



**LL.B. V Term**

**LB-5032 – Jurisprudence-II**

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# LL. B. V Term

## Paper - LB – 5032 – Jurisprudence –II

### TOPIC 1:

#### **The Concept of Rights and Duties: Jurisprudential Analysis**

- (a) R.W.M. Dias, “**Jural Relations**”, *Jurisprudence*, pp. 23-43 (1994). 1
- (b) Chhatrapati Singh, “**The Inadequacy of Hohfeld's Scheme: Towards more Fundamental Analysis of Jural Relations**”, 27 JILI. 117 (1985).
- (c) Upendra Baxi, “**Laches and the Rights to constitutional Remedies: *Quis Custodiet Ipsos Custodes?***”, Alice Jacob (ed.), *Constitutional Developments since Independence* (1975).  
14
- (d) Hart, H.L.A., “**Bentham on Legal Rights**”, in A.W.B. Simpson (ed.), *Oxford Essays in Jurisprudence, Second Series*, Oxford: Clarendon Press, (1973).
- (e) Ronald Dworkin, *Taking Rights Seriously*, Chapter 7, pp. 184-205. 19

### TOPIC 2:

#### **The Concept of Rights and Duties: Philosophical Analysis**

- (a) Bhiku Parekh, “**The Modern Conception of Right and Marxist Critique**” in Upendra Baxi (ed.), *The Right to be Human*, pp. 1-22 (1987). 35
- (b) Allen Buchanan, “**What is so Special about Rights,**” *Social Policy & Philosophy*, pp. 61-75 (1984). 47
- (c) Amartya Sen, “**Culture and Human Rights**”, in *Development as Freedom*, Chapter 10, pp. 227-48 (2000). 62

### TOPIC 3: LIABILITY

- (a) P.J. Fitzgerald, **Liability** in *Salmond on Jurisprudence*, pp. 349-410 (1966). 76
- (b) P.J. Fitzgerald, **Civil and Criminal Justice** in *Salmond on Jurisprudence*, pp. 91-106 (1966). 112

#### TOPIC 4: PERSONALITY

- (a) Joel Feinberg, “**The Rights of Animals and Unborn Generations**” in *Philosophy & Environmental Crisis* by William T. Blackstone (ed.), pp. 43-68 (1974). 122
- (b) R.W.M. Dias, **Theories of the Nature of ‘Legal Person’** in *Jurisprudence*, pp. 265-270 (1994). 132
- (c) Adolf A. Berle and Gardiner Means, “**The Evolution of Modern Corporate Structure**”, Chapter I of Book II, *Regrouping of Rights: Relative Legal Position of Ownership and Control of The Modern Corporation and Private Property* (1932).

#### **Cases:**

1. *Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Dass & Ors.*, 2000. 137
2. *The State Trading Corporation of India Ltd. & Ors. v. The Commercial Tax Officer, Visakhapatnam & Ors.*, AIR 1963 SC 1811; 1964 SCR (4) 89.
3. *Indian Young Lawyers Association v. State of Kerala*, 2018 SCC OnLine SC 1690.

#### TOPIC 5: PROPERTY

- (a) Roscoe Pound, “**Property**” in *An Introduction to Legal Philosophy*, New Haven, Oxford University Press, pp. 191-235 (1930). 150
- (b) Jeremy Waldron, “**Property and Ownership**”, *Stanford Encyclopaedia of Philos-*

- (c) John Locke, **Of Property**, Chapter 1 in C. B. Macpherson (ed.) *Property: Mainstream and Critical Positions*, University of Toronto Press, pp. 15-29 (1978).
- (d) O. Kahn-Fruend, **Introduction**, Chapter 1 in Karl Renner, *The Institutions of Private Law and Their Social Functions*, Agnes Schwarzschild (Trans.) (Routledge 1949).
- (e) Law Commission of India, *Seventieth Report on the Transfer of Property Act, 1882*, pp 1-10 (1977).

#### **TOPIC 6: POSSESSION AND OWNERSHIP**

- (a) P.J. Fitzgerald, **Possession** in *Salmond on Jurisprudence*, pp. 265-295 (1966). 182
- (b) A.M. Honore, **“Ownership”** in A.G. Guest (ed.) *Oxford Essays in Jurisprudence*, Oxford University Press, (1961). 201
- (c) Lallanji Gopal, **“Ownership of Agricultural Land in Ancient India”** *Journal of the Economic and Social History of the Orient*, Vol. 4, No. 3 (Dec., 1961), pp. 240-263.

#### **Cases:**

1. *Mohd. Noor vs. Mohd. Ibrahim*, AIR 1995 SC 398.
- 2.. *Rame Gowda vs. M. Varadappa Naidu*, AIR 2004 SC 4609.

## ***JURAL RELATIONS<sup>1</sup>***

Claims, liberties, powers and immunities are subsumed under the term ‘rights’ in ordinary speech, but for the sake of clarity and precision it is essential to appreciate that this word has undergone four shifts in meaning. They connote four different ideas concerning the activity, or potential activity, of one person with reference to another.

(1) Y’s duty with regard to X would be expressed by X as ‘you ought (must)’ (X is then said to have a claim or right, *stricto sensu*).

(2) X’s freedom to do something in relation to Y would be expressed by X as ‘I may’: (X has a liberty or privilege).

(3) X’s ability to alter Y’s legal position would be expressed by X as ‘I can’: (X has a power).

(4) Y’s inability to alter X’s legal position would be expressed by X as ‘you cannot’: (X has an immunity)

The use of the homonym ‘right’ to denote these separate ideas obscures the distinctions and leads to confusion sooner or later. It would be helpful, therefore, to make the distinctions as obvious as possible by allotting to each a term of its own.

An important preliminary point is that a jural relation between two parties should be considered only between them, even though the conduct of one may create another jural relation between him and someone else. In *Chapman v. Honig* [(1963) 2 Q. B.502] the defendant’s action in terminating the plaintiff’s tenancy was lawful (i.e. he had a liberty) as between them, although it was at the same time unlawful (i.e. breach of duty) as between defendant and the court (contempt).

When operating the scheme the following formulae will be helpful.

**Jural Correlatives** (vertical arrows and read both ways):... in one person, X, implies the presence of its correlative ..., in another person, Y’. Thus, claim in X implies the presence of duty in Y (but in so far as duties may exist without correlative claims, the converse proposition is not always true). Again, liberty in X implies the presence of no-claim in Y, and vice versa.

**Jural Opposites**, including what one might here call jural negations (diagonal arrows and read both ways) : ... in one person, X, implies the absence of its opposite, ..., in himself’. Thus, claim in X implies the absence of liberty in himself, and vice versa.

The merit of Professor Williams’s presentation is that it is possible to discern at a glance a third set of jural relations not mentioned by Hohfeld. These may be called

**Jural Contradictories** (horizontal arrows and read both ways): ... in one person, X, implies the absence of its contradictory, ..., in another person, Y’. Thus, claim in X implies the absence of liberty in Y, and vice versa. In the case of duties with correlative claims, a duty in

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\* R.W.M. Dias, *Jurisprudence*, Chapter 2, “ Legal Material”, pp. 23-40 (5th Ed., 1985).

X (absence of liberty) implies the absence of no-claim in Y and vice versa. (The question whether there are non-correlative duties will be discussed below).

With these formulae in mind the scheme may now be considered in detail.

### CLAIM-DUTY RELATION ('YOU OUGHT')

Hohfeld himself suggested the word 'claim', however, will be preferred in this book. He did not deal at length with this relation, believing that the nature of claim and duty was sufficiently clear. This was perhaps rather a facile assumption. He did, however, point out that the clue to claim lies in duty, which is a prescriptive pattern of behaviour. A claim is, therefore, simply a sign that some person ought to behave in a certain way. Sometimes the party benefited by the pattern of conduct is able to bring an action to recover compensation for its non-observance, or he may be able to avail himself of more indirect consequences. At other times, he can do nothing.

The correlation of claim and duty is not perfect, nor did Hohfeld assert that it was. Every claim implies the existence of a correlative duty, since it has no content apart from the duty. The statement, 'X has a claim', is vacuous; but the statement, 'X has a claim that Y ought to pay him £10' is meaningful because its content derives from Y's duty. On the other hand, whether every duty implies a correlative claim is doubtful. Austin admitted that some duties have no correlative claims, and he called these 'absolute duties' [Austin *Jurisprudence*, 11<sup>th</sup> ed., pp 401-403]. His examples involve criminal law. Salmond, on the other hand, thought that every duty must have a correlative claim somewhere [Salmond *Jurisprudence* (7<sup>th</sup> edn) p 240]. Allen supported Austin. Professor G.L. Williams treats the dispute as verbal [In Salmond *Jurisprudence* (11<sup>th</sup> edn) pp 264-265]. Duties in criminal law are imposed with reference to, and for the benefit of, members of society, none of whom has claims correlative to these duties. As far as their functioning is concerned, it is immaterial whether the claims are in the crown, the Crown in Parliament, or whether there are any claims.

Statutory duties furnish other examples. It rests on the interpretation of each statute whether the duties created by it are correlative to any claims in the persons contemplated by the duties. It was held in *Arbon v. Anderson* (1943) 1 All ER 154 that even if there had been a breach of the Prison Rules 1933 which had been made under the Prison Act 1898, s 2, a prisoner affected by such a breach had no action since he had no claim. The decision in *Bowmaker Ltd. v. Tabor* (1941) 2 KB 1 creates a difficulty. The Courts (Emergency Powers) Act 1939, s i (2), forbade hire-purchase firms to retake possession of things hired without first obtaining leave of court. The claim to damages was conferred by the statute on any hire purchaser from whom goods were retaken without the necessary leave having been obtained. In this case the defendant purchaser consented to the plaintiffs retaking possession of the article hired, and they did so without obtaining leave of court. The plaintiffs later sued the defendant for arrears of rent, which had accrued up to the time of the retaking, and the defendant counterclaimed for damages under the statute. The Court of Appeal held that he was entitled to damages. This means that there was a duty to pay damages, which was correlative to the claim to receive them. The duty not to retake possession without leave of court was, as the Court pointed out, imposed in the public interest and not for the benefit of an individual. The defendant, therefore, could not absolve the plaintiffs from it. The inference is

that the claim was not in him. The further question as to why the defendant's consent to the plaintiffs' course of action did not debar him from exercising his claim to damages was answered by the Court on the ground that consent, or *volenti non fit injuria*, is no defence to a breach of this kind of statutory obligation [*Cf. Carr v. Broaderick & Co. Ltd.* (1942) 2 KB 275].

Conduct is regulated by the imposition of duties. Claims may assist in achieving this end, but if it can be otherwise achieved, there is no reason why the mere fact that Y is under a duty with regard to X should confer upon X, or anyone else for that matter, a corresponding claim (Kelson, *General Theory of Law and State* 85). There is nothing to prevent it being the law that every breach of duty, of whatsoever sort, shall be dealt with by the machinery of the state. Such a state of affairs, though possible, would be inconvenient, for it would stretch state machinery to breaking point. Where duties are of private concern, the remedies are best left to individuals to pursue in the event of their breach. Above all, it is expedient to give aggrieved persons some satisfaction, usually by way of compensation. Every system of law has to decide which breaches of duties shall be taken up by the public authorities on their own motion, and which shall be left to private persons to take up or not as they please. The distinction between 'public' and 'private' law is quite arbitrary. It would seem, therefore, that there is no intrinsic reason why claims should be a necessary concomitant of duties (Radin, 'A Restatement of Hohfeld' (1938) 51 *Harv LR.* 1149-1150, says that X's claim and Y's ;duty are the same thing. On the argument above, his statement is unacceptable). Indeed, some modern writers, for different reasons, reject the whole idea of claim as redundant. If non-correlative duties are accepted, they do not fit snugly into the Hohfeldian scheme.

#### **LIBERTY-NO-CLAIM RELATION ('I MAY')**

Hohfeld distinguished the freedom which a person has to do or not do something from claim, and called it 'privilege' ; but the term liberty will be preferred. X's so-called 'right' to wear a bowler hat consists, on Hohfeld's analysis, of liberty to wear the hat and another liberty not to wear it. The relationship between claim, duty, liberty and no-claim can be explained in the following way.

(I) Duty and liberty are jurally 'opposite'. If, for example, X were under a duty to wear a bowler hat, this would imply the absence in him of any liberty not to wear it, i.e. the Hohfeldian opposite of duty means that there is no liberty to do whatever is opposite to the content of the duty. Similarly, if X were under a duty not to wear the hat, this would be the opposite of a liberty to wear it, i.e. there would be no liberty to do so. The jural opposition between duty and liberty does not mean simply that the one cancels out the other, but that they will only have that effect when the content of one is irreconcilable with the content of the other. For example, X normally has the liberty of wearing his hat. If he puts himself under a duty to wear it, his liberty and duty of wearing the hat are harmonious and co-exist. It is only when he puts himself under a duty not to wear it that his liberty to wear it and his duty conflict and are jurally opposite.

The opposition may be illustrated by *Mills v. Colchester Corpn* [(1867) LR 2 CP 476. A liberty must be limited by circumstances which may create a duty to grant a licence: *David v. Abdul Cader* (1963) 3 All ER 579. The owners of an oyster fishery had, since the days of

Queen Elizabeth I, granted licences to fish to persons who satisfied certain conditions. The plaintiff, who satisfied them but was refused a licence, brought an action alleging a customary claim correlative to a duty in the defendants to grant him one. The Court held otherwise on the basis that the defendants had always exercised a discretion in the matter. This implied not only a liberty to grant licences, but also a liberty not to grant licences, which implied the absence of a duty to do so. If, then, they were under no duty to grant licences, the plaintiff could have no claim.

Sometimes it is held for reasons of policy that the liberty of doing a particular thing cannot be erased by a contrary duty. *Osborne v. Amalgamated Society of Railway Servants* (1910) AC 87 lays down that the liberty of a member of Parliament to vote in any way he chooses on a given issue cannot be overridden by a contractual duty to vote in a certain way. Similarly in *Redbridge London Borough v. Jacques* (1971) 1 All ER 260, the respondent had for several years stationed his vehicle on a service road in the afternoons of early closing days and had operated a fruit and vegetable stall from the back of it. The local authority was aware of this practice and had raised no objection. It then charged him with obstructing the highway. The justices dismissed the charge on the ground that the local authority had, in effect, given him a licence (liberty). The decision was reversed on the ground that where there is a public duty, created by statute, this prevents the conferment of liberty to do what the duty forbids.

- (2) If Y has a claim, there must be a duty in X. A duty in X implies the absence of a liberty in X. Therefore, a claim in Y implies the absence of a liberty in X, i.e. claim and liberty are 'Jural contradictories'.
- (3) Conversely, the presence of liberty in X implies the absence of a claim in Y. Hohfeld calls this condition 'no-claim'. Therefore, a liberty in X implies the presence of 'no-claim' in Y, i.e., liberty and no-claim are 'jural correlatives'. On the opposition between claim and no-claim are 'jural correlatives'. On the opposition between claim and no-claim there is this to be said. The opposition here is different from that between duty and liberty. No question of content arises. No-claim is simply not having a claim, and having a claim is not being in the condition on no-claim is simply not having a claim, and having a claim is not being in the condition on no-claim, just as having a wife is not being in a state of bachelordom (no-wife). If it is thought necessary to distinguish between the opposition of duty and liberty on the one hand, and no-claim and claim on the other, the latter might be styled 'jural negation' instead.

### **Distinction between claim and liberty**

A claim implies a correlative duty, but a liberty does not. X's liberty to wear a bowler hat is not correlative to a duty in anyone. There is indeed a duty in Y not to interfere, but Y's duty not to interfere is correlative to X's claim against Y that he shall not interfere. X's liberty to wear the bowler hat and his claim not to be prevented from so doing are two different ideas. Thus, X may enter into a valid contract with Y where X gives Y permission to prevent him from wearing the hat, but X says he will nevertheless try to wear it. If X succeeds in evading Y and leaves the scene wearing the hat, he has exercised his liberty to wear it and Y has no



cause for complaint. If, on the other hand, Y prevents him from wearing the hat, he cannot complain, for he has by contract extinguished his claim against Y that Y shall not interfere. This shows that the liberty and the claim are separate and separable; the claim can be extinguished without affecting the liberty.

It is usual for liberties to be supported by claims, but it is important to realize that they are distinct and separate, and the distinction is reflected in case law. It was held in *Musgrove v. Chun Teeong Toy* (1891) AC 272. This case was originally quoted by Salmond. Cf. *Mackenzie King*: 'it is not a "fundamental human right" of an alien to enter Canada. It is a privilege. It is a matter of domestic policy,' quoted in *Re Hanna* (1957) 21 WWR NS 400. See also *R. v. Secretary of State for Home Department, exp Bhurosah* (1968) 1 QB 266] that at common law an alien has the liberty to enter British territory, but no claim not to be prevented; which was re-affirmed in *Schmidt v. Secretary of State for Home Affairs* (1969) 2 Ch. 149. See also *DPP v. Bhagwan* (1972) AC 60. *Chaffers v. Goldsmid* (1894) 1 QB 186. shows that a person has the liberty of presenting a petition to Parliament through his representative member, but no claim against such member that the latter shall comply. *Bradford Corpn. v. Pickles* (1937) 1 KB 316 shows that a landowner has the liberty of abstracting subterranean water, but no claim against anyone else who, by abstracting the water before it reaches the landowner, prevents him from exercising his liberty. In *Cole v. Police Constable* (1966) 2 All ER 133, the court considered the position of a non-parishioner in extra-parochial churches, for example Westminster Abbey, which is a Royal peculiar. Although the language of the learned judges is open to criticism, their conclusion, translated into Hohfeldian terminology, was that a non-parishioner has a liberty to be in such a church, but no claim not to be prevented. Therefore, the plaintiff's ejection by the respondent, who acted under instructions from the Dean, gave him no cause for complaint. Again, in *Piddington v. Bates* (1960) 3 All ER 660 the defendant, a trade unionist, in the course of a trade dispute insisted on going to the rear entrance of certain premises at which two pickets were already standing. To do so would not have been wrongful, for he would merely have exercised a liberty. In fact, however, the complainant, a police officer, who had decided that two pickets were all that were needed in the circumstances, prevented the defendant from going to the rear entrance. The latter then 'pushed gently past' the complainant 'and was gently arrested' by him. The defendant was found guilty of obstructing a constable in the exercise of his duty, since his liberty to stand at the entrance was not supported by a claim not to be prevented.

The failure to distinguish between claim and liberty leads to illogical conclusion. Thus, a member of the public has only a liberty to attend public meeting, which is not supported by a claim not to be prevented. The tribunal in *Thomas v. Sawkins* (1935) 2 KB 249 argued at one point that such a liberty to attend was a 'right' and that, therefore there was a duty not to prevent the person concerned, who happened to be a policeman. The conclusion is a non sequitur, since it fails to perceive the distinction between the two uses of 'right' as established by case law. If, as was probably the case, it was sought to create a claim-duty relation for reasons of policy, more convincing reasoning should have been employed. Cases on trade competition, whatever the merits of the decisions, present an array of fallacious propositions, which would have been avoided had the distinction between liberty and claim been perceived.

The claim not to be interfered with in trade corresponds to a duty not to interfere. There is indeed a duty not to interfere, e.g. by smashing up the plaintiff's shop; but no duty not to interfere by underselling him. So the question how far a duty not to interfere extends, i.e. how far the liberty of another person to interfere is allowed, is a delicate decision of policy. This is the real issue, which is thrown into relief when these situations are seen to involve conflicting liberties, but which is masked by the language of duties and claims.

The exposure of faulty reasoning also helps in assessing the effect and worth of decided cases. In *Thomas v. Sawkins* (1935) 2 KB 249 for example, the very demonstration that the conclusion was illogical when stated in terms of 'rights' and duties shows that the way to reconcile it with the established law is by saying that it has, in effect, created a new rule of law for policemen.

Finally, it may be observed that Hohfeld's analysis of claim, duty, liberty and no-claim is useful in many general ways. It may be used for drawing distinctions for purposes of legal argument or decision. It was held, for instance, in *Byrne v. Deane* (1937) 2 All ER 204. See also *Berry v. Irish Times Ltd.* (1973) IR 368 that to call a person an 'informer is a person who gives information of crime; there is in law a duty to do so, and Byrne's case decides that it is not defamatory to say that a man has performed a legal duty. There is only a liberty to be a 'conscientious objector', and Byrne's case is thus no authority for saying that it cannot be defamatory to allege that a person has exercised this liberty [Hamson, 'A Moot Case in Defamation' (1948) CLJ 46]. Again, the analysis is useful in considering the relation between common law and equity; in particular, it helps to demonstrate the precise extent to which there was conflict. Thus, the life-tenant had at law the liberty to cut ornamental trees, in equity he was under a duty not to do so. The liberty and duty are jural opposites and the latter cancels out the former. At common law a party had a claim to payment under a document obtained by fraud, in equity he had no-claim to payment under a document obtained by fraud, in equity he had no-claim. Further, such a person had at law the liberty of resorting to a common law court on such a document, where as equity imposed on him a duty not to do so (common injunction) [Hohfeld *Fundamental Legal Conceptions* 133].

### **Liberty as 'law'**

It has been shown that liberty begins where duty ends. Some have maintained that freedom is outside the law. Thus, Pound declared that liberty is 'without independent jural significance', ['Legal Rights' (1916) 26 *International Journal of Ethics* 92 at 97] and Kelsen said, 'Freedom is an extra-legal phenomenon'. As to this, it is as well to remember that liberty may result (a) from the fact that legislators and judges have not yet pronounced on a matter, and represents the residue left untouched by encroaching duties, e.g. invasion of privacy; or (b) it may result from a deliberate decision not to interfere, as in *Bradford Corpn. v. Pickles* [(1895) AC 587 (c) from the deliberate abolition of a pre-existing duty, e.g. the statutory abolition of the duty forbidding homosexuality between consenting adults, or an Act of Indemnity absolving a person from a penal duty. There is some plausibility in saying with Pound and Kelsen that liberty in sense (a) lies outside law; but it seems odd to say that the liberty pronounced by a court in (b) and the statutory provisions in (c) are 'without

independent jural significance' and 'extra-legal'. Analytically, the resulting position in all three cases is the same, namely, no duty not to do the act.

### **Kinds of liberties**

Some liberties are recognised by the law generally, e.g. liberty to follow a lawful calling. So, too, are 'Parliamentary privilege' in debate and 'judicial privilege', which are liberties in the Hohfeldian sense in that both connote the absence of a duty not to utter defamatory statements. An infant's position (sometimes called in non-Hohfeldian language an immunity) in contracts for things other than necessities is more complicated. In some cases it amounts to a power to repudiate the contract; in others it is not clear whether an infant has a liberty not to perform the contract, ie no primary duty to perform *Coults & Co. v. Browne-lecky* (1947) KB 104, (1946) 2 All ER 207, or whether there is a sanctionless duty, i.e. a primary duty which he ought to fulfil, but no sanctioning duty to pay damages and instead an immunity from the power of judgment.

Other liberties are recognised by law on special occasions, that is to say, the normal duty not to do something is replaced in the circumstances by the liberty to do it, e.g. self-help, self-defence, the defences of fair comment and qualified privilege. Lastly, liberty may be created by the parties themselves, e.g. consent, or *volenti non fit injuria*, one effect of which is that it absolves a defendant from his duty.

### **Limit of liberties**

Some liberties are unlimited, even if exercised maliciously, e.g., 'Parliamentary' or 'Judicial privilege'. *Non omne quod licet honestum est*. In other cases, the exercise of liberties may be limited by the law of 'blackmail', by public policy.

### **POWER-LIABILITY RELATION ('I CAN')**

Power denotes ability in a person to alter the existing legal condition, whether of oneself or of another, for better or for worse. Liability, the correlative of power, denotes the position of a person whose legal condition can be so altered. This use of 'liability' is contrary to accepted usage, but when operating the Hohfeldian table words have to be divorced from their usual connotations. X has a power to make a gift to Y, and correlatively Y has a liability to have his legal position improved in this way. A further point is that a person's legal condition may be changed by events not under anyone's control, e.g. an accumulation of snow on his roof. A distinction accordingly needs to be drawn between liability, which is correlative to power, i.e. the jural relation; and what for present purposes may be termed 'subjection', namely, the position of a person which is liable to be altered by non-volitional events. This is not a jural relation.

### **Distinction between claim and power**

On the face of it the distinction is obvious: a claim is always a sign that some other person is required to conform to a pattern of conduct, a power is the ability to produce a certain result. The 'right', for example, to make a will can be dissected into a liberty to make a will (there is another liberty not to make one), claims against other people not to be prevented from making one, powers in the sense of the ability to alter the legal conditions of persons specified in the will, and immunities against being deprived of will-making capacity.

The power itself has no duty correlative to it. It would be incorrect to describe this as a 'right' in the testator correlative to the duty in the executor to carry out the testator correlative to the duty in the executor to carry out the testamentary dispositions, for the will takes effect as from death and the executor's duty only arises from that moment. When the testator dies his claims etc cease, so the duty cannot correlate to any 'right' in him.

The distinctions between claim, liberty and power are important for much the same reasons as those considered above. A complex illustration is *Pryce v. Belcher* (1847) 4CB 866. At an election the plaintiff tendered his vote to the defendant, the returning-officer, who refused to accept it. The plaintiff was in fact disqualified from voting on grounds of non-residence. It was held that he had exercised a power by tendering his vote, which imposed on the defendant the duty to accept it. The latter's refusal to do so was a breach of that duty, which might well have rendered him liable to a criminal prosecution. However, the plaintiff's power to impose such a duty did not carry with it either the liberty of exercising the power or a claim to the fulfillment of the duty.

He, therefore failed in his action against the defendant for the breach of his duty.

Although a party in the situation of the plaintiff, has the power in this way to compel the returning-officer under the apprehension of a prosecution, to put his name upon the poll, he is acting in direct contravention of the Act of Parliament, the terms of which are express that he shall not be entitled to vote; and that the rejection of his vote cannot amount to a violation of any thing which the law can consider as his right. Coltman J at 883.

