundamentals" says:

"The chief argument for the policy of repression is today what it always has been, that 'An ounce of prevention is worth a pound of cure.' Yet on precisely that theory, the British monarchy prohibited the publishing of books and writings except those which were approved and licensed by august agents of the royal government. It was this very idea which Milton denounced and refuted in that historic argument for the Freedom of the Press, his immortal Areopagitica. It is this exact doctrine that was practiced by every autocracy from the beginning of time.

"It cannot be too often repeated that not only has the repressive policy been ineffective in preventing the spread of proscribed ideas, but, on the contrary, it has given those ideas wings of fire; and that, moreover, by compelling the advocates of those ideas to work in secret instead of the open, the repressive policy has made dangerous opinions which otherwise were harmless. Punishment for preaching religious, economic, social or political beliefs clothes the preacher with the attractive garments of martyrdom. Moreover the repressive policy arouses the curiosity and sympathy of those who, but for the repression, might have been indifferent or hostile. It is merely human nature to inquire what the doctrine is, for advocating which men are punished; and those who are thus led to investigate proscribed ideas to which they might otherwise have paid no attention whatever, too often listen or read with favoring eye or ear. That is the reason for the well known fact that radical leaders rejoice in repression."

Repressive measures are born of fear, usually unfounded. The discussion of repressive measures relates to the question of freedom of speech more often than to other natural, individual rights because that right is probably more often impaired. The remarks as to repression of freedom of speech apply, however, with substantially equal force, to all measures for the repression of the exercise of the natural rights of the individual. For this reason I trust that my quotations which mention the right of freedom of speech will not be misunderstood as being limited simply to that right.

Benjamin Franklin said "Freedom of speech is the principal pillar of free government; when this support is taken away the constitution of free society is dissolved and tyranny is erected on its ruins. Those abuses of freedom of speech are the excesses of liberty. They ought to be repressed—but to whom dare we commit the care of doing it? An evil magistrate entrusted with power to punish for errors, would be armed with a weapon the most destructive and terrible. Under the pretense of pruning off the exuberant branches, he would be apt to destroy the tree."

In quoting the following from an article by Dr. Frank Crane entitled "Trembling Patriots", I do not quote from him as an authority but for the reason that he has in this case put some fundamental truths in very clear language. He says: "It needs to be clearly understood that those trembling patriots who are so timid that they would imprison, suppress or punish anybody who thinks that the government should be changed, are the real manufacturers of bolshevism and lawlessness in this country. If there is anything worse than a lie, it is a silly attempt to suppress it." And again, "I do not like, any more than the nervous policeman likes, the scarecrow-shrieking of the soured apostles of discontent, but I like less the czaristic method of dealing with them. Meet ideas with ideas, lies with truth, unreason with reason and let us have done forever with the fallacy of force."

I have made no attempt at a technical legal argument nor to answer all of the points raised by Mr. Arnold. To do so would, in my mind, belittle the subject which is really involved and to which we should all give our attention.

I believe that true Americanism is big enough and on a sufficiently solid foundation, to withstand all assaults of its enemies and that its only danger lies in the unfounded and unreasoning fear of some of its avowed friends.

I believe that martial law in Colorado and the things that have been done under it and in its name are the result of such an unfounded and unreasoning fear resulting in turn from a failure to fully appreciate the strength and power of true Americanism.

We have boasted that this is the land of liberty. I would like to keep it so and I know of no more appropriate way to close this article than with the Ode of John Hay to Liberty:

LIBERTY

What man is there so bold that he should say
"Thus, and thus only, would I have the sea?"
For whether lying calm and beautiful
Clasping the earth in love, and throwing back
The smile of heaven from waves of amethyst;
Or whether, freshened by the busy winds,
It bears the trade and navies of the world
To ends of use or stern activity;
Or whether, lashed by tempests, it gives way
To elemental fury, howls and roars
At all its rocky barriers, in wild lust
Of ruin drinks the blood of living things,
And strews its wrecks o'er leagues of desolate shore,—
Always it is the sea, and men bow down
Before its vast and varied majesty.

So all in vain will timorous ones essay
To set the metes and bounds of Liberty.
For Freedom is its own eternal law;
It makes its own conditions, and in storm
Or calm alike fulfills the unerring Will.
Let us not then despise it when it lies
Still as a sleeping lion, while a swarm
Of gnat-like evils hovers round its head,
Nor doubt it when in mad, disjointed times
It shakes the torch of terror, and its cry
Shrills o'er the quaking earth, and in the flame
Of riot and war we see its awful form
Rise by the scaffold, where the crimson axe
Rings down its grooves the knell of shuddering kings.
Forever in thine eyes, O Liberty,
Shines that high light whereby the world is saved,
And though thou slay us, we will trust in thee!

An Agnostic

"An agnostic is a person who knows he knows nothing; and believes no other person knows any more than he does."—*R. G. Ingersoll.*