In *David v. Abdul Cader* (1963) 3 All ER 579, the defendant refused to exercise a statutory power to grant the plaintiff a licence to run a cinema. The Supreme Court of Ceylon rejected the latter's action for damages on the ground that an action presupposes violation of a 'right' (claim) in the plaintiff and that until the power had been exercised the plaintiff acquired no 'right'. The fallacy is clear. The 'right' which the plaintiff would have acquired on the exercise of the power is the liberty to run his cinema with appurtenant claims, powers, etc. The acquisition or non-acquisition of these is independent of the question whether the defendant was under a duty to exercise the power and whether there was in the plaintiff a claim correlative to this duty. The Judicial Committee of the Privy Council reversed the Supreme Court on this very ground and remitted the case for trial on those issues. Failure to observe the distinction between power and claim results in confusion, though this occurs less often than in the case of liberty and claim. Also, analysis does help to assess the case law. An example is *Ashby v. White* (1703) 2 Ld Raym 938 where the 'right' to vote was held to import a duty not to prevent the person from voting. The 'right' to vote is a power coupled with a liberty to exercise it, and the whole point was whether there was a claim not to be prevented. The decision in effect created such a claim, although the reasoning was fallacious. The Sale of Goods Act 1893 (now the Act of 1979), s. 12 (I), introduces an implied condition that a seller of goods 'has a right to sell the goods'. It is clear from the context, which deals with conditions as to title, that 'right' here means 'power' to pass title. It was held in *Niblett v. Confectioners' Materials Co.* (1921) 3 KB 387 that the defendant company had no 'right' to sell certain articles because a third party could have restrained the sale for infringement of a trade mark. This is confusion between power and liberty. For, the fact that the defendants

had no 'right' to sell certain articles because a third party could have restrained the sale for infringement of a trade mark. This is confusion between power and liberty. For, the fact that the defendants had power to pass title is independent of whether or not they had a duty not to exercise it (i.e. no liberty to do so).

### **Distinction between duty and liability**

If X deposits or lends a thing to Y, there is no duty in Y to restore it until X makes a demand. Before such demand is made Y is under a liability to be placed under the duty. The demand itself is the exercise of a power. The distinction is important, for instance, in connection with the limitation of actions. Thus, in *Re Tidd, Tidd v. Overell* (1893) 3 Cj 154., where money was entrusted to person for safe-keeping, it was held that the period of limitation only commenced from the time that a demand for restoration had been made. Again, a deposit of money with a bank amounts to a loan, and there is no duty to repay until a demand has been made. *Joachimson v. Swiss Bank Corpn.* (36) 3 KB 110 shows that time only runs from demand and not from the time of the original deposit. A sum of money can be attached under a garnishee order if there is a duty to pay, even though the actual time for payment may be postponed. In *Seabrook Estate Co. Ltd. v. Ford* (37) (1949) 2 All ER 94, a debenture holder appointed a receiver, who was to realize the assets and then pay off any preferential claims and the principal and interest to the debenture holders, and having done that, to pay the residue to the company. The judgment creditors of the company sought to attach a certain sum of money in the hands of the receiver before he had paid these other debts and which was estimated to be the residue that would be left in his hands. It was held that this could not be done as there was as yet no duty owing to the company from this kind of situation must be distinguished those where there is a duty owing, but the performance of which is postponed. Such a debt can properly be the subject of attachment.

### **Distinction between duty and 'subjection'**

If X promises Y under seal, or for consideration, that he will pay Y £5 on the following day should it rain, there is clearly no duty in X unless and until that event occurs. In the meantime X's position is simply that he is 'subject' to be placed under a duty. The distinction need not be elaborated further and may be dismissed with the comment that this is not liability to a power, but to a non-volitional event and, as such, forms the basis of much of the law of insurance.

An analytical problem arises with such a rule as *Rylands v. Fletcher*, 38 (1868) LR 3 HL 330. (under which an occupier has to pay for damage caused by the escape of a substance likely to do mischief) and the rule concerning animals (under which the 'keeper' has to pay for damage done by dangerous animals and trespassing cattle), both of which do not involve fault. There seems to be a distinction between these cases, which are sometimes called 'strict duties'. A duty prescribes a pattern of conduct, and by 'strict duty' (e.g. duty to fence dangerous machinery) is meant one to which the actor may not be able to conform no matter how reasonably he behaves in the circumstances. With *Rylands v. Fletcher* and animals, the policy of the law is not to prevent people from keeping mischievous substances or animals, i.e. there is no duty not to keep them. It could be argued, perhaps, that there are duties to prevent escape, in which case they would be correlative to claims; but this is not how the

rules are framed. What they say, in effect, is that one keeps these things at one's peril, i.e. liability attaches in the event of escape, which makes the position analogous to X having to pay £5 tomorrow if it rains. If so, there is no way of accommodating cases of 'subjection' within the Hohfeldian scheme, except to say that they are not jural relations and therefore are not entitled to a place therein.

### **Distinction between liberty and power**

Buckland disputes the need for any distinction.

All rights [liberties] are rights to act or abstain, not to produce legal effects. To say that he has a right that his act shall produce that effect is to imply that if he liked it would not have that effect, and this is not true. The act will produce the legal effect whether he wishes it or not. If I own a jug of water I have a right to upset it, but it is absurd to say that I have a right that the water shall fall out. [Buckland, *Some Reflections on Jurisprudence* 96].

It would appear that Buckland misunderstood the nature of the Hohfeldian power. It is not a 'right' that certain effects shall ensue. Acts that have certain effects are called powers; those that do not are not called powers. That is distinct from the liberty to perform or not to perform such an act. The distinction may be put as follows: the liberty to perform or not applies to all types of conduct, but considered with reference to their effects, it can be seen that some actions result in an alteration of existing legal relations, while others do not.

### **Rightful and wrongful powers**

The significance of the distinction between the nature of the act and the liberty to do it may be demonstrated in this way. Sometimes a power may be coupled with a liberty to exercise it and a liberty not to exercise it, while at other times it may be coupled with a duty to exercise it. In both situations the exercise of the power may be said to be 'rightful'. When a power is coupled with a duty not to exercise it, such exercise would then become 'wrongful'

Where a power is coupled with a liberty, a party cannot be penalised for having exercised it, or for not having done so. Thus, X may for no consideration at all give Y permission to picnic on his land. He may then change his mind with impunity and order Y to depart, i.e. exercise a power revoking Y's licence and imposing on him a duty to leave. If Y fails to do so within a reasonable time he commits a breach of that duty and becomes a trespasser. *Chapman v. Honig* (1963) 2 QB 502, Y had a liberty to be on X's land. X assigned his interest to A and Y assigned his interest to B and exercised his power to revoke B's liberty. It was held that he could do so; since there was no contract between A and B, A was under no duty not to exercise his power, i.e. he had a liberty to do so. *Wood v. Lead bitter* (1845) 13 M & W 838. Little is left of this case since *Hurst v. Picture Theatres Ltd.* (1915) 1 KB 1, but the principle is sound is not exactly in point, for the plaintiff's liberty to be on the defendant's premises was created by contract. The defendant ordered the plaintiff to leave and, after a reasonable time, expelled him with reasonable force. The plaintiff did not sue in contract, though there was undoubtedly a contractual duty not to exercise the power, but sued for assault instead. It was held that, since he had become a trespasser, he could be ejected with reasonable force. It was held in *East Suffolk Rivers Catchment Board v. Kent* (1941) AC 74 that the Board had a power and discretion (liberty) as to its exercise. In *R. v. Board of*

*Referees, exp Calor Gas (Distributing) Co. Ltd.* (1954) 47 R & IT 92, where a statutory power was coupled with a liberty to exercise it and also not to exercise it, the Divisional court refused an application for an order of mandamus to compel the Board to exercise it [*R. v. Secretary of State for the Environment, exp Hackney London Borough Council* [(1984) 1 All ER 956]. Discretionary powers may be controlled as follows. (a) Abusive exercise may be held void: *Congreve v. Home Office* (1976) QB 629 (b) If reasons are given, the courts may inquire into their adequacy, e.g. if reasons are stated in a return to a writ of habeas corpus for the release of a person committed for contempt by the House of Commons. The Judicial Committee of the Privy Council thought that a malicious refusal to exercise a discretionary power might amount to a breach of duty; but this is a limit on the liberty.

Where a power is coupled with a duty to exercise it, i.e. no liberty not to exercise it, there is no question of any 'right' to do the act; the party 'must' do it. A simple example is the power and duty of a judge to give a decision. Generally the presumption is against there being a duty to exercise statutory powers. The word 'may' in an empowering statute is usually taken to confer a liberty to exercise a power and not a duty, so mandamus will not lie. At the same time, it was held in *Trigg v. Staines UDC* (1969) Ch 10 that a local authority cannot contract not to exercise a power of compulsory acquisition, i.e. it cannot deprive itself of the liberty to use its power by an opposite contractual duty. Where, however, there is a duty to exercise a power, a remedy will lie for a breach of it. In *Ferguson v. Earl of Kinnoull* (1842) 9 Cl & Fin 251 especially at 311; *David v. Abdul Cader* (1963) 3 All ER 579 damages were awarded for the refusal by the Presbytery to take a preacher on trial. In *R. v. Somerset Justices Exp EJ Cole and Partners Ltd.* (1950) 1 KB 519 the Divisional court held that the statutory power of Quarter Sessions to state a case was coupled with a duty to do so in cases of conviction for crimes, but that in other cases there was only a liberty to do so. Mandamus lies in the former. Under s.17 of the Criminal Appeal Act 1968, the Home Secretary has the liberty to exercise his power to refer a criminal case to the Court of Appeal after the normal time limit for appeal has elapsed. Where a power is coupled with a duty not to exercise it, the party concerned has no liberty to do so. Thus, if a person has a liberty to be on premises by virtue of a contract, *Kerrison v. Smith* (1897) 2 QB 445; *Thompson v. Park* (1944) KB 408. The case of *Pryce v. Belcher* (1847) 4 Ch. 866 has already been considered. Another example is that of a thief who sells a thing in market over to an innocent purchaser for value. He exercises a power in that he deprives the owner of his title and confers title on the purchaser, but he is under a duty not to exercise this power and commits a fresh conversion by so doing. The simplest example is the commission of tort: it is a power in that the legal positions both of the victim and of the tortfeasor are altered, but there is a duty, owned to the victim, not to commit the tort. Furthermore, the commission of a tort may operate as a power against a third party. Thus, a servant who commits a tort in the course of his employment alters the legal position of his master by imposing upon him the duty to pay damages vicariously and a liability to be sued therefore, but the servant concurrently owes a duty to his master not to exercise this power of imposing vicarious responsibility upon him for the breach of which the master can recover from the servant by way of indemnity what he has to pay to the victim of the tort. In all these situations the act of the party concerned is a power, for it alters the legal position, even though its exercise is a breach of duty. To call such powers 'rights' would be a misnomer, for it would amount to speaking of 'rights' to commit wrongs,

i.e. breaches of duty. Though Hohfeld purported to distinguish between uses of the word 'right', it is clear that not all powers, in the sense in which he used that term, can be called 'right'. This is hardly a criticism. The power concept is unobjectionable as power; it cannot always be brought under the umbrella of 'rights'; which only reinforces the case for the greater precision and scope of the Hohfeldian terminology.

### **Kinds of powers**

Broadly, they may be divided into 'public' and 'private', but both involve ability to change legal relations. When a public power is coupled with a duty to exercise it, it is termed a 'ministerial' power; when it is coupled with a liberty, it is termed 'discretionary'. Public powers, though numerous especially in a administrative law, cannot compete with the profusion of private powers. The appointment of an agent, for instance, is a power, for it confers on the agent further powers to alter the legal position of the principal and creates in the latter corresponding liabilities. A married woman has power to pledge her husband's credit for necessaries, in contract there is a power to make an offer and a power to accept, and innumerable other in contract, property, procedure and, indeed, in every branch of the law. Private powers may also be coupled with duties to exercise them, e.g. certain powers of trustees, or they may be coupled with liberties.

### **IMMUNITY- DISABILITY RELATION ('YOU CANNOT')**

Immunity denotes freedom from the power of another, which disability denotes the absence of power. In *Hurst v. Picture Theatres Ltd.* (1915) 1 KB 1 it was held that where a liberty to be on premises is coupled with an 'interest', this confers an immunity along with the liberty, which cannot therefore be revoked. The relationship between power, liability, immunity and disability may be explained as follows:

- (1) If X has a power, Y has a liability. They are therefore 'jural correlatives'. A liability in Y means the absence of an immunity in him. Therefore, immunity and liability are 'jural opposites' (more strictly, 'jural negations', as previously explained).
- (2) Conversely, the presence of an immunity in Y implies the absence of a liability in him. The absence of a liability in Y implies the absence of a power in X. Therefore, an immunity in Y implies the absence of a power in X, i.e. power and immunity are 'jural contradictories',
- (3) The absence of power could have been styled 'no-power', in the same way as no-claim, but Hohfeld preferred to give it the term disability. Power and disability thus become 'jural opposites' ('negations'). It follows from this that immunity in Y implies the presence of a disability in X, i.e. they are 'jural correlatives'.

### **Distinction between claim and immunity**

An immunity is not necessarily protected by a duty in another person not to attempt an invasion of it. If X is immune from taxation, the revenue authorities have no power to place him under a duty to pay. A demand for payment is ineffectual, but X has no remedy against them for having made the demand. If immunity is the same as claim, there should be correlative duty not to make a demand. In *Kavanagh v. Hiscock* (1974) QB 600, it was held that the relevant section of the Industrial Relations act 1971 (since repealed) conferred on pickets an immunity



from prosecution or civil suit, but no liberty to stop vehicles on the highway and no claim not to be prevented from trying to stop vehicles. Secondly, there may be an immunity in X, which is protected by a duty in Y, but the claim correlative to that duty is not in X. Thus, diplomatic envoys are immune from the power of action or other legal process. As pointed out earlier, even if there are claims correlative to duties in criminal law, they are not in the persons for whose benefit the duties exist. Finally, an immunity in X may be protected by a duty in Y and the claim correlative to the duty may also be in X, as in the case of the malicious presentation of a petition in bankruptcy [*Chapman v. Pickersgill* (1762) 2 Wils 145]. In 1936 the corporation conveyed to the company a plot of land for 99 years for use as an airfield, and the corporation undertook to maintain it for use by the company. In 1970 the corporation purported to revoke the company's interest in the land. It was held that although the corporation was not entitled to override the company's interest in the land, the latter's only remedy lay in damages and not in an injunction. The effect of the 1936 conveyance would appear to have been to grant, *inter alia*, a liberty to the company; and if the corporation was unable to determine that interest, then that liberty seems to have been coupled with an immunity against revocation. The court refused an injunction on the ground that to issue one would amount to compelling the corporation to fulfil its obligation to maintain the airfield, i.e. be equivalent to an order for specific performance. It is here that the confusion lies. The 'right' of the company, which the court held could not be overridden, was its liberty plus immunity; but the 'right' correlative to the duty to maintain the airfield was its contractual claim. Breach of this duty is remediable by damages, but the question whether an injunction could be issued to support the immunity ought not to have been related to compelling performance of the contractual duty.

#### **Distinction between liberty and immunity**

The position of a diplomatic envoy illustrates this. Such a person is treated as being capable of committing a breach of duty and is under a duty to pay damages, although immune from the power of action or other legal process to compel him to do so. In other words, he has no liberty to do the act, nor a liberty not to pay damages for it, but he has an immunity from process all the same. It was held in *Dickinson v. Del Solar* (1930) 1 KB 376 that the fact that an envoy was thus under a sanctionless duty to pay damages was sufficient to involve his insurance company in responsibility. If, on the other hand, he voluntarily pays the damages, he cannot recover them, since there is the duty to pay.

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## ***LACHES AND THE RIGHTS TO CONSTITUTIONAL REMEDIES: QUIS CUSTODIET IPSOS CUSTODES?<sup>1\*</sup>***

### **V**

The threshold question is one simply of the ambit of the right to constitutional remedies. Interpretative effort is only called for if article 32 formulations are blurred or equivocal. In any case, close textual analysis must precede examination of policy approaches to the interpretation of article 32.

The Constitution makes it admirably clear that the right to constitutional remedies is a fundamental right. Under clause 4, this fundamental right is not to be suspended "except as otherwise provided in the Constitution." But from here on the manifest clarity of article 32 seems to ebb. For, article 32(1) instead of guaranteeing in terms a right to constitutional remedies, guarantees merely "the right to *move* the Supreme Court by appropriate proceedings for the enforcement of fundamental rights."

True, article 32(1) obviously entitles a person or citizen to move the court for the enforcement of fundamental rights, but this right must be exercised through 'appropriate proceedings'. The Constitution nowhere defines what are 'appropriate proceedings' for moving the Supreme Court. Obviously, the court has to decide the appropriateness of the proceedings. It may say what proceedings are 'appropriate' and indeed determine the very scope of the term 'proceedings'.<sup>2</sup> The court has to make law either through the interpretation of the term 'appropriate proceedings' or under its rule-making power by virtue of article 145(1)(c). Whichever way it does this, the court (being included, as will be seen later, in the definition of State under article 12) cannot 'take away' the right to move itself which is a guaranteed right. It is a moot point whether interpretations of article 32(1) or rules elucidating 'appropriate proceedings' under article 145(1)(c) can be said to unconstitutionally 'abridge' article 32 guarantee. Thus, when the court applies the doctrine of *res judicata*, or constructive *res judicata* or laches, the problem of whether in particular situations application of these doctrines is an impermissible 'abridgement' persists. Also persistent is the problem whether the cumulative impact of such 'abridgements' amounts to the court's 'taking away' the article 32 right.

Be that as it may, article 32(1) by itself provides only a right to move the court for the enforcement of fundamental rights. Many scholars argue that is all.<sup>3</sup> But this cannot be the

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\* Upendra Baxi, "Laches and the Rights to constitutional Remedies: *Quis Custodiet Ipsos Custodes?*", Alice Jacob (ed.), *Constitutional Developments since Independence* (1975).

<sup>2</sup> In *Daryao v. State of U.P.*, A.I.R. 1961 S.C. 1457 the court held that the "argument that Art. 32 does not confer upon a citizen the right to move this Court by an original petition but merely gives him the right to move this Court by an appropriate proceeding according to the nature of the case seems to us to be unsound".

<sup>3</sup> E.g., Alice Jacob, "Laches : Denial of Judicial Relief under Articles 32 and 226", being a paper presented at the I.L.I. Seminar on Administrative law (Nainital, May 1973) p. 16. Professor Jacob maintains that Article 32(2) is "an enabling provision" and the court is not "bound to give relief in all

case. If any person has the right to move the court, the court is under a corresponding duty to be so moved. Although the term 'move' can be interpreted restrictively so as to denote a most casual consideration of the petition or the mere act of receiving it, it is not controversial to say that the bare text of article 32(1) imposes an obligation upon the Supreme Court to take appropriate action if the case is proven.

What then is the significance of the court's power to interpret the term 'appropriate proceedings'? It is submitted that, in strict Hohfeldian analysis, we have here a case of legal duty qualified by a privilege. The Hohfeldian co-relative of privilege is a 'no-right'. We would then have to say that if the court holds that a particular way of moving it for the enforcement of the fundamental rights is not in the nature of 'appropriate proceedings', no right of the individual is thereby violated. But surely this privilege - no-right relation occurs within the context of a right-duty relation. That is to say, the court is not free to say that it is under no legal duty to be moved. It is. It can only say that it has a privilege to hold that a particular manner of initiating proceedings before it is not 'appropriate'. The court has a similar privilege to define the term 'proceedings'.

We now turn to article 32(2) which, as is well-known, empowers the court to issue "directions or orders, or writs...for the enforcement of any of the rights conferred by this Part". This language of article 32(2) is regarded by some scholars to mean that the court is enabled, in cases of proved violations of fundamental rights, to issue certain orders, directions and writs. The argument is that if article 32(2) is an enabling provision, an empowering one, the court has a discretion whether or not to use that power. The conclusion follows inescapably that article 32(1) guarantees a *right*; 32(2) invests the court with *power*. There thus arises a dualism between the two provisions: one under which the court is under a legal obligation to be moved, another under which it has a power which it is under no legal obligation at all to exercise.

The conclusion is manifestly wrong because the reasoning is entirely fallacious. The correct juristic analysis is that the constitutional obligation cast upon the court to be moved for enforcement of part III rights is coupled here with attendant powers to be so moved. The court cannot be moved to any worthwhile effect under article 32(1) if it did not have a power to issue 'directions, orders or writs'. Since the power is conferred in the aid of a constitutional obligation, the exercise of that power cannot at all be discretionary. Whenever an appropriate proceeding as determined by the court is before the court, the court must issue directions, or orders or a writ. And the 'direction, order or writ' must be for the enforcement of a fundamental right if the right is found to be in need of such enforcement. Only the Supreme Court (or a court empowered under article 32(3)) can decide whether right is violated or it needs to be enforced. The moot point here is: Can the Supreme Court itself say otherwise? That is, can the court say that even though the right is violated or needs enforcement, it will not exercise its article 32(2) power?

The answer to this is that it may say so; but when the court so says its judgment is vitiated by unconstitutionality and, even on a strictly legal positivistic approach, the judgment is not entitled to obedience, it being void under article 13. A judgment or an order of the court is

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instances of infringement of fundamental rights discarding certain cardinal principles of administration of justice...."; see also Seervai, *infra* note 3.

undoubtedly a law under article 13. It determines no doubt the legal relations *inter partes*. But decisions for the enforcement of part III rights also create law which is binding on all courts throughout the territory of India. If this answer is correct (and the author believes it is) then article 32(2) cannot at all be regarded as conferring a power merely; it must be appreciated as conferring the power to enable the court to perform its constitutional obligation.

From this viewpoint, the decision by the Supreme Court to dismiss a petition *in limine*, or on the grounds of *laches*, *res judicata* (constructive or otherwise) presents massive problems. This is so because the court in these cases is not really saying that the allegedly infringed fundamental rights need no enforcement. Rather, the court is saying that it itself will *not* examine that issue *at all*. With great respect it is submitted, the court has no authority to so do, more so since the right to constitutional remedies is itself a fundamental right.

Seervai argues, however, that no "fundamental right is conferred to obtain relief from the Supreme Court regardless of all considerations relevant to the administration of justice."<sup>4</sup> Such a statement standing alone cannot signify anything more than an elucidation of Seervai's personal preferences which, though entitled to some weight, cannot be regarded as more authoritative than the plain text of article 32. And Seervai is normally a champion of the rule that the clear text is compelling.

Realising this, he argues as follows:

...Article 32(2)...confers a power to issue writs. This power is not expressly coupled with a duty, nor can a duty to exercise the power be implied because the writs there mentioned, except *habeas corpus*, were discretionary in England and in India.<sup>5</sup>

The language of article 32(2) is, unfortunately for this view, even *more* clear than what Seervai allows. It is *more* clear because *first* the power is the power to issue 'directions, orders and writs'. *Second*, the writs are inclusive of five typical writs but not exhaustive. New writs could be evolved, which are unknown elsewhere. To say that this cannot happen is to impute disingenuity to Indian lawyers and judges. *Third*, and equally important, the powers to issue writs is the power to issue writs in the nature of five writs therein mentioned. So the fact of their being discretionary in England is not constitutionally conclusive in India. The expression writs 'in the nature of the five historic writs does not necessarily refer to the discretionary nature of the writs. The words 'in the nature of rather refer to the mode of proceedings and judicial order upon hearing and disposal of the same.

By the same token, the argument that the Supreme Court has treated article 32(2) as discretionary as far as the issue of the writs is concerned is scarcely an argument for saying that it is necessarily right in so doing. *Golak Nath* showed that an approach to amending power employed by the court for nearly seventeen years may yet be declared wrong.

Indeed, Seervai himself seems to disagree *with his above-quoted views*. In his treatise on constitutional law, he goes so far as to say that the judgments of the Supreme Court which suggest, or state, that the grant of an appropriate writ under Art. 32 is discretionary, are not

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<sup>4</sup> See H.M. Seervai, "The Supreme Court, Article 32 of the Constitution and Limitation," 73 *Bombay L.R. (Journal)* 35-38 (1969) at p. 37 and V.G. Ramachandran, "Is Article 32 a Discretionary Remedy Subject to the Doctrine of Laches?" 1969 (2) S.C.C. 21-34.

<sup>5</sup> *Id.* at 37-8.

correct because they overlook the difference between the English and the Indian law brought about by Art. 32(1).<sup>6</sup>

Moreover, to say that article 32(2) power is not expressly coupled with a duty is to say the right guaranteed by the Constitution has no co-relative duty or to say that the duty is discretionary but the right is somehow fundamental. Such a statement is absurd from a strictly analytical viewpoint.

The article 32(2) power is necessary to discharge article 32(1) duty. And article 32(2) is on any approach a provision ex *abundanti cautela*. Suppose the constitutional text gave no specific power to the court at all. Can it be seriously urged that the court, therefore, had no power to discharge a duty cast upon it by the guarantee of fundamental right in article 32(1)? When the constitutional duty and power are so explicit, it is scarcely necessary to have recourse to tenuous denials of implied duty-power relation in article 32.

Furthermore, the meaning of the proposition that article 32(2) power is discretionary is not at all clear. Discretion means choice. The Supreme Court may choose to issue a writ or not issue it. None can seriously argue against the view that the power is discretionary in the sense that if a case is not made out at all for the issue of a writ or a direction, the court may properly decline to issue it. The words "for the enforcement of rights conferred by this Part" occurring in article 32(1) and (2) make this very commonsensical point abundantly clear. If the rights do not need to be enforced because their violation is not proven, then no writs or directions need be issued. But can we really maintain that the court has discretion whether or not to issue writs, directions or orders if the rights need enforcement? Indeed not. Seervai himself elsewhere argues that such refusal to issue writs to protect fundamental rights would be an "abdication of the duty laid upon the Supreme Court".<sup>7</sup> Indeed, Seervai himself (and quite rightly so) argues that even under article 226 the 'discretion' enjoyed by the High Courts in the issuing of the writs must be properly exercised in the matter of fundamental rights. This means virtually that the High Courts must give relief if a case for relief is made out in a matter involving fundamental right.<sup>8</sup>

The *question whether relevant considerations as are routinely employed* in administration of justice should apply to article 32 is a question of policy and not *merely* a question of textual analysis of article 32. It does not help clear thinking to coalesce two distinct questions. The crucial questions here, tolerating no obfuscation, are: are considerations of public policy underlying administration of justice—(embodied in doctrines like *res judicata*, laches, etc.)—to be imported in enforcing fundamental rights, including the right to constitutional remedies? If so, does the Constitution authorize the court to so do? *These* questions do not even begin to emerge so long as we continue to pour our preferences and values in the text of the Constitution which is compellingly clear.

To conclude this section, let us reiterate the following results of strict juristic analysis of article 32. The article creates the following jurial relations:

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<sup>6</sup> Seervai, *Constitutional Law of India* 624 (1968).

<sup>7</sup> *Id.* at 625.

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

- (i) a right in the allegedly aggrieved person to move the court by appropriate proceedings and a duty in the court to be so moved for the enforcement of fundamental rights;
- (ii) this latter duty is coupled with power (by article 32(2)) vested in the court to facilitate its discharge; the power has its correlative liability of the State for its action to be judicially reviewed;
- (iii) the court has the privilege to determine what 'proceedings' are 'appropriate' to article 32 and no right of aggrieved person is violated by the court's exercise of this privilege.

## RONALD DWORKIN

### The Model Rules I,<sup>1</sup>

#### RULES, PRINCIPLES, AND POLICIES

I want to make a general attack on positivism, and I shall use H. L. A. Hart's version as a target, when a particular target is needed. My strategy will be organized around the fact that when lawyers reason or dispute about legal rights and obligations, particularly in those hard cases when our problem with these concepts seem most acute, they make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards. Positivism, I shall argue, is a model of and for a system of rules, and its central notion of a single fundamental test for law forces us to miss the important roles of these standards that are not rules.

I just spoke of 'principles, policies, and other sorts of standards'. Most often I shall use the term 'principle' generically, to refer to the whole set of these standards other than rules; occasionally, however, I shall be more precise, and distinguish between principles and policies. Although nothing in the present argument will turn on the distinction, I should state how I draw it. I call a 'policy' that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change). I call a 'principle' a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality. Thus the standard that automobile accidents are to be decreased is a policy, and the standard that no man may profit by his own wrong a principle. The distinction can be collapsed by construing a principle as stating a social goal (*i.e.*, the goal of a society in which no man profits by his own wrong), or by construing a policy as stating a principle (*i.e.*, the principle that the goal the policy embraces is a worthy one) or by adopting the utilitarian thesis that principles of justice are disguised statements of goals (securing the greatest happiness of the greatest number). In some contexts the distinction has uses which are lost if it is thus collapsed.

My immediate purpose, however; is to distinguish principles in the generic sense from rules, and I shall start by collecting some examples of the former. The examples I offer are chosen haphazardly; almost any case in a law school casebook would provide examples that would serve as well. In 1889 a New York court, in the famous case of *Riggs v. Palmer*, had to decide whether an heir named in the will of his grandfather could inherit under that will, even though he had murdered his grandfather to do so. The court began its reasoning with this admission: 'It is quite true that statutes regulating the making, proof and effect of wills, and

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<sup>1</sup> Ronald Dworkin, *Taking Rights Seriously*, The Model Rules I, 22-31 (1977, Indian reprint 2010).

the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer.’ But the court continued to note that ‘all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.’ The murderer did not receive his inheritance.

The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.

This all-or-nothing is seen most plainly if we look at the way rules operate, not in law, but in some enterprise they dominate — a game, for example. In baseball a rule provides that if the batter has had three strikes, he is out. An official cannot consistently acknowledge that this is an accurate statement of a baseball rule, and decide that a batter who has had three strikes is not out. Of course, a rule may have exceptions (the batter who has taken three strikes is not out if the catcher drops the third strike). However, an accurate statement of the rule would take this exception into account, *and* any that did not would be incomplete. If the list of exceptions is very large, it would be too clumsy to repeat them each time the rule is cited; there is, however, no reason in theory why they could not all be added on, and the more that are, the more accurate is the statement of the rule.

If we take baseball rules as a model, we find that rules of law, like the rule that a will is invalid unless signed by three witnesses, fit the model well. If the requirement of three witnesses is a valid legal rule, then it cannot be that a will has been signed by only two witnesses and is valid. The rule might have exceptions, but if it does then it is inaccurate and incomplete to state the rule so simply, without enumerating the exceptions. In theory, at least, the exceptions could all be listed, and the more of them that are, the more complete is the statement of the rule.

A principle like ‘No man may profit from his own wrong’ does not even purport to set out conditions that make its application necessary. Rather, it states a reason that argues in one direction, but does not *necessitate* a particular decision. If a man has or is about to receive something, as a direct result of something illegal he did to get it, then that is a reason which the law will take into account in deciding whether he should keep it. There may be other principles or policies arguing in the other direction — a policy of securing title, for example, or a principle limiting punishment to what the legislature has stipulated. If so, our principle may not prevail, but that, does not mean that it is not a principle of our legal system, because in the next case, when these contravening considerations are absent or less weighty, the principle may be decisive. All that is meant, when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another.



*Rules, Principles, and Policies*

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The logical distinction between rules and principles appears more clearly when we consider principles that do not even look like rules. Consider the proposition, set out under ‘(d)’ in the excerpts from the *Henningsen* opinion, that ‘the manufacturer is under a special obligation in connection with the construction promotion and sale of his cars’. This does not even purport to define the specific duties such a special obligation entails, or to tell us what rights automobile consumers acquire as a result. It merely states — and this is an essential link in the *Henningsen* argument — that automobile manufacturers must be held to higher standards than other manufacturers, and are less entitled to rely on the competing principle of freedom of contract. It does not mean that they may never rely on that principle, or that courts may rewrite automobile purchase contracts at will; it means only that if a particular clause seems unfair or burdensome, courts have less reason to enforce the clause than if it were for the purchase of neckties. The ‘special obligation’ counts in favour, but does not in itself necessitate, a decision refusing to enforce the terms of an automobile purchase contract.

This first difference between rules and principles entails another. Principles have a dimension that rules do not — the dimension of weight or importance. When principles intersect (the policy of protecting automobile consumers intersecting with principles of freedom of contract, for example), one who must resolve the conflict has to take into account the relative weight of each. This cannot be, of course, an exact measurement, and the judgment that a particular principle or policy is more important than another will often be a controversial one. Nevertheless, it is an integral part of the concept of a principle that it has this dimension, that it makes sense to ask how important or how weighty it is.

Rules do not have this dimension. We can speak of rules as being *functionally* important or unimportant (the baseball rule that three strikes are out is more important than the rule that runners may advance on a balk, because the game would be much more changed with the first rule altered than the second). In this sense, one legal rule may be more important than another I use it has a greater or more important role in regulating behavior. But we cannot say that one rule is more important than another within the system of rules, so that when two rules conflict one supersedes the other by virtue of its greater weight.

If two rules conflict, one of them cannot be a valid rule. The decision as to which is valid, and which must be abandoned or recast, must be made by appealing to considerations beyond the rules themselves. A legal system might regulate such conflicts by other rules, which prefer the rule enacted by the higher authority, or the rule enacted later, or the more specific rule, or something of that sort. A legal system may also prefer the rule supported by the more important principles. (Our own legal system uses both of these techniques.)

It is not always clear from the form of a standard whether it is a rule or a principle. ‘A will, is invalid unless signed by three witnesses’ is not very different in form from ‘A man may not profit from his own wrong’, but one who knows something of American law knows that he must take the first as stating a rule and the second as stating a principle. In many cases the distinction is difficult to make — it may not have been settled how the standard should operate, and this issue may itself be a focus of controversy. The first amendment to the United States Constitution contains the provision that Congress shall not abridge freedom of speech. Is this a rule, so that if particular law does abridge freedom of speech, it follows that it is

unconstitutional? Those who claim that the first amendment is ‘an absolute’ say that it must be taken in this way, that is, as a rule. Or does it merely state a principle, so that when an abridgement of speech is discovered, it is unconstitutional unless the context presents some other policy or principle which in the circumstances is weighty enough to permit the abridgement? That is the position of those who argue for what is called the ‘clear and present danger’ test or some other form of ‘balancing’.

Sometimes a rule and a principle can play much the same role, and the difference between them is almost a matter of form alone. The first section of the Sherman Act states that every contract in restraint of trade shall be void. The Supreme Court had to make the decision whether this provision should be treated as a rule in its own terms (striking down every contract ‘which restrains trade’, which almost any contract does) or as a principle, providing a reason for striking down a contract in the absence of effective contrary policies. The Court construed the provision as a rule, but treated that rule as containing the word ‘unreasonable’, and as prohibiting only ‘unreasonable’ restraints of trade.’ This allowed the provision to function logically as a rule (whenever a court finds that the restraint is ‘unreasonable’ it is bound to hold the contract invalid) and substantially as a principle (a court must take into account a variety of other principles and policies in determining whether a particular restraint in particular economic circumstances is ‘unreasonable’).

Words like ‘reasonable’, ‘negligent’, ‘unjust’, and ‘significant’ often perform just this function. Each of these terms makes the application of the rule which contains it depend to some extent upon principles or policies lying beyond the rule, and in this way makes that rule itself more like a principle. But they do not quite turn the rule into a principle, because even the least confining of these terms restricts the *kind* of other principles and policies on which the rule depends. If we are bound by a rule that says that ‘unreasonable’ contracts are void, or that grossly ‘unfair’ contracts will not be enforced, much more judgment is required than if the quoted terms were omitted. But suppose a case in which some consideration of policy or principle suggests that a contract should be enforced even though its restraint is not reasonable, or even though it is grossly unfair. Enforcing these contracts would be forbidden by our rules, and thus permitted only if these rules were abandoned or modified. If we were dealing, however, not with rule but with a policy against enforcing unreasonable contracts, or a principle that unfair contracts ought not to be enforced, the contracts could be enforced without alteration of the law.

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## The Model of Rules II<sup>2</sup>

Before I turn to the specific objections I listed, however, I want to consider one very general objection that I did not list, but which I believe, for reasons that will be clear, underlines several of those I did. This general objection depends on a thesis that Hart defended in *The Concept of Law*, a thesis which belongs to moral as well as to legal philosophy. It argues, in its strongest form, that no rights or duties of any sort can exist except by virtue of a uniform social practice of recognizing these rights and duties. If that is so, and if law is, as I suppose, a matter of rights and duties and not simply of the discretion of officials, then there must be a commonly recognized test for law in the form of a uniform social practice, and my argument must be wrong. In the first section of this essay I shall elaborate this powerful thesis, with special reference to the duty of judges to apply particular standards as law. I shall then argue that the thesis must be rejected. In the remaining sections I shall, on some occasions, recast my original arguments to show why they depend on rejecting it.

### Social Rules

I shall begin by noticing an important distinction between two of the several types of concepts we use when we discuss our own or other people's behavior. Sometimes we say that on the whole, all things considered, one 'ought' or 'ought not' to do something. On other occasions we say that someone has an 'obligation' or a 'duty' to do something, or 'no right' to do it. These are different sorts of judgments: it is one thing, for example, simply to say that someone ought to give to a particular charity and quite another to say that he has a duty to do so, and one thing to say simply that he ought not to drink alcohol or smoke marijuana and quite another to say that he has no right to do so. It is easy to think of cases in which we should be prepared to make the first of each of these claims, but not the second.

Moreover, something might well turn, in particular cases, on which claim we did feel was justified. Judgments of duty are commonly much stronger than judgments simply about what one ought to do. We can demand compliance with an obligation or a duty, and sometimes propose a sanction for non-compliance, but neither demands nor sanctions are appropriate when it is merely a question of what one ought, on the whole, to do. The question of when claims of obligation or duty are appropriate, as distinct from such general claims about conduct, is therefore an important question of moral philosophy, though it is a relatively neglected one.

The law does not simply state what private citizens ought or ought not to do; it provides what they have a duty to do or no right to do. It does not, moreover, simply advise judges and other officials about the decisions they ought to reach; it provides that they have a duty to recognize and enforce certain standards. It may be that in some cases a judge has no duty to

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<sup>2</sup> Ronald Dworkin, *Taking Rights Seriously*, The Model Rules II, 46-68 (1977, Indian reprint 2010).

decide either way; in this sort of case we must be content to speak of what he ought to do. This, I take it, is what is meant when we say that in such a case the judge has ‘discretion’. But every legal philosopher, with the exception of the most extreme of the American legal realists, has supposed that in at least some cases the judge has a duty to decide in a particular way, for the express reason that the law requires that decision.

But it is a formidable problem for legal theory to explain why judges have such a duty. Suppose, for example, that a statute provides that in the event of intestacy a man’s property descends to his next of kin. Lawyers will say that a judge has a duty to order property distributed in accordance with that statute. But what imposes that duty on the judge? We may want to say that judges are ‘bound’ by a general rule to the effect that they must do what the legislature says, but it is unclear where that rule comes from. We cannot say that the legislature is itself the source of the rule that judges must do what the legislature says, because that explanation presupposes the rule we are trying to justify. Perhaps we can discover a basic legal document, like a constitution, that says either explicitly or implicitly that the judges must follow the legislature. But what imposes a duty on judges to follow the constitution? We cannot say the constitution imposes that duty without begging the question in the same way.

If we were content to say merely that judges *ought* to follow the legislature, or the constitutions, then the difficulty would not be so serious. We might provide any number of reasons for this limited claim; for example, that everyone would be better off in the long run, on balance, if judges behaved in this way. But this sort of reason is unpersuasive if we want to claim, as our concept of law seems to assume, that judges have a *duty* to follow the legislature or the constitution. We must then try to find, not just reasons why judges should do so, but grounds for asserting that duty, and this requires that we face the issue of moral philosophy I just named. Under what circumstances do duties and obligations arise?

Hart’s answer may be summarized in this way. Duties exist when social rules exist providing for such duties. Such social rules exist when the practice-conditions for such rules are met. These practice-conditions are met when the members of a community behave in a certain way; this behavior *constitutes* a social rule, and imposes a duty. Suppose that a group of churchgoers follows this practice (a) each man removes his hat before entering church, (b) when a man is asked why he does so, he refers to ‘the rule’ that requires him to do so, and (c) when someone forgets to remove his hat before entering the church he is criticized and perhaps even punished by the others. In those *circumstances*, according to Hart, practice conditions for a duty imposing rule are met. The community has a social rule to the effect that men must not wear hats in church, and that social rule imposes a duty not to wear hats in church. That rule takes the issue of hat-wearing in church out of the general run of issues which men may debate in terms of what they ought to do, by creating a duty. The existence of the social rule, and therefore the existence of the duty, is simply a matter of fact.

Hart then applies this to the issue of judicial duty. He believes that in each legal system the practice conditions are met by the behavior of judges, for a social rule that imposes a duty to identify and apply certain standard as law. If, in a particular community, those officials (a) regularly apply the rules laid by the legislature in reaching their decisions, (b) justify this

*Rules, Principles, and Policies*

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practice by appeal to ‘the rule’ that judges must follow the legislature, and (c) censure any official who does not follow the rule, then, on Hart’s theory, this community can be said to have a social rule that judges must follow the legislature. If so, then judges in that community have a duty to do so. If we now ask why judges have a duty to follow social rules, after the fashion of our earlier quibble, Hart will say that we have missed the point. It belongs to the concept of a duty, on his account, that duties are created by social rules of the sort he describes.

But Hart’s theory as so far presented is open to an objection that might be put in the following way. When a sociologist says that a particular community ‘has’ or ‘follows’ a particular rule, like the no-hat-in-church rule, he means only to describe the behaviour of that community in a certain respect. He means only to say that that community suppose that they have a particular duty and not that he agrees. But when a member of the community himself appeals to that rule, for the purpose of criticising his own or someone else’s behaviour then he means not simply to describe the behaviour of the other people but to evaluate it. He means not simply that others believe that they have a certain duty, but that they *do* have that duty. We must therefore recognise a distinction between two sorts of statements each of which uses the concept of a rule. The sociologist, we might say, is asserting a *social* rule, but the churchgoer is asserting a *normative* rule. We might say that the sociologist’s assertion of a social rule is true (or warranted) if a certain factual state of affairs occurs, that is, if the community behaves in the way Hart describes in his example. But we should want to say that the churchgoer’s assertion of a normative rule is true (or warranted) only if a certain normative state of affairs exists, that is, only if individuals in fact do have the duty that they suppose they have in Hart’s example. The judge trying a lawsuit is in the position of the churchgoer, not the sociologist. He does not mean to state, as a cold fact, simply that most judges believe that they have a duty to follow what the legislature has said; he means that they do in fact have such a duty and he cites that duty, not others’ beliefs, as the justification for his own decision. If so, then the social rule cannot, without more, be the source of the duty he believes he has.

Hart anticipates this objection with an argument that forms the heart of his theory. He recognizes the distinction I have drawn between assertions of a ‘social rule’ and assertions of a ‘normative rule’, though he does not use these terms. However, he denies, at least as to the cases he discusses, that these two sorts of assertions can be said to assert two different sorts of rules. Instead, he asks us to distinguish between the *existence* of a rule and its *acceptance* by individual members of the community in question. When the sociologist asserts the existence of a social rule he merely asserts its existence: he says only that the practice-conditions for that rule have been, met. When the churchgoer asserts its existence he also claims that these practice-conditions are met, but *in addition* he displays his *acceptance* of the rule as a standard for guiding his own conduct and for judging the conduct of others. He both identifies a social practice and indicates his disposition to conform his behavior to it. Nevertheless, insofar as each refers to a rule, it is the same rule, that is, the rule that is constituted by the social practice in question.

The difference between a statement of a social rule and a statement of a normative rule then is not a difference in the type of rule each asserts, but rather a difference in the attitude each displays towards the social rule it does assert. When a judge appeals to the rule that whatever the legislature enacts is law, he is taking an internal point of view towards a social rule; what he says is true because a social practice to that effect exists, but he goes beyond simply saying that this is so. He signals his disposition to regard the social practice as a justification for his conforming to it.

So Hart advances both a general theory about the concept of obligation and duty, and a specific application of that theory to the duty of judges to enforce the law. For the balance of this initial section, I shall be concerned to criticize the general theory, which I shall call a social rule theory, and I shall distinguish strong *and* weaker version of that theory. On the strong version, whenever anyone asserts a duty, he must be understood as presupposing the existence of a social rule and signifying his acceptance of the practice the rule describes. So if I say that men have a duty not to lie, I must mean at least that a social rule exists to that effect, and unless it does my statement must be false. On a weaker version, it is simply *sometimes* the case that someone who asserts a duty should be understood as presupposing a social rule that provides for that duty. For example, it might be the case that a churchgoer who says that men must not wear hats in church must be understood in that way, but it would not follow that the man who, asserts a duty not to lie must be understood in the same way. He might be asserting a duty that does not in fact depend upon the existence of a social rule.

Hart does not make entirely plain, in the relevant pages of *The Concept of Law*, which version he means to adopt, though much of what he says suggests the strong version. But the application of his general theory to the problem of judicial duty will, of course, depend upon which version of the social rule theory he means to snake out. If the strong version is right, then judges who speak about a fundamental duty to treat what the legislature says as law, for example, must presuppose a social rule to that effect. But if some weaker version of the social rule theory holds, then it simply might be the case that this is so, and further argument would be needed to show that it is.

The strong version of the theory cannot be correct if it proposes to explain all cases in which people appeal to duties, or even to all cases in which they appeal to rules as the source of duties. The theory must concede that there are some assertions of a normative rule that cannot be explained as an appeal to a social rule, for the reason that no corresponding social rule exists. A vegetarian might say, for example, that we have no right to kill animals for food because of the fundamental moral rule that it is always wrong to take life in any form or under any circumstance. Obviously no social rule exists to that effect: the vegetarian will acknowledge that very law then now recognize any such rule or any such duty and indeed that is his complaint.

However, the theory might argue that this use of the concepts of rule and duty designates a special case, and belongs in fact to a distinct kind of moral practice that is parasitic upon the standard practice the theory is designed to explain. The vegetarian must be understood, on this account, really to be saying not that men and women presently have a duty not to take life, but rather that since there are very strong grounds for saying that one *ought* not to take

Rules, Principles, and Policies

life, a social rule to that effect *ought to* exist. His appeal to ‘the rule’ might suggest that some such rule already does exist, but this suggestion is a sort of figure of speech, an attempt on his part to capture the imperative force of social rules, and extend that force to his own very different sort of claim.

But this defense misunderstands the vegetarian’s *claim*. He wants to say, not simply that it is desirable that society rearrange its institution so that no man ever has the right to take life, but that in fact, as things stand, no one ever does have that right. Indeed, he will want to urge the existence of a moral duty to respect life as a reason why society should have a social rule to that effect. The strong version of the social rule theory does not permit him to make that argument. So that theory can accommodate his statements only by insisting that he say something that he does not want to say.

If the social rule theory is to be plausible, therefore, it must be weakened at least to this extent. It must purport to offer an explanation of what is meant by a claim to duty (Or an assertion of a normative rule of duty) only in one sort of case, namely, when the community is

by-and-large agreed that some such duty does exist. The theory would not apply in the case of the vegetarian, but it would apply in the case of the churchgoer. This weakening would not much affect the application of the theory to the problem of judicial duty, because judges do in fact seem to follow much the same rules in deciding what to recognize as the law they are bound to enforce.

But the theory is not plausible even in this weakened form. It fails to notice the important distinction between two kinds of social morality, which might be called *concurrent* and *conventional* morality. A community displays a concurrent morality when its members are agreed in asserting the same, or much the same, normative rule, but they do not count the fact of that agreement as an essential part of their grounds for asserting that rule. It displays a conventional morality when they do. If the churchgoers believe that each man has a duty to take off his hat in church, but would not have such a duty but for some social practice to that general effect, then this is a case of conventional morality. If they also believe that each man has a duty not to lie, and would have this duty even if most other men did, then this would be a case of concurrent morality.

The social rule theory must be weakened so as to apply only to cases of conventional morality. In cases of concurrent morality, like the lying case, the practice-conditions Hart describes would be met. People would on the whole not lie, they would cite ‘the rule’ that lying is wrong *as* a justification of this behavior, and they would condemn those who did lie. A social rule would be constituted by this behavior, on Hart’s theory, and a sociologist would be justified in saying that the community ‘had a rule’ against lying. But it would distort the claim that members of the community made, when they spoke of a duty not to lie, to suppose them to be *appealing* to that social rule, or to suppose that they count its existence necessary to their claim. On the contrary, since this is a case of concurrent morality, the fact is that they do not. So the social rule theory must be confined to conventional morality.

This further weakening of the theory might well reduce its impact on the problem of judicial duty. It may be that at least some part of what judges believe they must do represents concurrent rather than conventional morality. Many judges, for example, may believe that they have a duty to enforce decision of a democratically elected legislature on the grounds of political principles which they accept as having independent merit, and not simply because other judges and officials accept them as well. On the other hand, it is at least plausible to suppose that this is not so, and that at least the bulk of judges in typical legal systems would count some general judicial practice as an essential part of the case for any claim about their judicial duties.

However, the social rule theory is not even an adequate account of conventional morality. It is not adequate because it cannot explain the fact that even when people count a social practice as a necessary part of the grounds for asserting some duty, they may still disagree about the scope of that duty. Suppose, for example, that the members of the community which 'has the rule' that men must not wear hats in church are in fact divided on the question of whether 'that' rule applies to the case of male babies wearing bonnet. Each side believes that its view of the duties of the babies or their parents is the sounder, but neither view can be pictured as based on a social rule, because there is no social rule on the issue at all.

Hart's description of the practice-conditions for social rules is explicit on this point: a rule is constituted by the conforming behaviour of the bulk of a population. No doubt he would count, as conforming behavior, behaviour that everyone agrees would be required in a particular case even though the case has not arisen. So the social rule would 'cover' the case of a red-headed man, even if the community did not happen to include one as yet. But if half the churchgoers claim that babies are required to take off their bonnets and the other half denies any such requirement, what social rule does this behavior constitute? We cannot say either that it constitutes a social rule that babies must take off their bonnets, or a social rule that provides that they do not have that duty.

We might be tempted to say that the social rule about men wearing hats in church is 'uncertain' as to the issue of babies. But this involves confusion of just the sort that the social rule theory is meant to avoid. We cannot say that the social rule is uncertain when all the relevant facts about social behavior are known, as they are in this case, because, that would violate the thesis that social rules are constituted by behavior.

A social rule about wearing hats in church might be said to be uncertain when the facts about what people did and thought had not yet been gathered, or, perhaps, if the question of babies had not yet arisen, so that it was unclear whether the bulk of the community would be of one mind or not. But nothing like this kind of uncertainty is present here; the case has arisen and we know that members of the community do not agree. So we must say, in this kind of case, not that the social rule about wearing hats in church is uncertain, but rather that the only social rule that the behavior of the community constitutes is the rule that prohibits grown men from wearing hats in church. The existence of that rule is certain, and it is equally certain that no social rule exists on the issue of babies at all.



*Rules, Principles, and Policies*

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But all this seems nearly fatal to the social rule theory, for this reason: when people assert normative rules, even in cases of conventional morality, they typically assert rules that differ in scope or in detail, or, in any event, that would differ if each person articulated his rule in further detail. But two people whose rules differ, or would differ if elaborated, cannot be appealing to the same social rule, and at least one of them cannot be appealing to any social rule at all. This is so even though they agree in most cases that do or might arise when the rules they each endorse are in play. So the social rule theory must be weakened to an unacceptable form if it is to survive at all. It must be held to apply only in cases, like some games, when it is accepted by the participants that if a duty is controversial it is no duty at all. It would not then apply to judicial duties.

The theory may try to avoid that conclusion in a variety of ways. It might argue, first, that when someone appeals to a rule, in a controversial case, what he says must be understood as having two parts: first, it identifies the social rule that does represent agreement within the community (that grown men must not wear hats in church) and then it urges that this rule *ought* to be extended to cover more controversial cases (babies in church). The theory might, in other words, take the same line towards a controversial appeals to rules as I said it might in the case of the vegetarian. But the objection I made in discussing the vegetarian's case could then be made, with much greater effect, as a general critique of the theory as a whole. People, at least people who live outside philosophy texts, appeal to moral standards largely in controversial circumstances. When they do, they want to say not that the standard ought to apply to the case in hand, whatever that would mean, but that the standard does apply; not that people ought to have the duties and responsibilities that the standard prescribed, but that they do have them. The theory could hardly argue that all these claims are special or parasitic employments of the concept of duty; if it did, it would limit its own application to the trivial.

The theory might be defended, alternatively, in a very different way: by changing the concept of a social rule that it employs. It might do this by fixing on the fact that, at least in the case of conventional morality, certain verbal formulations of a rule often become standard, like the form, 'men must take off their hats in church.' On the revised concept, a social rule exists when a community accepts a particular verbal formulation of its duties, and uses that formulation as a guide to conduct and criticism; the rule can then be said to be 'uncertain' to the degree that the community disagrees about the proper application of some one or more terms in the standard formulation, provided that it is agreed that the controversial cases must be decided on the basis of one or another interpretation of these terms. The revision would provide an answer to the argument I made. The churchgoers do accept one single social rule about their hat-wearing responsibilities, namely the rule that men must not wear hats in church. But that rule is uncertain, because there is disagreement whether 'men' includes male babies, or whether 'hats' includes bonnets.

But this revision of the concept places much too much weight upon the accident of whether members of the community in question are able to, or do in fact, locate their disagreements about duties as disagreements in the interpretation of some key word in a particular verbal formulation that has become popular. The churchgoers are able to put their disagreement in this form, but it does not follow that they all will. The verbal formulation of

the rule might have been different without the underlying social facts having been different, as if people were in the habit of saying that only women may cover their heads in church; in that case the disagreement would have to be framed, not as a disagreement over whether 'women' includes 'male babies' but whether the popular version was a correct statement of the right normative rule.

Moreover, the theory would lose most of its original explanatory power if it were revised in this way. As originally presented it captured, though it misrepresented, an important fact, which is that social practice plays a central role in justifying at least some of our normative claims about individual responsibility or duty. But it is facts of consistent practice that count, not accidents of verbal behavior. Our moral practices are not exercises in statutory interpretation.

Finally, the social rule theory might retain Hart's original definition of a social rule, a description of uniform practice, but retreat in a different way and cut its losses. It might give up the claim that social rules ever set the *limit* of a man's duties, but keep the idea that they set their *threshold*. The function of social rules in morality might then be said to be this: social rules distinguish what is settled by way of duties, not simply in the factual sense that they describe an area of consensus, but in the conceptual sense that when such consensus exists, it is undeniable that members of that community have at least the duties it embraces, though they may, and perhaps may properly, refuse to honor these duties. But the social rule does not settle that individuals have no rights or duties beyond its terms even in the area of conventional morality; the fact that the social rule does not extend to some case, like the case of babies in church, means rather that someone asserting a duty in that case must rely on arguments that go beyond a simple appeal to practice.

If the social rule theory is revised in this way it no longer supports Hart's thesis of a social rule of recognition in the way that the original theory I described does. If judges may have a duty to decide a case in a particular way, in spite of the fact that no social rule imposes that duty, then Hart's claim that social practice accounts for all judicial duty is lost. I should like to point out, however, the weakness that remains in even this revised form of the social rule theory. It does not conform with our moral practice to say even that a social rule stipulates the minimum level of rights and duties. It is generally recognized, even as a feature of conventional morality, that practices that are pointless, or inconsistent in principle with other requirements of morality, do not impose duties, though of course, when a social rule exists, only a small minority will think that this provision in fact applies. When a social rule existed, for example, that men extend certain formal courtesies to women, most people said that women had a right to them; but someone of either sex who thought these courtesies an insult would not agree.

This fact about conventional morality, which the social rule theory ignores, is of great importance because it points toward a better understanding of the connection between social practice and normative judgments than that theory provides. It is true that normative judgments often assume a social practice as an essential part of the case for that judgment; this is the hallmark, as I say of conventional morality. But the social rule theory misconceives the connection. It believes that the social practice *constitutes* a rule which the normative

*Rules, Principles, and Policies*

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judgment accepts; in fact the social practice helps to *justify* a rule which the normative judgment states. The fact that a practice of removing hats in church exists justifies asserting a normative rule to that effect — not because the practice constitutes a rule which the normative judgment describes and endorses, but because the practice creates ways of giving offense and gives rise to expectations of the sort that are good grounds for asserting a duty to take off one's hat in church or for asserting a normative rule that one must.

The social rule theory fails because it insists that a practice must somehow have the same *content* as the rule that individuals assert in its name. But if we suppose simply that a practice may justify a rule, then while the rule so justified may have the same content as the practice, it may not; it may fall short of, or beyond it. If we look at the relationship between social practice and normative claims in this way, then we can account, smoothly, for what the social rule theory labors to explain. If someone finds a social practice pointless, or silly, or insulting, he may believe that it does not even in principle justify asserting any duties or normative rules of conduct, and in that case he will say, not that it imposes a duty upon him which he rejects, but that, in spite of what others think, it imposes no duty at all.

If a community has a particular practice, moreover, like the no-hat-in-church practice, then it will be likely, rather than surprising, that members will assert different normative rules, each allegedly justified by that practice. They will disagree about whether babies must wear bonnets because they will differ about whether, all things considered, the fact of the practice justifies asserting that duty. Some may think that it does because they think that the practice as a whole establishes a form of insult or disrespect that can be committed vicariously by an infant's parents. Others may disagree, for a variety of reasons. It is true that they will frame their dispute, even in this trivial case, as a dispute over what 'the rule' about hats in church requires. But the reference is not to the rule that is constituted by common behavior, that is, a social rule, but the rule that is justified by common behavior, that is, a normative rule. They dispute precisely about what *that* rule is.

It may be that judicial duty is a case of conventional morality. It does not follow that some social rule states the limit, or even the threshold, of judicial duty. When judges cite the rule that they must follow the legislature, for example, they may be appealing to a normative rule that some social practice justifies, and they may disagree about the precise content of that normative rule in a way that does not represent merely a disagreement about the facts of other judges' behavior. The positivist may be right, but he must make out his case without the short-cut that the social rule theory tries to provide.

**Does 'Institutional Support' Constitute A Rule Of Recognition?**

In Chapter 2 I said that principles, like the principle that no man may profit from his own wrong, could not be captured by any simple rule of recognition, like the rule that what Parliament enacts is law. The positivist, I said, has this choice. He might argue that these principles are not part of the law, because the judge has no duty, but only discretion, to take them into account. Or he might concede that they are law, and show how a more complicated social rule of recognition might be constructed that does capture such principles. Of course, the positivist might combine these strategies: he might argue that a more complex rule of

recognition would capture some of the principles that judges cite, and then argue that judges have no duty to enforce any principles but these.

Dr Raz wishes to combine both strategies in that way. His principal reliance is on the argument, which I shall consider in the next section, that judges have discretion, but no duty, to employ certain principles. But he believes that judges do have a duty to take into account at least some principles, and that these can be brought under something like a social rule of recognition, through the notion of what he calls a 'judicial custom'. Suppose a particular principle is in fact cited by many judges over a period of time as a principle that must be taken into account. Then that very practice, he points out, would constitute a distinct social rule which would then stand, along with rules of recognition of the conventional sort that Hart had in mind, within a cluster of social rules that together provide a test for law.

But, for two reasons, this concept of judicial custom cannot carry the argument very far. First, the great bulk of the principles and policies judges cite are controversial, at least as to weight; the weight of the principle that no man may profit from his own wrong, for example, was sufficiently controversial to provoke a dissent in *Riggs v. Palmer*. Second, a great many appeals to principle are appeals to principles that have not been the subject of any established judicial practice at all; this is true of several of the examples I gave from the decision in the *Henningsen* case, which included principles that had not in fact been formulated before, in anything like the same fashion, like the principle that automobile manufacturers have a special responsibility to the public.

So Raz's notion of judicial custom would not distinguish many of the principles that judges treat as principles they must take into account. We shall therefore have to consider very seriously his argument that judges in fact have no duty to give effect to principles that are not the subject of such a judicial custom. But first I want to consider a different and more complex idea of how the notion of a social rule of recognition can be adapted to capture principles as well as rules.

Professor Sartorius agrees with me in rejecting the idea that when judges appeal to principles in hard cases they do so in the exercise of some discretion. If he wishes to embrace the first thesis I distinguished, therefore, he must describe a form of social rule that does in fact capture or at least provide for all these principles. This he attempts to do, and he proposes to use my own arguments against me. He admits that the development of a fundamental test for law would be extremely laborious, but he believes that it is in principle possible. He believes, further, that the nerve of any such ultimate test would lie in the concept of 'institutional support' that I developed in Chapter 2. He quotes the following passage from that chapter as authority for his own position:

[I]f we were challenged to back up our claim that some principle is a principle of law, we would mention any prior cases in which that principle was cited, or figured in the argument. We would also mention any statute that seemed to exemplify that principle (even better if the principle were cited in the preamble of the statute, or in the committee reports or other legislative documents that accompanied it). Unless we could find some

*Rules, Principles, and Policies*

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such institutional support, we would probably fail to make out our case, and the more support we found the more weight we could claim for the principle.

Of course Professor Sartorius would want to develop this doctrine of institutional support in much more detail than that. I myself should elaborate it in the following way, and his article suggests that he might accept this elaboration. Suppose we were to gather together all the rules that are plainly valid rules of law in, for example, a particular American state, and add to these all the explicit rules about institutional competence that we relied upon in saying that the first set of rules were indeed valid rules of that jurisdiction. We would now have an imposing set of legal materials. We might then ask what set of principles taken together would be necessary to *justify* the adoption of the explicit rules of law and institutional rules we had listed. Suppose that each judge and lawyer of that state were to develop a ‘theory of law’ which described that set of principles and assigned relative weights to each (I ignore the fact that the labor of a lifetime would not be enough for a beginning). Each of them might then argue that his set of principles must count as principles of the legal system in question... But some clarification is now needed. Sartorius could not mean that any particular lawyer’s theory of law provides a *social* rule of recognition

So Sartorius must say, not that any particular lawyer’s theory of law supplies a social rule of recognition, but rather that the test of institutional support *itself* is such a social rule. He might say, that is, that the social rule of recognition is just the rule that a principle must be applied as law if it is part of the soundest theory of law, and must be applied with the weight it is given by that theory. On this view, the different theories of law different lawyers would offer are simply different theories about how that social rule should be applied to particular cases.

But I do not see how one can put the matter that way, and still retain the idea that the test of institutional support provides ‘specific criteria’ of ‘pedigree’ rather than ‘content’. The concept of a theory of law, in the way I described it, does not suppose that principles and policies explain the settled rules in the way in which a legal historian might explain them, by identifying the motives of those who adopted these rules, or by calling attention to the pressure groups which influenced their enactments, if a theory of law is to provide a basis for judicial duty, then the principles it sets out must try to *justify* the settled rules by identifying the political or moral concerns and traditions of the community which, in the opinion of the lawyer whose theory it is, do in fact support the rules. This process of justification must carry the lawyer very deep into political and moral theory, and well past the point where it would be accurate to say that any ‘test’ of ‘pedigree’ exists for deciding which of two different justifications of our political institutions is superior.

The simple example I gave earlier illustrates the point. If I disagree with another lawyer about the relative force to be given to older precedents, I will urge a theory of law that takes a view of the point of precedent that supports my case. I might say that the doctrine of precedent serves equality of treatment before the law, and that simplicity of treatment becomes less important and even perverse as the time elapsed between the two occasions increases. He might reply that the point of precedent is not so much equality as predictability of decision, which is best served by ignoring distinctions of age between precedents. Each of

us will point to features of adjudicating that support one view against the other. If one of us could find none, then, as I said in the quoted passage, his case would be weak. But the choice between our views will not depend only on the number of features each can find. It will depend as well on the moral case I can make for the duty of equal treatment that my argument presupposes, because the thesis that this duty justifies precedent assumes that the duty exists.

I do not mean to say that no basis can be found for choosing one theory of law over another. On the contrary, since I reject the doctrine of discretion described in the next section, I assume that persuasive arguments *can* be made to distinguish one theory as superior to another. But these arguments must include arguments on issues of normative political theory, like the nature of society's duty of equality, that go beyond the positivist's conception of the limits of the considerations relevant to deciding what the law is. The test of institutional support provides no mechanical or historical or morally neutral basis for establishing one theory of law as the soundest. Indeed, it does not allow even a single lawyer to distinguish a set of legal principles from his broader moral or political principles. His theory of law will usually include almost the full set of political and moral principles to which he subscribes; indeed it is hard to think of a single principle of social or political morality that has currency in his community and that he personally accepts, except those excluded by constitutional considerations, that would not find some place and have some weight in the elaborate scheme of justification required to justify the body of laws. So the positivist will accept the test of institutional settlement as filling the role of his ultimate test for law only at the cost of abandoning the rest of his script.

If that is so, the consequences for legal theory are considerable. Jurisprudence poses the question: what is law? Most legal philosophers have tried to answer this question by distinguishing the *standards* that properly figure in arguments on behalf of legal rights and duties. But if no such exclusive list of standards can be made, then some other way of distinguishing legal rights and duties from other sorts of rights and duties must be found.

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**CONCEPT OF RIGHT AND DUTIES:**  
**PHILOSOPHICAL ANALYSIS**

***THE MODERN CONCEPTION OF RIGHT AND  
ITS MARXIST CRITIQUE<sup>1</sup>***

During the past few years academic literature on rights has been growing at a considerable pace. Since most of it is written within the liberal-democratic tradition, it tends to concentrate on such questions as whether we can meaningfully talk about natural, human or inalienable right, what criteria a right must satisfy in order to be so called, what rights-if any-meet the requirement and which every state must be required to guarantee, and how the economic and social rights differ from legal, political and civil rights. In this paper I shall discuss two of the many questions that have received comparatively little attention.

First, in much of the literature on the subject it is taken for granted that the currently dominant conception of right is somehow self-evident and represents the 'only' way in which the concept of right can be understood. I propose to argue that it is relatively recent in origin, and does not go back much further than the seventeenth century and is fraught with paradoxes and contradictions. Second, almost from its inception the modern conception of right has been subjected to considerable criticism by such diverse groups of people as the old natural law theorists, religious writers, socialist and the Marxists. They were deeply troubled by it, and explored either an alternative conception of right or a society to which the concept of right was not central. Since the Marxist critique of it is the most systematic and highly influential, I shall focus on it and indicate the lines along which a richer and more satisfactory conception of right could be developed.

**I**

We have become so accustomed to conceptualizing human relations in terms of rights that we do not appreciate that nearly all non-western and most pre-modern European societies managed, to do without them. Not all of them were despotic or autocratic. In some of them men enjoyed many of the liberties characteristic of a free society, such as security of life and possessions. They did not murder each other at will, nor did their rulers deprive them of their lives-except according to established procedures and for commonly agreed purposes. They also had possessions which they used as they pleased and bequeathed to their children. They followed the occupations of their choice and enjoyed freedom of movement. Yet they did not regard these as their rights or claims. They took these freedoms for granted, and enjoyed and exercised them without in any way feeling self-conscious about them. Even as they had eyes and ears, they had certain freedoms of which they did not feel the need to remind either themselves or others. Even classical Athens, widely acknowledged to be the cradle of western democracy, managed to do without the concept of right. Indeed, like many classical languages, classical Greek did not even have word for it.

The concept of right was first systematically developed in Rome, which was also the first western society to develop the concept of the private realm and to insist on its relative inviolability and equality with the public realm. For the Roman jurists, right, law and justice were inseparable and the term *ius* was used to refer to them all. Rights were created by the law, and the law was an articulation of the community's conception of justice. Law was associated primarily not with order as in the current expression 'law and order', but with justice. Justice alone created and sustained order; and when dissociated from it, the law became a source and an instrument of disorder. The concept of a right was inseparable from that of right. As both of Gaius and Ulpian observed, a right consisted in enjoying what was right; and justice secured a man's right by 'giving him his right.'

A Roman *civis* had several rights, such as the right to property, to discipline and to exercise the power of life and death over the members of his family and household, to enjoy access to common land, and to participate in the conduct of public affairs. These rights belonged to him not as an individual but as the head

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<sup>1</sup> Bhikhu Parekh in Upendra Baxi (ed.), *The Right to be Human* 1-22 (1987).

of a family or *pater familiae*; and the family, not the individual, was deemed to be the primary subject of rights.

The individual enjoyed rights because it was believed that only thus could the community realize its general ends. He had no claim to the rights; and he did not enjoy rights as of right. The community conferred them on him as the necessary conditions for the realization of its common purpose. A man's legal personality was made up of the interests and powers of action conceded to him by the social order, and justice consisted in respect for each other's legal personality.

Rights were subject to several constraints, and restricted in depth and scope. The law was not their only source; customs, usages and traditions also generated rights, and these were in no way inferior. A right, further, did not imply absolute control. One had a right to use but not to own certain things and one was not free to do what one liked with the things one owned. Thus one was not free to sell one's land, if it was located at a certain place, substantial in area, or for generations had been inhabited by people. Under the influence of the Stoic idea of naturalist ratio, the Romans also thought that certain things could not be individually owned, for that ran counter to their 'natural purpose', and formed part of *res extra commercium*. Above all, in their view the language of rights was limited in scope and inherently inapplicable to such areas of life as familial and political and political morality. Rights pertained primarily to the civil society, not to the state or the family and governed the relations between the individuals and not between them and the state.

During the several centuries of feudalism, the picture was equally complex. Not only the individuals but such traditional communities and groups as the cities, guilds and estates were also bearers of rights. Individuals acquired rights by virtue of their membership of specific groups or by entering into certain types of relationship. Rights were derived from several sources, of which the law was but one and not the most important. The long established traditions, which defined the content of justice and rights, severely limited the scope and authority of the law. Further, the concept of duty, not right, dominated the feudal society. The king and his subjects, and the lord and his vassal, entered into quasi-contractual and unequal relationship, and acquired reciprocal and limited duties. Each party was expected to act in the contracted manner because he had a duty to do so, not because the other party had a right to require him so to act. The concept of duty was logically prior to that of right, in the sense that the duties generated rights, not the other way round. And the language of duties was for the most part considered self-sufficient in the sense that social relations were deemed to be adequately conceptualized in terms of duties, without introducing the language of rights. Further, private and public relations were never separated. A vassal's right to his property, whether it consisted in cultivating land, operating a mill or collecting a toll, entailed a public service of some specified kind, such as military service and attendance at the lord's court. Every private right had a public dimension, and implied public and institutional obligations.

From the seventeenth century onwards, the traditional conception of right begins to undergo profound changes. Broadly speaking, the changes occur in four areas, namely, the subject of right, its object, the relations between the two, and the place of right in moral and political life. Let us take each in turn.

## II

Unlike in pre-modern society where communities, traditional groups, guilds, corporations, families and even land were bearers of rights, the modern conception of rights regards the individual as its primary bearer. Groups do of course have rights, but these are derivative, and in principle reducible to those of their members.

The concept of the individual is obviously complex and presupposes a theory of individuation. By the very conditions of his existence, every man is inseparably connected with other men and nature. The individual is not given by nature, but socially demarcated and defined. To individuate a man is to decide where to draw the boundary between him and other men and nature. Individuation is thus a matter of social convention, and obviously different societies individuate men and define the individual differently. The ancient Athenians saw man as an integral part of nature and society and believed that a man taken together with his land and political rights constituted an individual. Almost right up to the end of the Middle Ages, a craftsman's tools were believed to be inseparable from the man. They constituted his 'inorganic body' and were just as much an integral part of his self as his hands and feet. To deprive the craftsman of his tools was



thus to mutilate him, and he was not free to alienate them. For the Hindus the set of social or caste relation into which an individual is born are an inseparable part of himself, and define him as an individual. The Chinese view the family as an indissoluble organism. Linking the ancestors and their descendants into a living union, and have a highly complex conception of the individual.

The seventeenth century writers define the individual in extremely narrow terms. For them the naturally given biological organism, neatly encapsulated in the body, constitutes the individual. As a neatly self enclosed natural organism, each human being constitutes a self-contained unit. The limits of his body are taken to be the limits of his self. He appropriates the world by means of his senses and reason, and creates an internal world of sensations, ideas, feelings and experiences. Everything lying outside the outer surface of his skin constitutes the 'external' world and does not form an integral part of his self; everything lying 'within' it is internal to and an indivisible part of his self. In this way of thinking the center of each individual is firmly located within himself. Others can enjoy varying degrees of closeness to him, but only he can constitute the center or axis of his life.

With the modern naturalist or physicalist conception of the individual, the body acquires unprecedented ontological, epistemological, moral and political significance. It becomes the criterion of reality in that an individual is deemed to be real and to exist as long as he inhabits a living body. Its dissolution represents his dissolution. Life, the continuation of the body in time, and liberty, the unhindered movement of the body, become two of the highest moral values. Violence is defined in physical terms so that the infliction of physical harm is violence, but that of psychic or moral harm is not. A man's freedom is deemed to be restricted when he is physically restrained from moving as he pleases, but not when his ideas or beliefs or emotions are conditioned and moulded. Morally, it is physical more than any other type of suffering that dominates the moral imagination. If one saw someone crying, dying, starving, one might find that one ought to do something about it; but if one saw a child frustrated from developing his abilities for want of money, or a man in despair for lack of gainful employment, one would not generally see that a moral problem was involved and that its redress was just as urgent as the prevention of death.

### III

The second important change which the concept of right undergoes during and after the seventeenth century relates to its scope. The earlier constraints on what can legitimately become an object of right, and how far a right can extend, more or less disappear. The natural world gets desacralised. It is no longer seen as a quasi-rational and moral whole, or even as an autonomous world of living beings endowed with measure of dignity, but rather as a material world, a world of 'dead matter' which man, its sovereign master, is free to plunder at will. Everything in the natural world therefore becomes an object of right, and capable of alienation.

Land, which in earlier centuries was invested with rights and whose alienation was subject to restraints, could now be freely bought and sold. In the earlier centuries, again, property largely meant the right to a revenue rather than to a thing, and it consisted in rights in rather than to things. The great bulk of property was in the form of land, and in the case of substantial estates the owner was not free to sell this. His property comprised the revenues accruing from his land. Another large segment of individual property consisted in the right to a revenue from such generally non-saleable things as corporate characters, monopolies and various political and ecclesiastical offices.

From the seventeenth century onwards, the right to property comes to imply the right to dispose to things as one pleases; and thus a more or less absolute and exclusive right to own, use and alienate them. In the earlier centuries, again, common land was regarded as an important part of communal life; and people had a right of access to it. After the seventeenth century, common land more or less disappears, and is privately divided up.

Even as the natural world is reduced to the material world and viewed as a collection of material objects, the human being is reduced to a collection of capacities and powers, almost all of which could be alienated and made objects of rights. In order that an individual can alienate and give others rights over his powers and capacities, two conceptual conditions must be satisfied. First, he himself must be presumed to have a right to them; that is, he must view them as his property-as things he owns and is free to dispose of at will. If for example, he were believed to be a custodian of his capacities and powers which he held as a trust

from god, society or mankind, he would obviously not be free to alienate them at will. Second, he must be presumed to be somehow separate from them, so that he does not sell or alienate himself when he sells or alienates them.

Both these conditions obviously require a new definition of man, of the nature and basis of his dignity, freedom and personal identity. In order to say that his freedom is not compromised when his abilities, skills and activities are placed at another man's disposal, he needs to be defined in the barest possible manner. Since almost everything about an individual is considered alienable, the crucial question arises as to what is to be considered essential to his human identity such that its alienation of his alienation, and his loss of control over it amounts to a loss of his humanity. The theorists of the modern conception of right locate his essential humanity in the interrelated capacities of choice and will. For them they represent man's differential specificia, and are the bases of human dignity. The individual differs from the rest of the universe in possessing the two basic capacities of reason and will. Thanks to them, he is capable of freedom and self-determination. As long as he is not physically over-powered, hypnotized or otherwise deprived of his powers of choice and will, he is considered to be autonomous; his actions are uniquely his, and therefore his sole responsibility. It does not matter how painful his alternatives are, how much his character is distorted by his background and upbringing, and how much his capacities of choice and will are debilitated by his circumstances. As long as he is able to choose, his choices and actions are his responsibility.

The individual is abstracted from his social background and circumstances, which are not therefore co-agents of, and co-responsible for his actions. He stands alone, all by himself, stripped of his social relations, circumstances and background, facing the world in his sovereign isolation and, like god, and the traditional distance between a man and god almost disappears.

When the individual is so austere conceived, the question arises as to how he is related to his alienable bodily and mental activities and powers. They cannot be conceived as his modes of being, the manner in which 'he' expresses himself and exists for himself and for others. They can be understood only as things he possesses. Modern writer appropriately define them as his properties, which in legal language become his possessions. If 'he' referred to the totality of his being and not merely to the capacities of choice and will, his powers and activities would be seen as an integral part of his self, as constitutive of his self, and therefore not as his possessions which he could dispose of 'at will'. He would not be able to alienate them any more than he could alienate his will or choice. And his so-called 'freedom' to sell his capacities and activities would appear not as freedom, but slavery.

Once the subject and the object of rights were defined in this way, certain rights became most important, especially the rights to life, liberty and property. Each came to be defined in narrow and restricted terms. Thus the right to life was taken to mean the right to be free from physical harm by other men; but not the right to material sustenance without which life is impossible, or the right to be free from in sanitary conditions of work or an unhealthy living environment or excessively long hours of work-all of which directly or indirectly reduce the span of life. The right to be free from the arbitrary will of other, including the government, and to participate in the conduct of public affairs, did not include the right to be free from the arbitrary will of employees or reduce their wages at will. As for the right to property, it meant the right to acquire property and to have it defended against others' interference; and not what it literally meant, the right to (possess at least some) property. We need hardly discuss why only these rights, and not such other rights as personal development, self-respect, employment and education, were emphasized; nor even why they were so narrowly defined.

Another important change occurred in the second half of the nineteenth century. The rights of life, liberty and property that had so far been emphasized were all rights to protection, in the sense that the only things their agents required to enjoy or exercise them were forbearance or non-interference by their fellow citizens, and protection by the government. In the nineteenth century social and economic rights were added to the list. Now, obviously, these have a very different character. They are not rights to protection but provision-the provision of sustenance, the means of material of well-being, employment and even basic opportunities for personal growth. As such, they require the government to play a positive and active role in economic life. They also imply that, in order to meet the social and economic rights of those in need, citizens

should not merely forbear from interference, but positively contribute by taxes and other means to the resources which a government requires.

These new rights thus called a radical change in the prevailing views on the role of the government and, more importantly, in the nature of the state. If the citizens of a state are to be required to help those in need, not as matter of duty entailed by the latter's legal or moral rights, it can no longer be seen as a mere collection of self-contained and atomic individuals united by allegiance to a common authority. Instead, it becomes a community of interdependent individuals, each caring and concerned about the way the others live, that is, a political community as different from a mere civil society. The new social and economic rights thus presuppose a very different view of man and society to the one underlying the old trinity of rights to life, liberty and property. Not surprisingly, a long and sometimes bloody struggle had to be undertaken before they were taken seriously. Even they were recognized as legitimate rights, their underlying assumptions were not. Not surprisingly, they continue to enjoy a precarious existence, and their recipients are treated as an inferior and sub-human species.

#### IV

The third important change since the seventeenth century has occurred in the way the concept of right is defined. The modern concept of right represents a novel and explosive combination of some of the features that it shares in common with its pre-modern cousins, and several other that it acquired for the first time in the seventeenth century. As it is commonly understood, a right has the following features.

First, a right is a claim. To say that 'A has a right to B' is to say that A possesses B not because others have kindly allowed him to acquire or enjoy it, but because he has a claim to it which others must recognize and respect. His claim is wholly independent of their personal feelings and sentiments towards him and requires a specific pattern of behaviour from them.

Second, the claim has the nature of a title and its bearer is entitled to make it. His claim is not arbitrary, but based on recognized procedures. Every bearer of a right is a title-holder, and able, when challenged, to point to his title-deed.

Third, the title is conferred upon him by the established legal authority, the generally acknowledged source of all titles within a territorially organized source of all titles within a territorially organized community. When challenged, the bearer of a right can point to a specific law which has given him the title. Since both he and others must know what he is entitled to own or enjoy and what he and they may or may not do, the law must publicly and unambiguously announce the title. The modern concept of right thus requires that customs, traditions and usages should all be replaced by the civil law as the sole and exclusive source of right. Not that they all disappear; rather they have no legal force or relevance unless the law takes cognizance of their existence and confers legal status upon them. The modern concept of right necessarily requires the modern concept of sovereignty as its logical correlative.

Fourth, to have a right is to be free to do what one likes with it in conformity with the condition of its grant. The modern concept of right places minimum restraints upon its exercise. For A to have a right to B means that he may give it away, store it up, destroy it and in general dispose of it in the way he pleases. Similarly, for A to possess a right to have C return his books, or repay his money, or render the contracted service, means that he can demand it of C irrespective of whether he needs these things, or C needs them more than he does, or C is in a position to do what he is required to do.

Fifth, to have a right to a thing means not only that one can do what one likes with it if it is within the legally prescribed limits, but also that others are excluded from access to it. The concept of exclusivity is built into the modern concept of right. It is not inherent in the concept or right itself for, as we saw, in several pre-modern societies, a man's enjoyment of a right did not prevent others from gaining access to its objects if their need for it was urgent or greater.

Sixth, a right not only excludes others but also requires a specific set of services from and imposes hardship on them. Minimally, they are required to refrain from interfering with it. At a different level, they are also required to make financial contributions towards the maintenance of the apparatus of the state which is required both to create and protect rights. A starving man, or one whose wife is dying for want of money to buy medicine, is naturally tempted to help himself to the surplus resources of his neighbour. The latter's

right requires him to resist the temptation, even at the risk of his own or his loved one's life. Again, rights impose a considerable moral burden. The rich man's right to do what he likes with his wealth, engage in conspicuous and wasteful consumption, buy and sell property, or set up an industry tends to damage a poor man's pride, self-respect and sense of dignity. It also set a vulgar social trend corrosive of traditional moral values, destroys long established communities and tends to weaken civic pride and unity.

A right then is at once both a source of benefits and burdens. It benefits its bearer, but only by imposing legal disabilities loss of liberty, suffering, and emotional, moral, cultural and financial burden on others. Different rights impose different kinds of degrees of burden upon others. For example, the right to life imposes fewer or lighter burdens than the right to property; for the former requires of others no more than self-restraint, whereas the latter imposes the additional social, economic and moral costs referred to earlier.

Again, the burdens imposed by the rights exercised by all are easier to bear than those by the rights restricted to a few. For example, the right to life is in practice enjoyed and exercised by all, and the burdens which it imposes are fairly distributed; whereas the right to property has virtually no meaning for those unlikely to own it. The meagre property which a poor man might possess imposes infinitely fewer burdens than the vast investment of an industrialist.

The equality of rights is therefore an ambiguous and misleading expression. All citizens may formally possess rights. However, since some rights make far greater demands on others and are in that sense more costly, expensive or burdensome, those in a position to exercise them impose far greater burdens upon their fellow-men than those who are not. The modern doctrine of rights treats them as homogeneous entities of identical weight, and ignores the differences in their nature, structure and consequences.

Seventh, a right is legally enforceable. To have a right implies that the state stands guard over a specific area of action, and punishes those who dare to transgress it. Every bearer of right has at his disposal the entire coercive machinery of the state which he can activate when his right is threatened. A right thus is a form of power, a share in the exercise of the state's sovereignty. Indeed to have right is to have a lease of the state for a specific purpose, for a specific period of time.

Eighth, since a right is a formal title conferred by the state, one's possession of it is not dependent on one's ability to exercise it. A man continues to possess and, strange as it may seem, 'enjoy' a right of life – even when he is dying for lack of food or medicine, or works in an asbestos factory or under conditions that make premature or painful death a virtual-certainty. Similarly, he possesses the right to sue his employer for breach of contract, even if he lacks the money to hire a lawyer and may never be able to exercise the right. And he enjoys the right to liberty, even when it is drastically curtailed by the power others wield over him. In short, the modern right is a strange ontological entity; it exists even when it is not a worldly reality, and one can possess it even if one can do nothing with it. By its very nature the modern concept of right is biased against those lacking the resources to exercise it. It promises them opportunities they can rarely enjoy, and which tantalize them but systematically elude their grasp.

## V

We have outlined three important changes the concept of right has undergone since the seventeenth century. We may now turn to the last one, namely, the enormous importance it has acquired as the central organizing principle of modern society. In pre-modern societies the moral conduct had many sources, such as communal loyalties, common sentiments and affections, traditional ties, customary duties and common interests and men cared for each other for one or more of these reasons. Indeed, each of them was tied to others by so many bonds that he did not define himself and his interest in isolation from, let alone in opposition to them.

From the seventeenth century onwards, social life changes radically. Communal ties and customary bonds disappear; men begin to define themselves as free individuals, with no ties to each other save those they have chosen to establish; and no duties other than those entailed by such ties. Lacking the background of traditional bonds and localities they cannot obviously take these constraints for granted. They do not, of course, need to assume that others are all vicious men determined to harm them; rather that in the absence of traditional restraints they cannot take any chances. Each must therefore look after his own interest, and devise ways of protecting them against the invasion of others who are at best indifferent and at worst hostile.

A group of equal, self-interested, self-assertive, otherwise unrelated and mutually suspicious individuals necessarily requires the modern state to hold them together. They recognize no authority save that of impersonal rules and the centralized public authority as their sole legitimate source. The state is based on rules and enjoys that monopoly of legislation. In order to enforce laws and protect rights, the state must enjoy also the monopoly of violence. In short the modern state, a unique historical institution, characterized by such features as centralized authority, monopoly of violence, impersonality, the rules of law and protection of individual rights, comes to replace earlier forms of organizing the community. It represents a particular kind of order and a particular manner of creating and sustaining it. The order consists in the maintenance of a clearly established system of rights and obligations; it is structured in terms of rules, especially laws; and it is underpinned by the state's monopoly of violence.

Order in modern society is articulated in terms of a system of rights and obligations created by the law. Law created civil morality as the primary and dominant form of morality in it and it is articulated in the idiom of rights, obligations and duties. Morality entails a scrupulous regard for each man's rights. One fights for one's rights, but at the same time respects others' rights.

In a right-centered society every man is not a wolf to everyone else. People do show respect for each other, but the respect is confined to a regard for their rights. In order that A can expect or ask B to do X for him, he must establish that he has a right to require B to do so. If he does not have a right, B has no duty; and in the absence of a duty he cannot see why he would do it. When A has a right and B a corresponding duty, B may discharge his duty because he may fear punishment, or because he may have internalized, that is, developed a character adequate to civil morality and act out of respect for A's right, or for the law which gives him the right, or because he may conclude that rationality or consistency requires him to respect A's right even as he wants A in turn to respect his. Whatever his reasons and motives, a right-based society rests on civil morality and requires no deeper moral motivation.

Since civil morality is the basis of modern society and dominates its public life, it predictably casts a long and deep shadow over all areas of human life, and determines the way these are conceptualized and talked about. Thanks to its domination, when men do good to others that is not apparently entailed by the latter's rights, they feel uneasy unless they can somehow show that their conduct is really a response to some unspecified rights of theirs. They postulate another category of rights, usually moral or natural or human rights, attribute these to others and view their own actions as duties entailed by them. They might intuitively feel that, either individually or collectively through the states, they ought to relieve distress, help their potential, but they feel unable to explain the 'ought' except as an act of charity or a mark of respect of their rights. And since the former turns them into helpless objects dependent upon others' contingent goodwill, they opt for the language of rights. They do not think it enough to say that they love their fellow-men, are deeply concerned about them, feel a sense of solidarity towards them, or feel guilty about their own undeserved privileges. Thanks to the fact that they live in a society almost wholly governed by the morality of rights, such moral emotions have either dried up in them, or they feel nervous and shy about admitting their existence. They have become so conditioned into thinking that every duty presupposes a right, that human dignity can be preserved only by endowing men with rights, that a right is the only alternative to charity, and so on, that a morality not based on rights somehow seems gravely inadequate or deeply flawed. This is not to say that human beings do not have moral or other kinds of non-legal rights. Rather that the postulation of such rights often springs from the inability to conceptualize moral relation in terms other than rights, and sustains a right-obsessed moral ethos.

Sometimes the right-centered moral thinking is taken to strange extremes. We would all agree that parents ought to look after their children and bring them up in an environment of love and warmth. As the writings of Plato, Aristotle, Augustine, Aquinas and Hegel show, the 'ought' in question can be derived in several different ways. The tendency since the seventeenth century onwards is to contend that children have rights to parental maintenance, love and even inheritance, and that parents have corresponding duties. What is generally a matter of love is first reduced to a duty, and then the duty is conceived as a demand originating from the child's right. To many pre-modern society this whole manner of thinking would have appeared perverse, even offensive. Parents have freely brought their children into the world, care for them, love them and make spontaneous sacrifices going far beyond the call of duty, and do not need to be morally bludgeoned into loving their children by the latter waving their legal or moral title-deeds. The relations

between the two is not and can never be reduced to that between two strangers. The family is not a civil morality. It is of course true that parents might occasionally ignore their children's needs and even maltreat them. However, such occasional lapses cannot justify a radical reinterpretation of the whole pattern of relationship. In any case they can be punished, if necessary without introducing the language of rights.

In the modern right-based society then, moral life undergoes radical transformation. Rights acquire a monopoly of moral legitimacy, and nothing has any or at least much value unless it is directly or indirectly related to and articulated in the vocabulary of rights, titles and claims. Even the most basic human needs do not generate an appropriate moral response unless those involved are shown to have a right to their satisfaction. Further, almost all types of morally desirable or commendable conduct are reduced to duties entailed by others' actual or hypothetical rights. On the mistaken assumption that whenever there is a smoke of duty, there must be a fire of right smouldering somewhere in the background, we conceptualize duties as response to rights. The duties to god, animals, friends, parents and the state are all mistakenly construed as responses to the rights allegedly possessed by their respective recipients.

In a right-based society, the moral and political discourse gets assimilated to the juristic discourse. Moral and political disputes come to center around who has the rights to enjoy what, and how best these can be secured. Further, we are afraid that the state might not create these rights or arbitrarily curtail or withdraw them. We, therefore, feel the need to show that we have the rights to these rights, the titles to these titles. To avoid infinite regress, we feel compelled to derive the right to rights from such allegedly indisputable nature, human nature, moral intuition, the structure of the universe, the original condition, the moral law and god. Most of contemporary literature on rights is centered upon the inherently suspect exercise of finding such allegedly unshakeable foundations for rights.

## VI

Like many other thinkers from the eighteenth century onwards, Marx subjected the modern conception of right to a searching critique. He developed his critique in three stages, first from a radical democratic standpoint, then from the perspective of a rather simplistic and reductionist theory of historical materialism, finally from that of its more sophisticated version. Although the languages and degree of penetration of his critique varied with each stage; its basic thrust and direction remained substantially the same.

Marx's critique of the modern conception of rights is too well known to require detailed elaboration. For him, it is basically an ideological rationalization of the capitalist society. As he understand it, the capitalist society has two conflicting requirements. First, since labour power is the sole source of surplus value, the capitalist society is compelled by its inherent logic to view man as a commodity or an alienable object. Second, since it is based on voluntary transactions between free individuals, it is compelled to define man as a self-determining being or a free subject. The logic of capitalism thus requires it to define man both as a subject and an object, a self-determining human being and a commodity.

The dominant ideology of the capitalist society meets the conflicting requirements and reconciles its contradictory social pre-suppositions by advancing a dualistic theory of man. As an empirical being, man is regarded as an object whose skills, services and powers can be alienated. He is also however invested with the juridical form of a person, and *qua* person he is regarded as a subject enjoying equality with other persons. The real living man who possesses powers and capacities is a saleable commodity; whereas his abstract and empty juristic personality or form is inviolable. Man is a 'profane' object capable of being bought and sold, whereas the formal person is sacred. The bourgeois society thus locates man's subjectively and dignity in a mere abstraction.

The bourgeois legal theory takes over this view of man and gives it a juristic expression in the theory of rights. Not a human being but a juristic person is invested with rights, and since the former is abstract and formal, so are his rights. The rights belong to the individual not as a concrete and socially situated human being occupying a specific position in society, but as a socially transcendental abstraction, as a more juristic fiction. Equality in the capitalist society is therefore equality of (abstract) persons, not of (concrete) human beings. As concrete and socially situated beings, men belong to different classes and possess unequal resources, and are obviously unequal in their powers, capacities and opportunities. Although the rights they possess are equal, those they exercise or enjoy are therefore necessarily unequal. The formal equality of rights is thus little more than a device to veil and legitimize the stark reality of inequality.

For Marx the modern theory of rights also alienates man from his fellow-men and destroys the unity of the human species. Rather than appreciate man's social nature and institutionalize and nurture human interdependence, the capitalist society is compelled by its logic to isolate and privatize men. Being a competitive and exploitative society, it necessarily presupposes isolated and egoistic men aggressively pursuing their narrow and exclusive interests. The modern theory of rights is a juristic expression of this. It institutionalizes isolation, legitimizes the egoistic pursuit of self-interest, and turns each individual into an 'isolated monad, withdrawn into himself.' 'A limited individual who is limited to himself'. It draws a boundary around each individual which others are forbidden to cross, and confines him to his clearly demarcated and fully fortified world.

By dividing up society into a cluster of little islands, the modern theory of rights conceals the reality of classes. Since a worker is free to leave one capitalist employer and work for another, he entertains the illusion that he is a self-determining individual freely deciding who to alienate his labour power. His personal freedom remains grounded in and severely circumscribed by his class slavery. The modern theory of rights, further, encourages the worker to think of himself primarily as a distinct individual, and thus weakens the objective unity of the working class. Since it heightens his consciousness of himself as a self-contained and self-enclosed individual constantly concerned to exclude and distance others, he fails to appreciate the class basis of his social being. The modern doctrine of rights creates a hiatus between his self-consciousness and his being, and prevents the emergence of class consciousness and class solidarity. It thus helps perpetuate the exploitative capitalist mode of production and is inherently ideological.

It is not entirely clear what conclusions Marx intended to draw from his critique of the modern theory of rights. The lack of clarity has encouraged some Marxists to draw two dubious conclusions. First, they argue that rights in the capitalist society are little more than devices of ideological legitimation and, like the state which grants and protects them, instruments of class domination. They obscure the harsh reality of class rule and create the illusion of genuine equality between free and self-determining individuals. For these Marxists the ideological nature of bourgeois rights receives further confirmation from the fact that the capitalist state respects the rights only as long as they do not threaten its existence and jettisons them the moment they do. The rights are therefore a mere 'camouflage', having little value and hardly worth fighting for. Indeed, since they conceal the reality of class struggle and lull the working class into a false sense of security, their disappearance is ultimately a boon.

Second, some Marxists argue that the very idea of right is bourgeois in nature and has no place in the communist society. As a distinct judicial product of the capitalist mode of production, it must of necessity disappear with the latter. The idea of right owes its origin to the two basic historical facts of material scarcity and unsocial individuality. In the communist society, scarcity is replaced by material abundance, and hence there is no need for the institution of right. Since men in the communist society are fully social and do not invade each other, they again do not need an essentially aggressive system of rights to protect themselves against each other.

Although some of Marx's polemical remarks may seem to support it, the first conclusion is obviously untenable. It is based on a mistaken interpretation of his theory of ideology. For Marx the logic of the capitalist society requires its dominant ideology to satisfy two contradictory demands. First, it must justify the prevailing system of inequality and exploitation. Second, since the capitalist society is based on freely negotiated contracts, the justification must be based on the general principles of freedom, equality and individual rights. The bourgeois legal and political theory must thus rest on egalitarian premises and draw inegalitarian conclusions; it must swear by human dignity and justify man's reduction to a commodity. In other words it is condemned by its provenance to remain inherently self contradictory.

Every component of bourgeois legal and political theory, be it liberty, equality, right, law, or state, is vitiated by this inescapable contradiction. The common mistake, or illusion as Marx calls it, consists in not fully appreciating their self-contradictory character. Thus in the capitalist society men have formally equal but substantively unequal rights. To believe with the bourgeois writers that all men in fact enjoy equal rights in the capitalist society is to entertain an illusion. However, the rights themselves are not illusions. The illusion consists in mistaking them for what they are not, in taking them to be more than what they really are. That the doctrine of equal rights formally recognizes the equality of all men and gives institutional

recognition and protection to the dignity of all men is not an illusion but a legal fact much to be valued and fought for. To imagine that the equality of legal persons is or amounts to the substantive equality of concrete men is an illusion. For Marx the bourgeois society is compelled by its inner logic to advocate and institutionalize the theory of equal rights. In so doing it provides a weapon that can be turned against it. The task of the working class is to accept the theory as its starting point, use it to expose the prevailing inequalities, and exert collective pressure to give it a new content. The bourgeois society cannot be fought in terms of abstract and transcendental ideals derived from outside it, but only in terms of those that are immanent in it and to which it itself subscribes.

For Marx, far from being illusions, right in the capitalist society in fact restrain the state, subject the capitalist class to certain norms and provide the conditions under which the working class can organize and grow. It is of course true that the state does suspend them, it weakens its authority in the eyes of its own functionaries as well as many of its subjects, including some members of the capitalist class. Further, to say that the rights are illusory is to imply that there is not real difference between a liberal democratic state on the one hand and a Bonapartist or fascist state on the other. Marx explicitly rejected such a view.

As for the second conclusion, it too is mistaken, although there is some support for it in Marx's writings, and hence its continued appeal. In the mature period of his life, Marx was so heavily preoccupied with the economic analysis of the capitalist mode of production that he did not offer comparable detailed critique of bourgeois legal and political theory. At the same time, he could not avoid making remarks about it, and these by their very nature were general and sweeping and open to dubious interpretations. Further, he tended to present the communist society as qualitatively different from the capitalist, and encouraged the belief that it therefore excluded all that was characteristic of the latter. Again, Marx's distinction between form and content, or shell and kernel, seems to imply that only the content of the capitalist society is valuable and worth preserving. Although the distinction is suspect and even perhaps invalid, it might not have done much damage if Marx had provided a clear criterion for deciding what was to count as the form and what as the content of capitalism. He did not furnish such a criterion, and tended to regard all that pertained to the realm of thought and institutions as the form and the productive forces as the content of the capitalist society. Marx did not carefully examine the concept of form either. He well knew that the content was inseparable from the form, and could not be taken over without taking over at least some aspects of the form. This meant that he needed to develop a method of subjecting the form itself to a systematic critique and separating its permanent features from the merely transitory.

From the dialectical point of view, the juristic form of the bourgeois society cannot be entirely bourgeois; it is bound to have features that point beyond the bourgeois society and require to be preserved. Historical progress cannot consist only in the continuity of the technological content, it must include also the preservation and consolidation of the different dimensions and forms of individuality achieved by mankind during successive historical epochs. In short the distinction between form and content was not enough; an analogous distinction needed to be drawn at the level of the form as well. Marx did not explicitly work out such a deeper conception of critique.

In spite of these and other ambiguities and confusions, a careful reading of Marx suggests that he did not intend to reject the modern theory of rights altogether and his attitude to it was subtle and discriminating. When he rejected the bourgeois conception of the isolated and atomic individual, he rejected also the opposite view that the individual was nothing more than an indissoluble part of the social organism. For him this kind of collectivism was characteristic of the tribal society over which bourgeois individualism represented a great historical advance.

Further, for Marx the communist society transcended the very dualism between individuals and society, as a network of relations among them. It could not therefore aim to destroy individuality; to the very contrary it aimed to preserve and develop it. For Marx individuality was a great bourgeois achievement secured, no doubt, under hostile conditions, and hence profoundly distorted. As such his task was to purge it of its bourgeois distortions, not to reject it altogether.

For Marx individuality cannot be protected indeed the consciousness of it cannot even emerge, let alone be sustained, unless it has an objective basis in society. It requires an institutional recognition in the form of rights and a material basis in the form of personal (though not private) property. In the absence of both, the



individual lacks social and material objectification and remains abstract and illusory. To claim to respect the individual and at the same time not to provide for his institutional and material objectification is to be quality of idealism. The great lesson Marx learned from Hegel was that the subject and the object constituted a unity and that the subject without a corresponding objective correlate was abstract and unreal. This is indeed how he explained the rise of individuality in Athens and Rome and its absence in India. Although he did not stress the point explicitly, the very logic of his materialist epistemology required him to recognize and stress rights and personal property as the necessary basis of individuality. To put the point differently, even as Marx did not reject the bourgeois concept of individuality but only its distortions, he did not reject the bourgeois concept of right but only its perverted forms.

Even Marx's ideal communist society then needs a theory of rights. The theory is obviously very different from the one that has been dominant for the past three hundred years. Not an abstract juristic person but a human being becomes the bearer of rights. Human being now define themselves as social and creative being concerned fully to develop such distinctively human powers as the intellectual, moral, emotional and aesthetic. And it is their development rather than the accumulation of property, the unhindered pursuit of private interest and the exercise of power over others that now becomes the object of rights.

Further, by their very nature, these and other human capacities and powers are such that they can be developed only in co-operation with others. Indeed, they are inherently non-competitive and non-conflictual in the sense that, far from hindering others, their development by one man stimulates and inspires others to develop them as well. The changes in the objects of right therefore entail profound changes in human relationships. Rights in the communist society are not defined in exclusive and possessive terms, and men do not constantly look over their shoulders in nervous fear or run for safety from others invasive presence. They develop cooperative rather than competitive dispositions and seek ways of building co-operation into the very structure of their society. A good deal of what they need from each other thus comes to be spontaneously offered. Conflicts cannot of course be wholly eliminated. However, they are now removed by persuasion, appeals to shared purposes and recognition of common interests and moderated by a deep sense of mutual concern built up over time and nurtured by social institutions. In a society based on trust, cooperation, mutual help and goodwill, the law has a very limited role to play, and is directive and advisory rather than punitive in orientation. Rights are therefore no longer the sole bases of social morality. The communist society is able to evoke and utilize many a noble human emotion and sentiment; the motives of self-interest and fear lying at the basis of modern society play only a minor role.

This inescapably sketchy and tentative outline of the kind of theory of rights that can be teased out of Marx's writings has been designed to highlight two points. First, Marx does not and cannot dispense with the concept of right altogether. Marxists commit grave mistakes when they argue that individuality is a bourgeois illusion and has no place in the communist society. That it can somehow be protected without some institutional provision of rights, that the communist society consists of angels who never interfere with each other, or that it is somehow free from the intractable problem of coping with conflicts and disagreements.

Second, Marx's thought is capable of offering an alternative theory of rights to the one currently dominant. Although the liberal ideologists might wish us to think otherwise, it is possible to define the concept of right in a non-possessive, non-absolutist, non-exclusive and non-aggressive manner, to propose other rights than those emphasized during the past three centuries, and to visualize a sensitive society in which men are grown up and caring enough to offer their co-operation without having to bludgeon each other with their titles and rights.

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## ***WHAT IS SO SPECIAL ABOUT RIGHTS?\****

Future historians of moral and political philosophy may well label our period the Age of Rights. In moral philosophy it is now widely assumed that the two most plausible types of normative theories are utilitarianism and Kantian theories and that the contest between them must be decided in the end by seeing whether Utilitarianism can accommodate a prominent role for rights in morality. In political philosophy even the most bitter opponents in the perennial debate over conflicts between liberty and equality often share a common assumption that the issue of liberty versus equality can only be resolved (or dissolved) by determining which is the correct theory of rights. Some contend that equal respect for persons requires enforcement of moral rights to goods and services required for the pursuit of one's own conception of the good, while others protest that an enforced system of positive rights violates the right to liberty whose recognition is the essence of equal respect for persons. The dominant views in contemporary moral and political philosophy combine an almost unbounded enthusiasm for the concept of rights with seemingly incessant disagreement about what our rights are and which rights are most basic. Unfortunately, that which enjoys our greatest enthusiasm is often that about which we are least critical.

My aim in this essay is to take a step backward in order to examine the assumption that frames the most important debates in contemporary moral and political philosophy the assumption that the concept of right has certain unique features which make rights so especially valuable as to be virtually indispensable element of any acceptable social order. In philosophy, whose main business is criticism a step backward need not be a loss of ground.

There are, it seems only two archetypal strategies for challenging the theses that rights are uniquely valuable. The first is to argue that rights are valuable only under certain defective- and temporary-social conditions. According to this position the conflicts that make rights valuable can and ought to be abolished. Thus even if rights are very valuable in a society fraught with conflict, they are not valuable in all forms of human society. Our efforts should not be directed towards developing and faithfully implementing more adequate theories of rights; we should strive to establish a social order which is so harmonious as to make rights otiose.

Variants of this view provide different accounts of the source of the conflicts that make rights valuable and alternative recommendations for how to eliminate them. Marx, I have argued elsewhere believed that the sorts of interpersonal conflicts that make rights valuable are rooted in class-conflict gives rise, under conditions of scarcity. Marx also predicted that class-divided society would eventually be replaced by a system of democratic control over production that would eliminate class-division and so reduce egoism and scarcity, and hence interpersonal conflict, that reliance upon rights would become largely, if not totally, unnecessary.

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\* Allen Buchanan, *2 Social Policy & Philosophy* 61-75 (1984).

If it turns out there are valuable functions that cannot be achieved without the distinctive features of rights, we shall know what is so special about rights. In particular, we shall know whether the reconciliation of liberty and equality, if it is possible at all, will rely upon a theory of rights. Further, in attempting to see whether rights are replaceable and hence dispensable, we will get clearer about what rights are. Whether or not our current enthusiasm for rights will be enhanced or diminished, it will at least be rationally supported, rather than dogmatic, and we will have a better idea of what we have been, or should be, so enthusiastic about.

We can begin by listing, in summary fashion, the features that are said by various writers to make rights uniquely valuable. (1) Because valid claims of right trump appeals to what would maximize social utility, rights provide the strongest protections for individuals and minorities. (2) A moral (or legal) system that included no provision for compensation to those whose interests have been invaded would be a very defective system; but compensation is appropriate only where a right has been infringed. (3) Rights enable us to distinguish between those moral principle that can justly be enforced and those that control. (4) The concept of a right expresses the idea that something is owed to the individual that a certain performance or certain forms of non-interference are his due or that he is entitled to them. Consequently, in a moral (or legal) system that lacked the concept of a right, individuals could only make requests, or beg, or ask favours; they could not demand certain treatment, but would be at the mercy of the generosity of personal whims of others. (5) Respect for persons simply is, or includes, recognition of the individuals status as a holder of rights. In a system in which such recognition is lacking, respect for oneself and others as persons is impossible, and to fail to respect persons as such is a grave moral defect. (6) A unique feature of rights is that the right holder may either invoke or not invoke or waive his right. For several reasons, this special feature makes rights principles more valuable than principles that merely state obligations or other moral (or legal) requirements. Each of these six features must now be examined in detail.

## I

Three of the most prominent contemporary rights theorists, John Rawls, Ronald Dworkin, and Robert Nozick, place great emphasis on the idea that valid claims of right at least in the case of basic rights, take precedence over, or as Dworkin puts it "trump" appeals to what would maximize social utility. It is easy to see that having some interest-protecting principles that take precedence over appeals to social utility maximization is extremely valuable. It is more difficult to see, however, why the attractiveness of the utility-trumping feature itself shows that rights are indispensable. For there is certainly nothing conceptually incoherent or even impractical about interest-protecting principles that have the utility-trumping feature but that include none of the other features said to be distinctive of rights. In particular, there seems to be a no conceptual or pragmatic connection between the trumping feature and the idea that something is owed to the individual, or that the individual may or may not invoke his right or waive it. After all, to say that the requirements laid down by a principle possesses the trumping feature is to make an external relation statement, a statement about the weighting or priority relation between that principle and other principles, in particular, the

principle or utility. It is not to say anything at all about the distinctive content of the principle in question.

Consequently, even if the utility trumping feature were necessary for a principle to be a rights principle, it hardly seems sufficient. Thus, although it maybe true that any system that lacked this feature would leave individuals or minority interests vulnerable, it does not follow that a system that lacked rights would be intolerable. To put the point differently, to adhere to utility trumping, interest-protecting principles is to recognize that certain interests (e.g., in food or shelter or in freedom from bodily invasion) are to be protected even at the cost of losses in social utility. But this seems to fall short of recognizing that individuals have rights.

## II

If a system that awards compensation for invasions of interests has significant advantages over one which does not, and if compensation presupposes infringement of a right. Then rights are distinctively valuable, at least for this reason. Assuming for a moment that rights alone provide a basis for compensation, why is a system that includes compensation better than one that does not? The most obvious reply is that compensation is an intuitively attractive response to an infraction of an interest-protecting principle. After all, if the infraction made A worse off, then it seems fitting to try to restore A's interests to the condition they were in before they were set back by the infraction.

A more subtle and less appreciated advantage of a system of compensation is that the prospect of compensation provides an incentive for reporting infringements and, hence, facilitates effective enforcement of the law. In many cases a rational victim will conclude that the cost to him of reporting an infringement (and of testifying, etc.) will exceed the benefits he would receive from doing so, unless he can expect compensation. This may well be the case if (a) the probability is low that one will be a victim of this sort of infraction again in the future, or if (b) the probability is low that punishment will achieve a significant deterrent effect.

However, when the prospect of compensation enters the picture; I have an incentive to report the infraction, even when conditions (a) and (b) are present. Thus, compensation is attractive in part because it promotes reporting of infractions and, hence, facilitates enforcement of interest protecting principles.

It does not follow, however, that only compensation can do this job. A simple reward system would also provide the needed incentive. If C can expect a reward for reporting an infraction of a principle that occurs when B's interests are invaded by A, then all C need be concerned about is whether his expected gain from the reward surpasses the expected cost to him of reporting the infraction. So it seems that compensation is not an indispensable aid to reporting infractions and, hence, to enforcement of interest-protecting principles.

The thesis that compensation presupposes infringement of a right is ambiguous. It may be understood either as a claim about the meaning of compensation or as claim about the necessary conditions for justified compensation. On the first interpretation, the thesis can be dismissed rather easily. There is nothing incoherent or meaningless about the idea of a principle of compensation which requires A to be compensated whenever certain of his interests are invaded, but which does not imply that A has any rights against the invasions in question. All that is needed is the principle of compensation itself and some way of picking out which inva-

sions of interest are to be compensated. The difficulty lies in determining which interests count for purposes of compensation. But precisely the same is true for a theory of rights-not just any interest will count as the basis for a right. It seems, then, that the burden of proof is on those who claim that no system could provide an adequate moral justification for compensation in the absence of infringement of rights.

Finally, although those who have assumed that compensation requires infringement of a right have somehow failed to notice it, our own legal system, in the law of torts dealing with fault liability, provides instances in which a successful case for compensation does not depend upon establishing that a right was infringed. Rather, one need only show that a legitimate interest was invaded and that the one who invaded it was at fault i.e. that his action was unjustified in that it failed to measure up to the action was unjustified in that it failed to measure up to the standard of care exercised by the reasonable persons. Thus, although establishing that a right was infringed provides one basis for compensation. This does not tell us what is distinctively valuable about rights, even in our own system at the present time.

Granted our earlier point that compensation promotes efficiency in reporting and, hence, in enforcing interest-protecting principles, it should come as no surprise that justification for a principle of compensation need not appeal to rights. A utilitarian system, or indeed any system that values efficiency, would find compensation attractive, even if such a system had no use for rights.

### III

The thesis that rights play an indispensable role in distinguishing those moral principles that can justly be enforced from those that cannot is ambiguous, lending itself to four quite different interpretations. (1) A valid claim of right is sufficient justification for enforcement (if enforcement is not only sufficient but necessary to avoid violations of the right). (2) A valid claim of right constitutes a prima facie case for enforcement (if enforcement is not only sufficient but necessary to avoid violations of the right, and thus shifts the burden of proof to those who would deny that enforcement is justified). (3) A valid claim of right is necessary for justified enforcement (i.e., only rights principles can justly be enforced). (4) Enforcement of a principle is justified only if that principle is a rights principle or if it is a non-rights principle whose enforcement would violate no rights.

The first interpretation may be eliminated, for at least two reasons. First, when rights conflict, not all of them can be enforced. Second, even those celebrants of rights who emphasize the idea that rights trump appeals to what would maximize utility admit that in some (presumably rare) cases valid claims of right must give way in order to avoid enormous disutility.

The second interpretation certainly seems to capture at least part of the connection between rights and enforcement. Indeed, some theorists, including Mill, tend to define rights as something that society ought to guarantee for the individual. A presumption of enforceability seems natural enough, granted the trumping feature. If rights are such important items that protecting them requires foregoing gains in social utility, then it is not surprising that we believe they should be protected, by force if necessary, absent some substantial reason for not doing so.

The more interesting question is this: what kinds of considerations defeat the presumption that rights may be enforced in cases where enforcement is necessary to avoid violations of rights? One plausible place to begin is with the suggestion that the presumption is not defeated by the mere fact that non-enforcement would maximize social utility. My purpose here, however, is not to develop a theory of the justified enforcement of rights but rather to see whether the connections between rights and justified enforcement is so close that the need for justified enforcement makes right uniquely valuable. The mere fact that the existence of a right constitutes a prima facie case for enforcement does not go very far towards showing that rights are indispensable. It would do so only if there were no serviceable non-rights-based arguments for enforcing moral principles.

The third interpretation, though more plausible than the first, is nonetheless insupportable, or at least not adequately supported by those who assume or assert it. There is indirect evidence that claim (3) is widely held. Almost without exception, those who argue that legal entitlements to goods or services are morally justified do so by arguing that there are moral rights to the goods and services in question. Their opponents, again almost without exception, attack the claim that legal entitlements to "welfare" are morally justified by arguing that there is no moral right to the goods and services in question.

A plausible explanation of this behaviour is that both sides assume that a legal right to X can only be adequately justified by showing that there is a moral right to X; in other words, that only (moral) rights principles are enforceable. A case in point is the debate over whether there is a sound moral justification for a legal right to a "decent minimum" of health care. The implicit assumption in this dispute seems to be that an enforced "decent minimum" policy, if it is morally justified, must rest upon a moral right to health care, either as a basic moral right or as a derivative moral right based on something more fundamental such as a moral right to equal opportunity.

The assumption that only rights principles are enforceable, however, seems to be an unsupported dogma. There is at least one rather widely recognized type of argument for enforcement that provides a serious challenge to the assumption that only rights principles may be enforce: principles requiring contribution to certain important "public goods" in the technical sense. It is characteristics of public goods (such as energy conservation, pollution control, and national defense) that if the goods is supplied it will be impossible or infeasible to exclude non-contributors from partaking of it. Hence each individual has an incentive to withhold his contribution to the achievement of the good, even though the net result will be that the goods is not achieved. Enforcement of a principle requiring everyone to contribute may be necessary to overcome the individuals incentive to refrain from contributing by imposing a penalty for this own failure to contribute.

In some instance, enforcement is needed not only to overcome the individuals incentive not to contribute to some good, but also to ensure that contributions are appropriately coordinated. To take one familiar example enforcement of the "rule of the road" ("drive only on the right") is needed not only to ensure that all will contribute to the goal of safe driving but also to coordinate individuals efforts so as to make attainment of that goal possible. Or, more accurately, in cases of this sort, a certain kind of coordinate collective behaviour just is the public good in question. To argue that enforcement of principles of contribution is sometimes

justified when necessary for the provision of important public goods, it is not necessary to assume that anyone has a moral (or legal) right to the good, whether it be safe-driving conditions, energy conservation, freedom from toxic wastes, or adequate national defense. If one believes, as I do, that there are at least some cases in which public goods arguments justify enforced contribution principles, in the absence of a right to the good in question, then one must reject the sweeping thesis that only right principles can justly be enforced?

To admit that some enforced principles requiring contributions to public goods are morally justifiable (in the absence of a right to the good) is not, however, to say that whenever a public good problem exists, enforcement is justified. First of all, since enforcement, even if not always an evil, is never a good thing, public goods problems generate enforceable principles only if the good cannot be attained by other, less undesirable means (e.g., moral exhortation, leading others to contribute by one's example, etc.). Second, and perhaps even more obviously, enforcement is not justified if the cost of enforcement is not surpassed by the benefit of attaining the good in question. Third, even when the preceding two conditions are satisfied, a further limitation may be needed to restrict the scope of public goods arguments for enforcement, simply because the class of things which can qualify as public goods is so extremely large that overuse of this type of argument for enforcement may result.

As this point, the attractiveness of the fourth interpretation of the thesis that rights are necessary for making a distinction between those principles that can rightly be enforced and those which cannot becomes apparent. On that interpretation, the connection between rights and enforcement is more subtle: if a principle can rightly be enforced, then either (a), it must itself be a rights principle or, (b) if it is not a rights principle, its enforcement must not violate any rights. Clause (b) places an important additional and very reasonable restriction on the scope of public goods arguments as justification for enforcement.

The purpose of our investigation of the connection between rights and enforcement was to determine whether rights are indispensable for distinguishing between those principles that can rightly be enforced and those which cannot. We have seen that rights can serve a valuable function in providing a prima facie justification for enforcement. We have also seen that although rights are not indispensable in the sense of providing the only basis for enforcement, they may play an important role in restricting the scope of non-rights-based justifications for enforcement.

One question remains: even if rights principles provide one plausible way of restricting the scope of non-rights-based justifications for enforcement, could the needed restriction be achieved equally well by non-right principles? If as I suggested earlier, the utility-trumping feature is at best necessary, but not sufficient, for a principle being a rights principle then the answer seems to be in the affirmative. A utility trumping principle which merely protected certain interests from being subordinated to the pursuit of utility, without including any of the other features associated with rights, would provide a significant restriction on the scope of public goods arguments for justified enforcement.

#### IV

Some writers, including Richard Wasserstrom, have held that at least part of what is distinctively valuable about rights principles is that they express the idea that something is owed

to the individual, that something is the individuals due or that he is entitled to something. Wasserstrom considers the case of racist who fails to recognize that Negroes have rights and then emphasizes two consequences of this failure. First the racists way of conceptualizing Negroes denies to any Negro "... the standing to protest against the way he is treated." If the white Southerner fails to do his duty, that is simply a matter between him and his conscience. Second, failure to recognize that Negroes have rights ... requires of any Negro that he make out his case for the enjoyment of any goods. Is reduces all of his claims to the level of request, privileges and favours.

Wasserstrom's example is graphic. Nonetheless, the conclusions he draws from it do not fully capture what is distinctive about the notion that what is mine as a matter of right is owed to or due me, or that I am entitled to it. Consider Wasserstrom's first claim. Is it true that one can protest the way one is being treated only if one is owed (or entitled to) a different sort of treatment, where being owed (or being entitled to) is not reducible to someone else's being obligations to treat you in a certain way? Suppose that there is a legal system of interest-protecting principles, including prohibitions against murder, but that this system does not base the prohibitions in question on any notion of a right not to be murdered. If you threaten to kill me or if you kill my friend, surely I have basis – namely, the existence of the publicly recognized prohibition-for protecting your behaviour.

Further, if the prohibition is enforced your failure to heed it will not simply be a matter between you and your conscience; instead, it may be a matter between you and the hangman. so contrary to Wasserstrom's first point, it is simply not true that rights provide the only basis for an individuals having standing to protest certain forms of behaviour in such a way as to achieve enforcement on punishment. Under a system of interest-protecting principles, I can be effective in protesting your behaviour as being prohibited and invoking enforcement of the laws you have violated, without having to establish that your behaviour has failed to measure up to what you owe me or what you owe any other individual.

Wasserstrom's second point is equally unconvincing because it confuses two distinctions. The first distinction is between demanding something and requesting it; the second is between demanding something as one's due and demanding it as being required by some recognized system of laws or principles. If the notion of something's being one's due is unique to the concept of a right, then a system in which right are not recognized is one in which one is not able to demand something as one's due. But it does not follow that in such a system you cannot make demands and, instead, are reduced to making mere requests. In the legal system described above, you need not merely request that you not be murdered; you can demand that the power of the law be brought to bear against the one who threatens you with murder and you can say to that individual that he is prohibited from killing you, not just that it would be awfully nice of him if he didn't.

Though this is only a conjecture, Wasserstrom may have gone astray, here, by uncritically assuming that only rights principles may be enforced. For if it were true that only rights principles may be enforced, and if it were also true one can demand only what may be enforced, then it would follow that without rights one could make requests but not demands. We have seen, however, that at least first premise of this argument is false.



If neither of the two features Wasserstrom emphasized does the job, how are we to capture the notion that right is an entitlement or that what is a matter of right is due or owed to one; and what, if anything, is uniquely valuable about this peculiar notion? Part of what is crucial to the notion that I am owed or entitled to something or that it is my due, is the idea that I, or my good, or my interests, constitute an independent source of moral (or legal) requirements.

Yet, the idea that the individual is an independent source of requirements is not by itself sufficient to distinguish rights, simply because it also applies to some moral requirements regarding others, in particular, duties of beneficence, where there are no correlative rights. If I ought to advance your interests or satisfy your needs, then your interests or needs are the focus of my duty-I have a duty regarding them. But if I ought to advance your interests or satisfy your needs only because doing so will advanced my own or someone else's good, then your interests are not the source of my duty, even though they are the focus of it.

The moral principle of beneficence, as I understand it, implies particular duties to individuals in need under certain circumstances (Jones is in need and I can help him without excessive costs to myself, etc.). When those circumstances obtain, it is my duty to help this particular individual, Jones, because he is in need, not simply because doing so may serve interests other than Jones.

In this sense, if I ought, as a matter of beneficence, to help you , then it is not just that I ought to do something regarding your interests; there is a sense in which you interests are the source, not merely the focus, of the requirement. I ought to help you because you are in need. Independently of whether in doing so I would fulfill anyone else's need or advanced any one else's interest or good. Nonetheless it is still true that you have no right to my aid, that you are not entitled to it.

My suggestion is that we can best appreciate what the notion of owedness or entitlement adds to the idea that the individual (or his needs or interests or good) is an independent source of moral (or legal) requirements if we concentrate on two facts which have so far gone unremarked in my analysis. First, when one is not treated as one is entitled or is not accorded what one is owed, one is wronged; second, if one is owed or entitled to something, certain excuses for nonperformance are ruled out which might be acceptable in the case of non-rights-based requirements, such as duties of beneficence.

The judgment that you have violated my right and thereby wronged me has certain implications which the judgment that I have failed to give you something you ought to have, or failed to treat you as you ought to be treated, does not have, even in cases in which you (or your interests or good) are the source of the requirements in question. The judgment that you have wronged me implies a presumption that you ought to provide restitution, compensation, or at least apologies to me. This is not the case if you merely fail to fulfill a non-rights-based requirement, such as duty of beneficence. If your duty toward me has a correlative right, then your failure to fulfill that requirement changes your moral (or legal) relationship to me in ways in which your failure to fulfill non-rights-based requirement does not. Further, as we saw earlier, if rights provide a prima facie justification for enforcement, then the fact that you have wronged me (violated my right) may also change your relationship to others in the community at large by creating a presumption,

though often a rather easily rebuttable one, that you may now be penalized, or that your liberty may now be limited, in ways that would have been impermissible had you not wronged me.

If I ought to give you food because you are hungry, but you are not entitled to the food, the fact that I prefer to give the food to another needy person may be an acceptable excuse for my not giving it to you, even if there is an enforceable, publicity recognized principle stating a requirement that I render aid to the needy. However, if you are entitled to the food as a matter of right, my preference, as such, is irrelevant to the moral (or legal) assessment of my not giving you the food.

We now at last can understand how the recognition that Negroes have rights changes things in Wasserstrom's example. As we saw earlier, it is not that the recognition of rights alone makes it possible for the Negro to protest the way he is being treated or to invoke the power of the law against his oppressor; nor does the lack of recognition of rights necessarily reduce him to making requests, rather than making demands, if the laws in question impose strict requirements. But even though the Negro can invoke enforceable prohibitions against the racist and is not limited to asking favours, there are something he cannot do unless he has rights. He cannot correctly claim that the racist's failure to fulfill certain requirements itself changes the relationship between him and the racist so that the presumption is that the racist is required to offer restitution or compensation or at least apologies to him. Further, if the Negro is entitled to be treated in certain ways and is wronged if he is not, then certain kinds of excuses for noncompliance with the requirements in question will not be available to the racist. Finally, if the racist fails to accord the Negro what he is entitled to or owed, then this failure itself constitutes a *prima facie* case for enforcing the requirements, even in the absence of any previously existing enforcement arrangements.

## V

Perhaps the most suggestive and influential formulation of the thesis that respect for persons is or entails recognition of their rights is that offered by Joel Feinberg. Feinberg states that (a) "... respect for persons... may simply be respect for their rights..." It is not clear how much weight Feinberg intends the term "person" to bear, here.

If "person", here means "moral agent" or if personhood at least entails moral agency, then (a) is incompatible with another thesis that Feinberg also endorses: (b) some animals who are not moral agents have rights (and we can and should show respect for their rights). According to Feinberg, a being can have rights if (and only if) it is a source of claims, i.e., if (and only if) its interests can be represented. Hence, those beings, and only those beings, that have interests, that have a good of their own, can have rights.

The difficulty is this. If some nonpersons (i.e., animals who lack moral agency) have rights and if it is possible for us to respect those rights, then respecting rights (or recognizing a being as a right holder) cannot itself entail, much less be equivalent to, showing respect for persons, as persons. If personhood simply is moral agency or if moral agency is distinctive of persons then it is clear that respect for persons as such must involve recognition of their distinctive capacities as moral agent. But recognizing a being as having interests that are an independent source of claims does not itself involve recognition of any capacities of moral agency.

Since on Feinberg's own analysis, merely recognizing a being as a right-holder implies nothing at all about moral agency, respect for rights neither can be nor can entail respect for personhood. Feinberg's view is, of course, compatible with the claim that recognition of certain rights, namely, those which presuppose moral agency, such as right of self-determination, shows respect for persons. But this latter claim is clearly a retreat from the more exciting proposal that respect for persons just is respect for their rights.

Although merely respecting a being's right does not itself show respect for that being as a moral agent (and hence as a person), it is, nonetheless, true that when we show respect for a person as a moral agent this characteristically involves respecting his rights. We need an explanation of why this is so. The explanation rests upon an account of the difference between a being with interests and a person.

To say that moral agency is what distinguishes persons from other beings who have interest is not terribly informative unless something is done to fill out the concept of moral agency. Here I can only offer a sketch. "Moral agency," as I understand the term, in short-hand for a set of capacities, including not just the capacity to assess the suitability of means to given ends, but also the capacity to evaluate ends. It includes the capacity to act for reasons, and the capacity to evaluate reasons for acting as well. A moral agent can ask himself whether a reason is a good or sufficient reason for acting.

A moral agent is more than a being who has interests. To put the point somewhat paradoxically, a moral agent, can take an interest in his interest, in the sense that he possesses the higher-order capacity to criticize, evaluate, and revise his interest. Moral agency, on this view, is that kind of distinguish himself from the interests that he happens to have at a particular time, or on the other hand, to identify with certain interests. To say that a being is a moral agent is to say that his behaviour and even his attitudes and dispositions are subject to moral requirements. Only a being who can stand in a critical relationship to his interests can be subject to moral requirements.

Although what distinguishes a moral agent from a mere being with interest is that he stands in a critical relationship to his interests, we show respect for a being as a moral agent by acknowledging principles that protect his interest. It is because capacities of moral agency are manifested only in the evaluation, revision, and pursuit of interests, that protection of interests can count as respect for persons as moral agents.

Now in our society, the protection of an individual's interests and, hence, the recognition of him as a being who stands in a critical relation to his interest, is achieved, at least in great part, by adherence to principles that specify his rights. It does not follow, however, that the needed protection of interests can be achieved only by rights principles. As I argue earlier, there seems to be no conceptual or pragmatic barrier to a system of enforceable, utility-trumping, interest-protecting principles which lack the other characteristics that are thought to be distinctive of rights.

We are still left with puzzle. Why would a theorist like Feinberg, who views rights principles primarily as especially valuable devices for protecting individuals interests and consequently, draws the reasonable conclusion that rights are something correctly ascribed to lower animals who lack moral agency, be tempted to assert the incompatible thesis that respect of

persons just is respect for their rights? And regardless of whether Feinberg's view is consistent, if we concentrate on the interest-protecting characteristics of rights, especially the utility-trumping features, why should anyone balk even for a moment at the propriety of ascribing rights to nonpersons, such as dogs?

The puzzle disappears if we distinguish between two questions (a) can we coherently ascribe rights to beings who lack moral agency; and (b) are we morally justified in ascribing rights to being who lack moral agency? If, like Dworkin, we concentrate on the idea that rights trump appeals to utility and are primarily devices for protecting an individuals interests, then we must answer the first question affirmatively, as Feinberg does.

An affirmative answer to the first question, however, does not preclude a negative answer to the second. A distinctive feature of Kantian moral theories is that they maintain that only moral agents have rights. On such a view only the interests of moral agents are of such moral significance that they warrant the especially strong protections afforded by rights. Or, perhaps more accurately, it is only because certain interests are the interests of moral agents that they should be protected so stringently.

A crucial element of Kantian moral theory, then, is the thesis that only those beings who are subjects to moral requirements, are also the proper objects of those especially stringent interest-protecting principles we call rights principles. Thus, a Kantian can admit that while it is conceptually coherent to ascribe rights to any being who has interests that can be protected, it is nonetheless true that respect for persons just is respect for rights. For if one believes, as the Kantian does, that rights can justifiably be ascribed only to moral agents and only in virtue of their moral agency, and if one identifies moral agency with personhood, then one will conclude that respecting an individuals rights just is respecting him as a person. Whether or not one will conclude that proper respect for persons can only be shown by respecting their rights will depend upon whether one thinks there are other ways of adequately acknowledging the distinctive moral importance of moral agents. I raise this question, but cannot hope to answer it here.

Feinberg proposes to "supplement" his account of the distinctive role of rights and "to correct some of its emphasis" by pointing out that because right-holders are not always obliged to exercise their rights, rights make supererogatory conduct possible. Now, it may be true that if, as a matter of right, you owe me something, but I refrain from exercising my rights even though it would be greatly to my advantage to do so, my conduct is supererogatory. However, it does not follow that supererogation is possible only through the decision to not exercise a right.

Suppose that we lived in a system of laws or moral rules which included the obligation, without correlative rights, of each person to contribute N hours of labour a week to the state or to the deity. If some generous individuals freely chose to contribute N+M hours a week, we might well describe their conduct as supererogatory. It seems, then, that even if some forms of supererogation presuppose the non-exercise of a right, others do not. And it is certainly not clear that society which lacked only those forms of supererogation which presuppose rights would be seriously morally defective.

It might be replied on Feinberg's behalf that the act of supererogation in my hypothetical example does presuppose at least one right, the right to devote ones extra labour – time to purposes other than of serving the deity or the state. This, however, appear to be stretching a point towards triviality. It seems more accurate to say that in the society in question there is a list of obligations (without correlative rights), along with the understanding that it is permissible to do whatever one is not obligated not to do. Should one insist on saying that this amounts to a right to do whatever one is not obligated not to do, this will still fall short of showing that life without rights – would be surely impoverished because supererogation would not be possible.

## VI

Benditt believes that rights especially valuable because they alone make possible a very useful distinction between what one ought morally to do, all things considered, and what one is morally required to do. For example, it may be that what I ought morally to do all things considered, is to forgive your debt to me. However, since I have a right to what you owe me, I may nonetheless insist that you repay me, even though, all things considered, I ought not. Benditt's point is, in a sense, the mirror-image of Feinberg's. For Benditt, rights are important because they provide a moral justification for less than morally optimal behaviour, including selfish or stingy behaviour.

Benditt thinks that morality which includes rights, and thus provides a justification for departures from what is morally optimal, has several advantages. (a) Without the discretion which rights allow, morality would be over-demanding-it would fail to take into account the unavoidable weakness of human personality. (b) The freedom to depart from the morally optimal, which rights provide, can serve as a kind of "safety valve" for "self-assertion within a framework of requirements often seen and felt as oppressive and quasioercive." (c) A morality which recognized to justified no departures from what is the morally best thing to do "would frustrate individual goals and life plans".

What Benditt fails to see is that even though rights have all of these advantages, a non-rights system might attain them just as well. Instead of a rather extensive and, hence, demanding moral code, softened with loopholes provided by rights, there is the option of having a less extensive code consisting of rather undemanding and narrow set of obligations, without any rights. Benditt wrongly assumes that the needed latitude for individual choice must be located within the moral code. An alternative is to constrict the moral code itself and make room for a great deal of discretion in matters not covered by morality.

I agree with both Feinberg and Benditt that part of what is distinctively valuable about rights is that they may be invoked or not invoked or waived. However, in my view the unique advantages of this feature of rights are different from any of those which they cite. The ability to invoke or not invoke or the waive one's right is uniquely valuable because it (a) makes possible certain efficiencies which are not available in a pure obligation system; (b) allows rights to function as non-paternalistic protections of the individual's interests, and, indeed, allows rights to function as non-paternalistic protection against paternalism; and (c) avoids a situation in which every instance of the nonperformance of an enforceable duty constitutes a prima facie case for complaints against the enforcement mechanism.

The first point, though rather obvious, has not to my knowledge been emphasized by philosophical rights theorists. If A can release B from an obligation by A waiving his right (or by A simply not insisting on B's performance by not invoking his (A's) right). A can sometimes gain more than if he insists on his right. In fact, in some cases both parties may be better off if the right holder is able to release the other party from an obligation.

It would be possible, of course, to have an arrangement whereby some third-party judge would be able to release B from his obligation, but the judge's decision would have to be made in either of two ways. Either the judge would release B from his obligation if and only if A wished him released; in which case the added cost of having a judge would be sheer waste; or the judge's decision to release B would be independent of A's wishes. The obvious difficulty with the second option is that it would render the whole arrangement much less valuable for anyone in A's position because one would no longer be able to rely upon B's performing (if one wishes him to). Such an arrangement would be about as satisfactory as a systems in which one can refuse to do what one has promised to do whenever refusal would maximize social utility. In both systems obligations would not provide a reliable framework for expectations. The ability to invoke or not invoke or waive a right allows enough flexibility for efficiency, without sacrificing stability and predictability.

It is also important to emphasize what may be called the essentially anti-paternalistic character of rights. On this view valid claims of right trump not only appeals to social utility-maximization, but also appeals to what would maximize the right-holders own utility. To borrow Hume's example I must return my profligate friend's money to him, even though doing so will result in his financial ruin, because he has a right to it. Thus, rights, even without the ability to waive them, provide protections against paternalistic interventions. Without the ability to waive, however, a system of enforceable rights may itself be paternalistic. For example, if I have a right to informed consent for medical treatment, but I am not permitted to waive that right in order to authorize my trusted physician to make certain decisions without consulting me, my autonomy to restrict my autonomy is limited by the very right that was designed to enhance it. A waivable right provided a non-paternalistic barrier against paternalistic interventions because it allows the right-holder to raise or lower the barrier at will. To the extent that respect for persons entails recognition of their autonomy, ascribing waivable rights to individuals does show respect for persons as such.

Finally, the third distinctive attraction of rights, so far as they may be invoked or not invoked or waived, can best be appreciated if we again consider a system lacking this feature. In some cases, nonenforcement of a generally useful law may be highly beneficial. Some flexibility is desirable. But in a system of enforceable obligations (without correlative rights) the failure of B to do what he is obligated to do *ipso facto* raise questions about the non-arbitrariness and effectiveness of the enforcement mechanism. In such a system, flexibility comes at a price a burden of proof must be borne to show that this instances was a justifiable exception to a valid principle specifying an obligation. Otherwise the legitimacy of the enforcement system is impugned.

In contrast, if A has freely and knowingly waived his right (or perhaps even merely refrained from exercising it when he had every opportunity to do so), B's non-performance does not even trigger *prima facie* concern about the effectiveness or fairness of the enforce-

ment mechanism. Flexibility is achieved without the cost of showing that this particular non-performance was a justified exception to a valid principle of obligation.

### **Conclusion**

The most fundamental disputes in contemporary moral and political philosophy are viewed as conflicts between competing theories of rights, the assumption being that rights are uniquely valuable and hence, indispensable. Considerable confusion exists, however, as to what the distinctive features of rights are and why they are uniquely valuable.

The perennial issue of conflicts between liberty and equality now focuses primarily on the question of whether there is a sound moral justification for positive legal entitlement – legal rights to goods and services – or whether the enforcement of positive rights would unacceptably infringe individual liberty. Both sides of the dispute tend to proceed as if a sound moral justification for positive legal entitlements requires showing that there are moral rights to the goods and services in question. What this suggests is that they share a common assumption, namely that only those moral principles which are rights principles can justly be enforced. This assumption, I have argued, is based on a misunderstanding of the connection between rights and justified enforcement. While valid rights principle provides a prima facie case for enforcement, the existence of a right is neither necessary nor sufficient for justified enforcement. Rights principles, however, may play a valuable, though not necessarily indispensable, role in restricting the scope of justifications for enforcing requirements that do not themselves rest on moral rights, such as the requirement to contribute to the provision of certain public goods.

This last point has rather surprising implications of the current state of the liberty versus equality debate. It has seemed to many that those, such as Nozick, who claim that there are only negative moral rights enjoy a great strategic advantage over those, such as Rawls, who claim there are positive moral rights. Most simply, the point is that rights to goods and services seem harder to justify than mere rights against interference with liberty. If one assumes that the only sound-moral basis for legal entitlements to goods and services is that entitlements are saddled with a much stronger burden of proof greatly altered one we acknowledge that there are sound non-rights-based justifications for positive legal entitlements. The burden of proof now shifts to the negative rights theorists to show that otherwise – compelling non-rights-based arguments for positive legal entitlements are ruled out by negative moral rights. To bear this burden of proof, the negative rights, theorist must provide a solid justification for a set of negative moral rights principles and then show that respect for these moral rights is in fact incompatible with enforcing the non-rights-based principles in question.

Some theorists have argued that it is misleading and unfruitful to ask whether equality and liberty are compatible; instead we should ask: What sorts of restrictions on liberty are required by equal respect for persons? Given the further assumption that respect for persons simply is, or at least entails, proper recognition of their rights, we are again brought back to the conclusion that everything depends upon the correct choice of a theory of rights.

Some of those, such as Dworkin, who emphasize this strong connection between respect for persons and recognition of rights focus almost exclusively upon the idea that certain interest ought to be protected even if this means losses in social utility. I have argued that this

trumping feature, however, does not seem to be peculiar to rights. There is nothing incoherent or impractical about the notion of interest-protecting principles that override the principle of utility but which include none of the other features associated with rights. To say that one principle trumps another is simply to make an external relational between the former and the latter; it tells us nothing of the content of either principal. Moreover, if we concentrate exclusively on the then that rights protect individuals interests from appeals to utility, the concept of a person and hence of respect for persons as such, never comes into view. Respect for persons entails proper recognition of their capacities as moral agents, not merely acknowledgment that they are being with interests.

There is at least one feature associated with the concept of a right which implies moral agency, not just the existence of interests-the idea that the right holder may invoke or not invoke or waive his right. This feature, which seems to be unique to rights, adds several important advantages to the notion that a right is simply an especially strong protector of interests. One is that the ability to release others from obligations by waiving one's rights makes possible certain efficiencies that are not attainable in a pure obligation system. Another is that the ability to waive rights allows interest-protecting principles, including those which protect our interest in self-determination, to function in a non-paternalistic way. Since respect for persons involves respect for their autonomy, recognition of waivable rights is one important way of showing respect for persons.

It has not been my purpose to deny than rights are valuable, nor even to show that rights are not uniquely valuable items in our current moral framework. Instead I have tried to examine critically the dogma that rights are so distinctively valuable as to be morally indispensable. I have argued that most of the features which are thought to be peculiar to rights are neither as clear individually, nor as closely related to one another, as is usually thought, and that many of the characteristic functions of rights principles could be fulfilled equally well by a combination of alternative moral principles.

Even if all this is true, however, rights may still be distinctively valuable to us. The best argument in favour of our according a central role of rights principles in morality may be one of simple efficiency. Granted that a number of quite conceptually distinguishable functions have come to be clustered under the concept of a right, it may be most economical to use this concept as we find it, rather than to devise alternatives to do these same jobs.

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## *Culture and Human Rights\**

The idea of human rights has gained a great deal of ground in recent years, and it has acquired something of an official status in international discourse. Weighty committees meet regularly to talk about the fulfillment and violation of human rights in different countries in the world. Certainly the *rhetoric* of human rights is much more widely accepted today - indeed much more frequently invoked - than it has ever been in the past. At least the language of national and international communication seems to reflect a shift in priorities and emphasis, compared with the prevailing dialectical style even a few decades ago. Human rights have also become an important part of the literature on development.

And yet this apparent victory of the idea and use of human rights coexists with some real skepticism, in critically demanding circles, about the depth and coherence of this approach. The suspicion is that there is something a little simple-minded about the entire conceptual structure that underlies the oratory on human rights.

### **Three Critiques**

What, then, appears to be the problem? I think there are three rather distinct concerns that critics tend to have about the intellectual edifice of human rights. There is, first, the worry that human rights confound consequences of legal systems, which give people certain well-defined rights, with pre-legal principles that cannot really give one a justiciable right. This is the issue of the legitimacy of the demands of human rights: How can human rights have any real status except through entitlements that are sanctioned by the state, as the ultimate legal authority? Human beings in nature are, in this view, no more born with human rights than they are born fully clothed; rights would have to be acquired through legislation, just as clothes are acquired through tailoring. There are no pre-tailoring clothes; nor any pre-legislation rights. I shall call this line of attack the *legitimacy critique*.

The second line of attack concerns the *form* that the ethics and politics of human rights takes. Rights are entitlements that require, in this view, correlated duties. If person A has a right to some *x*, then there has to be some agency, say B, that has a duty to provide A with *x*. If no such duty is recognized, then the alleged rights, in this view, cannot but be hollow. This is seen as posing a tremendous problem for taking human rights to be rights at all. It may be all very nice, so the argument runs, to say that every human being has a right to food or to medicine, but so long as no agency-specific duties have been characterized, these rights cannot really "mean" very much. Human rights, in this understanding, are heartwarming sentiments, but they are also, strictly speaking, incoherent. Thus viewed, these claims are best seen not so much as rights, but as lumps in the throat. I shall call this the *coherence critique*.

The third line of skepticism does not take quite such a legal and institutional form, but views human rights as being in the domain of social ethics. The moral authority of human rights, in this view, is conditional on the nature of acceptable ethics. But are such ethics really universal? What if some cultures do not regard rights as particularly

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\* Excerpted from Amartya Sen, *Development as Freedom*, Chap. 10, pp. 227-48 (2000).

valuable, compared to other prepossessing virtues or qualities? The disputation of the reach of human rights has often come from such cultural critiques; perhaps the most prominent of these is based on the idea of the alleged skepticism of Asian values toward human rights. Human rights, to justify that name, demand universality, but there are no such universal values, the critics claim. I shall call this the *cultural critique*.

### **The Legitimacy Critique**

The legitimacy critique has a long history. It has been aired, in different forms, by many skeptics of rights-based reasoning about ethical issues. There are interesting similarities as well as differences between different variants of this criticism. There is, on the one hand, Karl Marx's insistence that rights cannot really *precede* (rather than follow) the institution of the state. This is spelled out in his combatively forceful pamphlet "On the Jewish Question." There are, on the other hand, the reasons that Jeremy Bentham gave for describing "natural rights" (as mentioned before) as "nonsense" and the concept of "natural and imprescriptible rights" as "nonsense on stilts." But common to these—and many other—lines of critique is an insistence that rights must be seen in postinstitutional terms as instruments, rather than as a prior ethical entitlement. This militates, in a rather fundamental way, against the basic idea of universal human rights.

Certainly, taken as aspiring legal entities, pre-legal moral claims can hardly be seen as giving justiciable rights in courts and other institutions of enforcement. But to reject human rights on this ground is to miss the point of the exercise. The demand for legality is no more than just that—a demand—which is justified by the ethical importance of acknowledging that certain rights are appropriate entitlements of all human beings. In this sense, human rights may stand for claims, powers and immunities (and other forms of warranty associated with the concept of rights) supported by ethical judgments, which attach intrinsic importance to these warranties.

In fact, human rights may also exceed the domain of *potential*, as opposed to *actual*, legal rights. A human right can be effectively invoked in contexts even where its *legal* enforcement would appear to be most inappropriate. The moral right of a wife to participate fully, as an equal, in serious family decisions—no matter how chauvinist her husband is—may be acknowledged by many who would nevertheless not want this requirement to be legalized and enforced by the police. The "right to respect" is another example in which legalization and attempted enforcement would be problematic, even bewildering. Indeed, it is best to see human rights as a set of ethical claims, which must not be identified with legislated legal rights. But this normative interpretation need not obliterate the usefulness of the idea of human rights in the kind of context in which they are typically invoked. The freedoms that are associated with particular rights may be the appropriate focal point for debate. We have to judge the plausibility of human rights as a system of ethical reasoning and as the basis of political demands.

### **The Coherence Critique**

I turn now to the second critique: whether we can coherently talk about rights without specifying whose duty it is to guarantee the fulfillment of the rights. There is indeed a mainstream approach to rights that takes the view that rights can be sensibly formulated only

in combination with correlated duties. A person's right to something must, then, be coupled with another agent's duty to provide the first person with that something. Those who insist on that binary linkage tend to be very critical, in general, of invoking the rhetoric "rights" in "human rights" without exact specification of responsible agents and their duties to bring about the fulfillment of these rights. Demands for human rights are, then, seen just as loose talk. A question that motivates some of this skepticism is: How can we be sure that rights are realizable unless they are matched by corresponding duties? Indeed, some do not see any sense in a right unless it is balanced by what Emmanuel Kant called a "perfect obligation"—a specific duty of a particular agent for the realization of that right.

It is, however, possible to resist the claim that any use of rights except with co-linked perfect obligations must lack cogency. In many legal contexts that claim may indeed have some merit, but in normative discussions rights are often championed as entitlements or power or immunities that it would be good for people to have. Human rights are seen as rights shared by all—irrespective of citizenship—the benefits of which everyone *should* have. While it is not the specific duty of any given individual to make sure that the person has her rights fulfilled, the claims can be generally addressed to all those who are in a position to help. Indeed, Emmanuel Kant himself had characterized such general demands as "imperfect obligations" and had gone on to discuss their relevance for social living. The claims are addressed generally to anyone who can help, even though no particular person or agency may be charged to bring about the fulfillment of the rights involved.

It may of course be the case that rights, thus formulated, sometimes end up unfulfilled. But it is surely possible for us to distinguish between a right that a person has which has not been fulfilled and a right that the person does not have. Ultimately, the ethical assertion of a right goes beyond the value of the corresponding freedom only to the extent that some demands are placed on others that they should try to help. While we may be able to manage well enough with the language of freedom rather than of rights (indeed it is the language of freedom that I have been mainly invoking in *Development as Freedom*), there may sometimes be a good case for suggesting—or demanding—that others help the person to achieve the freedom in question. The language of rights can supplement that of freedom.

### **The Cultural Critique and Asian Values**

The third line of critique is perhaps more engaging, and has certainly received more attention. Is the idea of human rights really so universal? Are there not ethics, such as in the world of Confucian cultures, that tend to focus on discipline rather than on rights, on loyalty rather than on entitlement? Insofar as human rights include claims to political liberty and civil rights, alleged tensions have been identified particularly by some Asian theorists.

The nature of Asian values has often been invoked in recent years to provide justification for authoritarian political arrangements in Asia. These justifications of authoritarianism have typically come not from independent historians but from the authorities themselves (such as governmental officers or their spokesmen) or those close to people in power, but their views are obviously consequential in governing the states and also in influencing the relation between different countries.

Are Asian values opposed—or indifferent—to basic political rights? Such generalizations are often made, but are they well grounded? In fact, generalizations about Asia are not easy, given its size. Asia is where about 60 percent of the total world population live. What can we take to be the values of so vast a region, with such diversity? There are no quintessential values that apply to this immensely large and heterogeneous population, none that separate them out as a group from people in the rest of the world.

Sometimes the advocates of “Asian values” have tended to look primarily at East Asia as the region of particular applicability. The generalization about the contrast between the West and Asia often concentrates on the Land to the east of Thailand, even though there is a more ambitious claim that the rest of Asia is also rather “similar.” For example, Lee Kuan Yew outlines “the fundamental difference between Western concepts of society and government and East Asian concepts” by explaining, “when I say East Asians, I mean Korea, Japan, China, Vietnam, as distinct from Southeast Asia, which is a mix between the Sinic and the Indian, though Indian culture itself emphasizes similar values.”

In fact, however, even East Asia itself has much diversity, and there are many variations to be found among Japan and China and Korea and other parts of East Asia. Various cultural influences from within and outside the region have affected human lives over the history of this rather large territory. These influences still survive in a variety of ways. To illustrate, my copy of Houghton Mifflin’s international *Almanac* describes the religion of the 124 million Japanese in the following way: viz million Shintoist and 93 million Buddhist. Different cultural influences still color aspects of the identity of the contemporary Japanese, and the same person can be *both* Shintoist and Buddhist.

Cultures and traditions overlap over regions such as East Asia and even within countries such as Japan or China or Korea, and attempts at generalization about “Asian values” (with forceful—and often brutal—implications for masses of people in this region with diverse faiths, convictions and commitments) cannot but be extremely crude. Even the 2.8 million people of Singapore have vast variations of cultural and historical traditions. Indeed, Singapore has an admirable record in fostering intercommunity amity and friendly coexistence.

### **The Contemporary West and Claims To Uniqueness**

Authoritarian lines of reasoning in Asia—and more generally in non-Western societies—often receive indirect backing from modes of thought in the West itself. There is clearly a tendency in America and Europe to assume, if only implicitly, the primacy of political freedom and democracy as a fundamental and ancient feature of Western culture—one not to be easily found in Asia. It is, as it were, a contrast between the authoritarianism allegedly implicit in, say Confucianism vis-à-vis the respect for individual liberty and autonomy allegedly deeply rooted in Western liberal culture. Western promoters of personal and political liberty in the non-Western world often see this as bringing Occidental values to Asia and Africa. The world is invited to join the club of “Western democracy” and to admire and endorse traditional “Western values.”

In all this, there is a substantial tendency to extrapolate *backward* from the present. Values that European Enlightenment and other relatively recent developments have made

common and widespread cannot really be seen as part of the long-run Western heritage—experienced in the West over millennia. What we do find in the writings by particular Western classical authors (for example, Aristotle) is support for selected *components* of the comprehensive notion that makes up the contemporary idea of political liberty. But support for such components can be found in many writings in Asian traditions as well.

To illustrate this point, consider the idea that personal freedom for all is important for a good society. This claim can be seen as being composed of two distinct components, to wit, (1) *the value of personal freedom*: that personal freedom is important and should be guaranteed for those who “matter” in a good society, and (2) *equality of freedom*: everyone matters and the freedom that is guaranteed for one must be guaranteed for all. The two together entail that personal freedom should be guaranteed, on a shared basis, for all. Aristotle wrote much in support of the former proposition, but in his exclusion of women and slaves did little to defend the latter. Indeed, the championing of equality in this form is of quite recent origin. Even in a society stratified according to class and caste, freedom could be seen to be of great value for the privileged few (such as the Mandarins or the Brahmins), in much the same way freedom is valued for nonslave men in corresponding Greek conceptions of a good society.

Another useful distinction is between (i) *the value of toleration*: that there must be toleration of diverse beliefs, commitments, and actions of different people; and (a) *equality of tolerance*: the toleration that is offered to some must be reasonably offered to all (except when tolerance of some will lead to intolerance for others). Again, arguments for some tolerance can be seen plentifully in earlier Western writings, without that tolerance being supplemented by equality of tolerance. The roots of modern democratic and liberal ideas can be sought in terms of *constitutive* elements, rather than as a whole.

In doing a comparative scrutiny, the question has to be asked whether these constitutive components can be seen in Asian writings in the way they can be found in Western thought. The presence of these components must not be confused with the absence of the opposite, viz., of ideas and doctrines that clearly *do not* emphasize freedom and tolerance. Championing of order and discipline can be found in Western classics as well. Indeed, it is by no means clear to me that Confucius is more authoritarian in this respect than, say, Plato or St. Augustine. The real issue is not whether these nonfreedom perspectives are *present* in Asian traditions, but whether the freedom-oriented perspectives are *absent* there.

This is where the diversity of Asian value systems—which incorporates but transcends regional diversity—becomes quite central. An obvious example is the role of Buddhism as a form of thought. In Buddhist tradition, great importance is attached to freedom, and the part of the earlier Indian theorizing to which Buddhist thoughts relate has much room for volition and free choice. Nobility of conduct has to be achieved in freedom, and even the ideas of liberation (such as *moksha*) have this feature. The presence of these elements in Buddhist thought does not obliterate the importance for Asia of ordered discipline emphasized by Confucianism, but it would be a mistake to take Confucianism to be the only tradition in Asia—indeed even in China. Since so much of the contemporary authoritarian interpretation of Asian values concentrates on Confucianism, this diversity is particularly worth emphasizing.

### **Interpretations of Confucius**

Indeed, the reading of Confucianism that is now standard among authoritarian champions of Asian values does less than justice to the variety within Confucius's own teachings. Confucius did not recommend blind allegiance to the state. When Zilu asks him "how to serve a prince," Confucius replies, "Tell him the truth even if it offends him." Those in charge of censorship in Singapore or Beijing might take a very different view. Confucius is not averse to practical caution and tact, but does not forgo the recommendation to oppose a bad government. "When the [good] way prevails in the state, speak boldly and act boldly. When the state has lost the way, act boldly and speak softly."

Indeed, Confucius provides a clear pointer to the fact that the two pillars of the imagined edifice of Asian values, namely loyalty to family and obedience to the state, can be in severe conflict with each other. Many advocates of the power of "Asian values" see the role of the state as an extension of the role of the family, but as Confucius noted, there can be tension between the two. The Governor of She told Confucius, "Among my people, there is a man of unbending integrity: when his father stole a sheep, he denounced him." To this Confucius replied, "Among my people, men of integrity do things differently: a father covers up for his son, a son covers up for his father—and there is integrity in what they do."

### **Ashoka and Kautilya**

Confucius's ideas were altogether more complex and sophisticated than the maxims that are frequently championed in his name. There is also a tendency to neglect other authors in the Chinese culture and to ignore other Asian cultures. If we turn to Indian traditions, we can, in fact, find a variety of views on freedom, tolerance, and equality. In many ways, the most interesting articulation of the need for tolerance on an egalitarian basis can be found in the writings of Emperor Ashoka, who in the third century B.C. commanded a larger Indian empire than any other Indian king (including the Mughals, and even the Raj, if we leave out the native states that the British let be). He turned his attention to public ethics and enlightened politics in a big way after being horrified by the carnage he saw in his own victorious battle against the kingdom of Kalinga (what is now Orissa). He converted to Buddhism, and not only helped to make it a world religion by sending emissaries abroad with the Buddhist message to east and west, but also covered the country with stone inscriptions describing forms of good life and the nature of good government.

The inscriptions give a special importance to tolerance of diversity. For example, the edict (now numbered XII) at Erragudi puts the issue thus:

... a man must not do reverence to his own sect or disparage that of another man without reason. Depreciation should be for specific reason only, because the sects of other people all deserve reverence for one reason or another.

By thus acting, a man exalts his own sect, and at the same time does service to the sects of other people. By acting contrariwise, a man hurts his own sect, and does disservice to the sects of other people. For he who does reverence to his

own sect while disparaging the sects of others wholly from attachment to his own, with intent to enhance the splendour of his own sect, in reality by such conduct inflicts the severest injury on his own sect.'

The importance of tolerance is emphasized in these edicts from the third century B.C., both for public policy by the government and as advice for behavior of citizens to one another.

On the domain and coverage of tolerance, Ashoka was a universalist, and demanded this for all, including those whom he described as "forest people," the tribal population living in pre-agricultural economic formations. Ashoka's championing of egalitarian and universal tolerance may appear un-Asian to some commentators, but his views are firmly rooted in lines of analysis already in vogue in intellectual circles in India in the preceding centuries.

It is, however, interesting to look in this context at another Indian author whose treatise on governance and political economy was also profoundly influential and important. I refer to Kautilya, the author of *Arthashastra*, which can be translated as "the economic science," though it is at least as much concerned with practical politics as with economics. Kautilya was a contemporary of Aristotle, in the fourth century B.C., and worked as a senior minister of Emperor Chandragupta Maurya, Emperor Ashoka's grandfather, who had established the large Maurya empire across the subcontinent.

Kautilya's writings are often cited as a proof that freedom and tolerance were not valued in the Indian classical tradition. There are two aspects of the impressively detailed account of economics and politics to be found in *Arthashastra* that might tend to suggest such a diagnosis. First, Kautilya is a consequentialist of quite a narrow kind. While the objectives of promoting happiness of the subjects and order in the kingdom are strongly backed up by detailed policy advice, the king is seen as a benevolent autocrat, whose power, admittedly to do good, is to be maximized through good organization. Thus, *Arthashastra*, on the one hand, presents penetrating ideas and suggestions on such practical subjects as famine prevention and administrative effectiveness that remain relevant even today (more than two thousand years later), and yet, on the other hand, its author is ready to advise the king about how to get his way, if necessary, through violating the freedom of his opponents and adversaries.

Second, Kautilya seems to attach little importance to political or economic equality, and his vision of good society is strongly stratified according to lines of class and caste. Even though the objective of promoting happiness, which is given an exalted position in the hierarchy of values, applies to all, the other objectives are clearly inegalitarian in form and content. There is the obligation to provide the less fortunate members of the society the support that they need for escaping misery and enjoying life, and Kautilya specifically identifies as the duty of the king to "provide the orphans, the aged, the infirm, the afflicted, and the helpless with maintenance," along with providing "subsistence to helpless women when they are carrying and also to the [newborn] children they give birth to." But that obligation to support is very far from the valuing of these people's freedom to decide how to live—the tolerance of heterodoxy.

What, then, do we conclude from this? Certainly Kautilya is no democrat, no egalitarian, no general promoter of everyone's freedom. And yet, when it comes to characterizing what

the most favored people—the upper classes—should get, freedom figures quite prominently. Denying personal liberty to the upper classes (the so-called Arya) is seen as unacceptable. Indeed, regular penalties, some of which are heavy, are specified for the taking of such adults or children in indenture, even though the slavery of the existing slaves is seen as perfectly acceptable. To be sure, we do not find in Kautilya anything like the clear articulation that Aristotle provides of the importance of free exercise of capability. But the focusing on freedom is clear enough in Kautilya as far as the upper classes are concerned. It contrasts with the governmental duties to the lower orders, which take the paternalistic form of public attention and state assistance for the avoidance of acute deprivation and misery. However, insofar as a view of a good life emerges in all this, it is one that is entirely consistent with a freedom-valuing ethical system. The domain of that concern is, to be sure, confined to the upper groups of society, but this is not radically different from the Greek concern with free men as opposed to slaves or women. In respect to coverage, Kautilya differs from the universalist Ashoka, but not entirely from the particularist Aristotle.

### **Islamic Tolerance**

I have been discussing in some detail the political ideas and practical reason presented by two forceful, but very different, expositions in India respectively in the fourth and the third century B.C., because their ideas in turn have influenced later Indian writings. But we can look at many other authors as well. Among powerful expositors and practitioners of tolerance of diversity in India must of course be counted the great Moghul emperor Akbar, who reigned between 1556 and 1605. Again, we are not dealing with a democrat, but with a powerful king who emphasized the acceptability of diverse forms of social and religious behavior, and who accepted human rights of various kinds, including freedom of worship and religious practice, that would not have been so easily tolerated in parts of Europe in Akbar's time.

For example, as the year 1000 in the Muslim Hejira calendar was reached in 1591—1592., there was some excitement about it in Delhi and Agra (not unlike what is happening right now as the year 2000 in the Christian calendar approaches). Akbar issued various enactments at this juncture of history and these focused, *inter alia*, on religious tolerance, including the following:

No man should be interfered with on account of religion, and anyone [is] to be allowed to go over to a religion he pleased.

If a Hindu, when a child or otherwise, had been made a Muslim against his will, he is to be allowed, if he pleased, to go back to the religion of his fathers.

Again, the domain of tolerance, while religion-neutral, was not universal in other respects, including in terms of gender equality, or equality between younger and older people. The enactment went on to argue for the forcible repatriation of a young Hindu woman to her father's family if she had abandoned it in pursuit of a Muslim lover. In the choice between supporting the young lovers and the young woman's Hindu father, old Akbar's sympathies are entirely with the father. Tolerance and equality at one level are combined with intolerance and inequality at another level, but the extent of general tolerance on matters of belief and practice is quite remarkable. It may not be irrelevant to note in this context, especially in the



light of the hard sell of “Western liberalism,” that while Akbar was making these pronouncements, the Inquisitions were in full bloom in Europe.

Because of the experience of contemporary political battles, especially in the Middle East, Islamic civilization is often portrayed as being fundamentally intolerant and hostile to individual freedom. But the presence of diversity and variety *within* a tradition applies very much to Islam as well. In India, Akbar and most of the other Moghuls provide good examples of both theory and practice of political and religious tolerance. Similar examples can be found in other parts of the Islamic culture. The Turkish emperors were often more tolerant than their European contemporaries. Abundant examples of this can be found also in Cairo and Baghdad. Indeed, even the great Jewish scholar Maimonides, in the twelfth century, had to run away from an intolerant Europe (where he was born) and from its persecution of Jews, to the security of a tolerant and urbane Cairo and the patronage of Sultan Saladin.

Similarly, Alberuni, the Iranian mathematician, who wrote the first general book on India in the early eleventh century (aside from translating Indian mathematical treatises into Arabic), was among the earliest of anthropological theorists in the world. He noted—and protested against—the fact that “depreciation of foreigners . . . is common to all nations towards each other.” He devoted much of his life to fostering mutual understanding and tolerance in his eleventh century world.

It is easy to multiply examples. The point to be seized is that the modern advocates of the authoritarian view of “Asian values” base their reading on very arbitrary interpretations and extremely narrow selections of authors and traditions. The valuing of freedom is not confined to one culture only, and the Western traditions are not the only ones that prepare us for a freedom-based approach to social understanding.

### **Globalization: Economics, Culture And Rights**

The issue of democracy also has a close bearing on another cultural matter that has received some justified attention recently. This concerns the overwhelming power of Western culture and lifestyle in undermining traditional modes of living and social mores. For anyone concerned about the value of tradition and of indigenous cultural modes this is indeed a serious threat.

The contemporary world is dominated by the West, and even though the imperial authority of the erstwhile rulers of the world has declined, the dominance of the West remains as strong as ever—in some ways stronger than before, especially in cultural matters. The sun does not set on the empire of Coca-Cola or MTV.

The threat to native cultures in the globalizing world of today is, to a considerable extent, inescapable. The one solution that is not available is that of stopping globalization of trade and economies, since the forces of economic exchange and division of labor are hard to resist in a competitive world fueled by massive technological evolution that gives modern technology an economically competitive edge.

This is a problem, but not just a problem, since global trade and commerce can bring with it—as Adam Smith foresaw—greater economic prosperity for each nation. But there can be losers as well as gainers, even if in the net the aggregate figures move up rather than down. In

the context of economic disparities, the appropriate response has to include concerted efforts to make the form of globalization less destructive of employment and traditional livelihood, and to achieve gradual transition. For smoothing the process of transition, there also have to be opportunities for retraining and acquiring of new skills (for people who would otherwise be displaced), in addition to providing social safety nets (in the form of social security and other supportive arrangements) for those whose interests are harmed—at least in the short run—by the globalizing changes.

This class of responses will to some extent work for the cultural side as well. Skill in computer use and the harvesting of Internet and similar facilities transform not only economic possibilities, but also the lives of the people influenced by such technical change. Again, this is not necessarily regrettable. There remain, however, two problems—one shared with the world of economics and another quite different.

First, the world of modern communication and interchange requires basic education and training. While some poor countries in the world have made excellent progress in this area (countries in East Asia and Southeast Asia are good examples of that), others (such as those in South Asia and Africa) have tended to lag behind. Equity in cultural as well as economic opportunities can be profoundly important in a globalizing world. This is a shared challenge for the economic and the cultural world.

The second issue is quite different and distances the cultural problem from the economic predicament. When an economic adjustment takes place, few tears are shed for the superseded methods of production and for the overtaken technology. There may be some nostalgia for specialized and elegant objects (such as an ancient steam engine or an old-fashioned clock), but in general old and discarded machinery is not particularly wanted. In the case of culture, however, lost traditions may be greatly missed. The demise of old ways of living can cause anguish, and a deep sense of loss. It is a little like the extinction of older species of animals. The elimination of old species in favor of “fitter” species that are “better” able to cope and multiply can be a source of regret, and the fact that the new species are “better” in the Darwinian system of comparison need not be seen as consolation enough.

This is an issue of some seriousness, but it is up to the society to determine what, if anything, it wants to do to preserve old forms of living, perhaps even at significant economic cost. Ways of life can be preserved if the society decides to do just that, and it is a question of balancing the costs of such preservation with the value that the society attaches to the objects and the lifestyles preserved. There is, of course, no ready formula for this cost-benefit analysis, but what is crucial for a rational assessment of such choices is the ability of the people to participate in public discussions on the subject. We come back again to the perspective of capabilities: that different sections of the society (and not just the socially privileged) should be able to be active in the decisions regarding what to preserve and what to let go. There is no compulsion to preserve every departing lifestyle even at heavy cost, but there is a real need—for social justice—for people to be able to take part in these social decisions, if they so choose. This gives further reason for attaching importance to such elementary capabilities as reading and writing (through basic education), being well informed and well briefed (through free media), and having realistic chances of participating freely

(through elections, referendums and the general use of civil rights). Human rights in the broadest sense are involved in this exercise as well.

### **Cultural Interchange and Pervasive Interdependence**

On top of these basic recognitions, it is also necessary to note the fact that cross-cultural communication and appreciation need not necessarily be matters of shame and disgrace. We do have the capacity to enjoy things that have originated elsewhere, and cultural nationalism or chauvinism can be seriously debilitating as an approach to living. Rabindranath Tagore, the great Bengali poet, commented on this issue rather eloquently:

Whatever we understand and enjoy in human products instantly becomes ours, wherever they might have their origin. I am proud of my humanity when I can acknowledge the poets and artists of other countries as my own. Let me feel with unalloyed gladness that all the great glories of man are mine.

While there is some danger in ignoring uniqueness of cultures, there is also the possibility of being deceived by the presumption of ubiquitous insularity.

It is indeed possible to argue that there are more interrelations and more cross-cultural influences in the world than is typically acknowledged by those alarmed by the prospect of cultural subversion. The culturally fearful often take a very fragile view of each culture and tend to underestimate our ability to learn from elsewhere without being overwhelmed by that experience. Indeed, the rhetoric of “national tradition” can help to hide the history of outside influences on the different traditions. For example, chili may be a central part of Indian cooking as we understand it (some even see it as something of a “signature tune” of Indian cooking), but it is also a fact that chili was unknown in India until the Portuguese brought it there only a few centuries ago. (Ancient Indian culinary art used pepper, but no chili.) Today’s Indian curries are no less “Indian” for this reason.

Nor is there anything particularly shady in the fact that—given the blustering popularity of Indian food in contemporary Britain—the British Tourist Board describes curry as authentic “British fare.” A couple of summers ago I even encountered in London a marvelous description of a person’s incurable “Englishness”: she was, we were informed, “as English as daffodils or chicken tikka masala.”

The image of regional self-sufficiency in cultural matters is deeply misleading, and the value of keeping traditions pure and unpolluted is hard to sustain. Sometimes the intellectual influences from abroad may be more roundabout and many-sided. For example, some chauvinists in India have complained about the use of “Western” terminology in school curriculum, for example in modern mathematics. But the interrelations in the world of mathematics make it hard to know what is “Western” and what is not. To illustrate, consider the term “sine” used in trigonometry, which came to India straight through the British, and yet in its genesis there is a remarkable Indian component. Aryabhata, the great Indian mathematician of the fifth century, had discussed the concept of “sine” in his work, and had called it, in Sanskrit, *jya-ardha* (“half-chord”). From there the term moved on in an interesting migratory way, as Howard Eves describes:

Aryabhata called it *ardha-jya* (“half-chord”) and *jya-ardha* (“chord-half”), and then abbreviated the term by simply using *jya* (“chord”). From *jya* the Arabs phonetically derived *jiba*, which, following Arabic practice of omitting vowels, was written as *jb*. Now *jiba*, aside from its technical significance, is a meaningless word in Arabic. Later writers who came across *jb* as an abbreviation for the meaningless word *jiba* substituted *jaib* instead, which contains the same letters, and is a good Arabic word meaning “cove” or “bay.” Still later, Gherardo of Cremona (ca. 1150), when he made his translations from the Arabic, replaced the Arabian *jaib* by its Latin equivalent, *sinus* [meaning a cove or a bay], from whence came our present word *sine*.

My point is not at all to argue against the unique importance of each culture, but rather to plead in favor of the need for some sophistication in understanding cross-cultural influences as well as our basic capability to enjoy products of other cultures and other lands. We must not lose our ability to understand one another and to enjoy the cultural products of different countries in the passionate advocacy of conservation and purity.

### **Universalist Presumptions**

Before closing this chapter I must also consider a further issue related to the question of cultural separatism, given the general approach of this book. It will not have escaped the reader that this book is informed by a belief in the ability of different people from different cultures to share many common values and to agree on some common commitments. Indeed, the overriding value of freedom as the organizing principle of this work has this feature of a strong universalist presumption.

The claim that “Asian values” are particularly indifferent to freedom, or that attaching importance to freedom is quintessentially a “Western” value, has been disputed already, earlier on in this chapter. The point, however, is sometimes made that the tolerance of heterodoxy in matters of religion, in particular, is historically a very special “Western” phenomenon. When I published a paper in an American magazine disputing the authoritarian interpretation of “Asian values” (“Human Rights and Asian Values,” *The New Republic*, July 14 and 21, 1997), the responses that I got typically included some support for my disputation of the alleged specialness of “Asian values” (as being generally authoritarian), but then they went on to argue that the West, on the other hand, was really quite special—in terms of tolerance.

It was claimed that the tolerance of *religious* skepticism and heterodoxy was a specifically “Western” virtue. One commentator proceeded to outline his understanding that “Western tradition” is absolutely unique in its “acceptance of religious tolerance at a sufficient level that even atheism is permitted as a principled rejection of beliefs.” The commentator is certainly right to claim that religious tolerance, including the tolerance of skepticism and atheism, is a central aspect of social freedom (as John Stuart Mill also explained persuasively). The disputant went on to remark: “Where in Asian history, one asks, can Amartya Sen find anything equivalent to this remarkable history of skepticism, atheism and free thought?”

This is indeed a fine question, but the answer is not hard to find. In fact, there is some embarrassment of riches in deciding which part of Asian history to concentrate on, since the answer could come from many different components of that history. For example, in the context of India in particular one could point to the importance of the atheistic schools of Carvaka and Lokayata, which originated well before the Christian era, and produced a durable, influential and vast atheistic literature. Aside from intellectual documents arguing for atheistic beliefs, heterodox views can be found in many orthodox documents as well. Indeed, even the ancient epic *Ramayana*, which is often cited by Hindu political activists as the holy book of the divine Rama's life, contains sharply dissenting views. For example, the *Ramayana* relates the occasion when Rama is lectured by a worldly pundit called Javali on the folly of religious beliefs: "O Rama, be wise, there exists no world but this, that is certain! Enjoy that which is present and cast behind thee that which is unpleasant." It is also relevant to reflect on the fact that the only world religion that is firmly agnostic, viz., Buddhism, is Asian in origin. Indeed, it originated in India in the sixth century B.C., around the time when the atheistic writings of the Carvaka and Lokayata schools were particularly active. Even the Upanishads (a significant component of the Hindu scriptures that originated a little earlier—from which I have already quoted in citing Maitreyee's question) discussed, with evident respect, the view that thought and intelligence are the results of material conditions in the body, and "when they are destroyed," that is, "after death," "no intelligence remains." Skeptical schools of thought survived in Indian intellectual circles over the millennia, and even as late as the fourteenth century, Madhava Acarya (himself a good Vaishnavite Hindu), in his classic book called *Sarvadarsana samgraha* ("Collection of All Philosophies"), devoted the entire first chapter to a serious presentation of the arguments of the Indian atheistic schools. Religious skepticism and its tolerance are not uniquely Western as a phenomenon.

References were made earlier to tolerance in general in Asian cultures (such as the Arabic, the Chinese and the Indian), and religious tolerance is a part of it, as the examples cited bring out. Examples of violations—often *extreme* violations—of tolerance are not hard to find in any culture (from medieval inquisitions to modern concentration camps in the West, and from religious slaughter to the victimizing oppression of the Taliban in the East), but voices have been persistently raised in favor of freedom—in different forms—in distinct and distant cultures. If the universalist presumptions of this book, particularly in valuing the importance of freedom, are to be rejected, the grounds for rejection must lie elsewhere.

### **A Concluding Remark**

The case *for* basic freedoms and for the associated formulations in terms of rights rests on:

- 1) their *intrinsic* importance;
- 2) their *consequential* role in providing political incentives for economic security;
- 3) their *constructive* role in the genesis of values and priorities.

The case is no different in Asia than it is anywhere else, and the dismissal of this claim on the ground of the special nature of Asian values does not survive critical scrutiny.

As it happens, the view that Asian values are quintessentially authoritarian has tended to come, in Asia, almost exclusively from spokesmen of those in power (sometimes supplemented—and reinforced—by Western statements demanding that people endorse what are seen as specifically “Western liberal values”). But foreign ministers, or government officials, or religious leaders, do not have a monopoly in interpreting local culture and values. It is important to listen to the voices of dissent in each society. Aung San Suu Kyi has no less legitimacy—indeed clearly has rather more—in interpreting what the Burmese want than have the military rulers of Myanmar, whose candidates she had defeated in open elections before being put in jail by the defeated military junta.

The recognition of diversity within different cultures is extremely important in the contemporary world. Our understanding of the presence of diversity tends to be somewhat undermined by constant bombardment with oversimple generalizations about “Western civilization,” “Asian values,” “African cultures” and so on. Many of these readings of history and civilization are not only intellectually shallow, they also add to the divisiveness of the world in which we live. The fact is that in any culture, people seem to like to argue with one another, and frequently do exactly that—given the chance. The presence of dissidents makes it problematic to take an unambiguous view of the “true nature” of local values. In fact, dissidents tend to exist in every society—often quite plentifully—and they are frequently willing to take very great risks regarding their own security. Indeed, had the dissidents not been so tenaciously present, authoritarian polities would not have had to undertake such repressive measures in practice, to supplement their intolerant beliefs. The presence of dissidents *tempts* the authoritarian ruling groups to take a repressive view of local culture and, at the same time, that presence itself *undermines* the intellectual basis of such univocal interpretation of local beliefs as homogenous thought.

Western discussion of non-Western societies is often too respectful of authority—the governor, the minister, the military junta, the religious leader. This “authoritarian bias” receives support from the fact that Western countries themselves are often represented, in international gatherings, by governmental officials and spokesmen, and they in turn seek the views of their opposite numbers from other countries. An adequate approach of development cannot really be so centered only on those in power. The reach has to be broader, and the need for popular participation is not just sanctimonious rubbish. Indeed, the idea of development cannot be dissociated from it.

As far as the authoritarian claims about “Asian values” are concerned, it has to be recognized that values that have been championed in the past of Asian countries—in East Asia as well as elsewhere in Asia—include an enormous variety. Indeed, in many ways they are similar to substantial variations that are often seen in the history of ideas in the West also. To see Asian history in terms of a narrow category of authoritarian values does little justice to the rich varieties of thought in Asian intellectual traditions. Dubious history does nothing to vindicate dubious politics.

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## *Liability*<sup>1</sup>

### **The Nature and Kinds of Liability**

He who commits a wrong is said to be liable or responsible for it. Liability or responsibility is the bond of necessity that exists between the wrongdoer and the remedy of the wrong. Where the remedy is a civil one, the party wronged has a right to demand the redress allowed by law, and the wrongdoer has a duty to comply with this demand. In the case of a criminal remedy the wrongdoer is under a duty to pay such penalty as the law through the agency of the courts prescribes.

The purpose of this chapter, and of the two which follow it, is to consider the general theory of liability. We shall investigate the leading principles which determine the existence, the incidence, and the measures of responsibility for wrongdoing. The special rules which relate exclusively to particular kinds of wrongs will be disregarded.

Liability is in the first place either civil or criminal, and in the second place either remedial or penal. The nature of these distinctions has been already sufficiently considered in a previous chapter on the Administration of Justice. Here it need only be recalled that in the case of penal liability the purpose of the law, direct or ulterior, is or includes the punishment of a wrongdoer; in the case of remedial liability, the law has no such purpose at all, its sole intent being the enforcement of the plaintiff's right, and the idea of punishment being wholly irrelevant. The liability of a borrower to repay the money borrowed by him is remedial; that of the publisher of a libel to be imprisoned, or to pay damages to the person injured by him, is penal. All criminal liability is penal; civil liability, on the other hand, is sometimes penal and sometimes remedial.

### **The theory of remedial liability**

The theory of remedial liability presents little difficulty. It might seem at first sight that, whenever the law creates a duty it should enforce the specific fulfillment of it. There are, however, several cases where, for various reasons, duties are not specifically enforced. They may be classified as follows:-

1. In the first place, there are duties of imperfect obligation—duties the breach of which gives no cause of action, and creates no liability at all, either civil or criminal, penal or remedial. A debt barred by the status of limitations is a legal debt, but the payment of it cannot be compelled by any legal proceedings.

2. Secondly, there are many duties which from their nature cannot be specifically enforced after having once been broken. When a libel has already been published, or an assault has already been committed, it is too late to compel the wrongdoer to perform his duty of refraining from such acts. Wrongs of this description may be termed transitory; once committed they belong to the irrevocable past. Others, however, are continuing; for example, the non-payment of a debt, the commission of a nuisance, or the detention of another's

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<sup>1</sup> P.J. Fitzgerald, *Salmond on Jurisprudence* 349-394 (12<sup>th</sup> ed., 1966).

property. In such cases the duty violated is in its nature capable of specific enforcement, notwithstanding the violation of it.

3. In the third place, even when the specific enforcement of a duty is possible, it may be, or be deemed to be, more expedient to deal with it solely through the criminal law, or through the creation and enforcement of a substitutive sanctioning duty of pecuniary compensation. It is only in special cases, for example, that the law will compel the specific performance of a contract, instead of the payment of damages for the breach of it.

### **The theory of penal liability**

We now proceed to the main subject of our inquiry, namely, the general principles of penal liability. We have to consider the legal theory of punishment, in its application both to the criminal law and to those portions of the civil law in which the idea of punishment is relevant and operative. We have already, in a former chapter, dealt with the purposes of punishment, and we there saw that either its end is the protection of society or else that punishment is looked on as an end in itself. We further saw that the aim of protecting society is sought to be achieved by deterrence, prevention and reformation. Of these three methods the first, deterrence, is usually regarded as the primary function of punishment, the others being merely secondary. In our present investigation, therefore, we shall confine our attention to punishment as deterrent. The inquiry will fall into three divisions, relating (1) to the conditions, (2) to the incidence, and (3) to the measure of penal liability.

The general conditions of penal liability are indicated with sufficient accuracy in the legal maxim, *Actus non facit reum, nisi mens sit rea* – The act alone does not amount to guilt; it must be accompanied by a guilty mind. That is to say, there are two conditions to be fulfilled before penal responsibility can rightly be imposed. The one is the doing of some *act* by the person to be held liable. A man is to be accounted responsible only for what he himself does, not for what other persons do, or for events independent of human activity altogether. The other is the *mens rea* or guilty mind with which the act is done. It is not enough that a man has done some act which on account of its mischievous results the law prohibits; before the law can justly punish the act, an inquiry must be made into the mental attitude of the doer. For although the act may have been objectively wrongful, the mind and will of the doer may have been innocent.

Generally speaking, a man is penally responsible only for those wrongful acts which he does either wilfully or recklessly. Then and only then is the *actus* accompanied by the *mens rea*. But this generalisation is subject to two qualifications. First, the criminal law may include provisions penalising mere negligence, even though this may result simply from inadvertence. Secondly, the law may create offences of strict liability, where guilt may exist without intention, recklessness or even negligence. Where neither *mens rea* nor inadvertent negligence is present, punishment is generally unjustifiable. Hence inevitable accident or mistake – the absence both of wrongful intention or recklessness and of culpable negligence – is in general a sufficient ground of exemption from penal responsibility. *Impunitus est*, said the Romans, *qui sine culpa et dolo malo casu quodam damnum committit*.

We shall consider these conditions of liability, analysing, first, the conception of an act, and, secondly, that of *mens rea* in its forms of intention, recklessness and negligence.



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**Acts**

The term act is not capable of being defined with any great precision, since in ordinary language it is used at different times to point different contrasts. Acts may be contrasted with natural occurrences, with thoughts, with omissions or with involuntary behaviour. And in any rational system of law we shall expect to find liability attaching to the act rather than to its opposite. We shall not expect to find a man held liable for gales, thunderstorms and other natural phenomena beyond human control. Nor shall we expect to see him held liable for his thoughts and intentions, which are by themselves harmless, hard to prove and difficult to discipline.

Omissions, on the other hand, may attract liability. An omission consists in not performing an act which is expected of you either because you normally do it or because you ought to do it, and it is the latter type of omission with which the law is concerned. But while omissions incur legal liability where there is a duty to act, such a duty will in most legal systems be the exception rather than the rule, for it would be unduly oppressive and restrictive to subject men to a multiplicity of duties to perform positive acts. It is for this reason that rights in *rem*, which are rights against everyone, are negative and correspond to duties not to do something rather than to duties to confer positive benefits on the holder of such rights.

The most important distinction for legal purposes, however, is that between voluntary and involuntary acts. Examples of the latter are (1) activities outside normal human control, *e.g.*, the beating of one's heart; (2) automatic reflexes, such as sneezes and twitches, which, though normally spontaneous, can sometimes with difficulty be controlled; and (3) acts performed by persons suffering from some abnormal conditions, *e.g.*, acts done in sleep, under hypnosis or in the course of a fit of automatism. In so far as a man cannot help committing acts in these categories, it would be unjust and unreasonable that he should be penalised for them; and in common law such a man would normally be regarded as not having committed the *actus reus* of an offence. Since the majority of these involuntary acts [*e.g.*, those in categories (1) and (2) are harmless while the rest (*e.g.*, those in category (3)) are rare, the law relating to them is relatively undeveloped. Difficulty arises, however, where a man performs some dangerous act which is involuntary but which he might have avoided committing if he had not allowed himself to fall into such a condition as to be liable to behave in this involuntary way. On the other hand there is no *actus reus* for which to hold him liable but on the other hand he ought to be held responsible for the state into which he permitted himself to fall. What is needed is a general provision to the effect that the involuntariness of the defendant's behaviour shall constitute a defence to a criminal charge unless it is the result of previous deliberate or negligent conduct on his part.

Now one attempt to provide an account of what distinguishes voluntary from involuntary acts is made by the theory which regards an act as being divisible into (1) a willed muscular contraction, (2) its circumstances, and (3) its consequences. In its true sense a voluntary act is said to consist in a willed muscular contraction, which incurs moral or legal liability only by virtue of the circumstances in which it is committed or the consequences which it produces. An involuntary act is regarded therefore as one where the muscular contraction is not willed, its involuntariness consisting precisely in this absence of willing.

This theory, however, creates more difficulties than it solves. In the first place, it rests on dubious psychology. If we consider and examine ordinary examples of what are usually described as acts, we shall fail to find evidence of anything in the nature of a prior act of willing or of desiring either the muscular contraction or its consequences. Abnormal cases, where people find themselves unable to perform actions, contracting his muscles and so on, but the important thing to remember is that these are abnormal cases; we cannot necessarily infer that what occurs in the abnormal must also occur in the normal instance.

Secondly, the theory is utterly inappropriate for the problem of omissions. These negative acts can be either voluntary or involuntary. I may fail to perform an act required by law through forgetfulness or by design; for example I may just forget to make a return of income to the tax authorities, or I may refuse to do so. Alternatively, my failure to carry out my legal duty may result from some condition which prevents me: I may fail to rescue my child from danger because I have fallen asleep or because I am suffering from a fit of epileptic automatism. But in neither case is there any question of muscular contractions; and consequently we cannot contend that the difference between the two kinds of omissions is that a muscular contraction was willed in the first case and unwilled in the second.

The different kinds of involuntary behaviour are indeed linked by a common feature, but this consists not in the absence of an actual exercise of will but in the lack of ability to control one's behaviour. If I just forget to file a return of income, my omission will not qualify as involuntary because I could have filed a return had I remembered. We may say then that involuntary acts are those where the actor lacks the power to control his actions, and involuntary omissions are those where the actor's lack of power control his actions renders him unable to do the act required.

Thirdly, and quite apart from failing to explain the nature of the difference between voluntary and involuntary behaviour, the theory imposes on the meaning of the term *act* a limitation which seems no less inadmissible in law than contrary to the common usage of speech. We habitually include all material and relevant circumstances and consequences under the name of the act. The act of the murderer is the shooting or poisoning of his victim, not merely the muscular contractions by which this result is effected. To trespass on another man's land is a wrongful act, but the act includes the circumstances that the land belongs to another man, no less than the bodily movements by which the trespasser enters upon it. An act has no *natural* boundaries, any more than an event or place has. Its limits must be artificially defined for the purpose in hand for the time being. It is for the law to determine, in each particular case, what circumstances and what consequences shall be counted within the compass of the act with which it is concerned. To ask what act a man has done is like asking in what place he lives.

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**Two classes of wrongful acts**

Every wrong is an act which is mischievous in the eye of the law – an act to which the law attributes harmful consequences. These consequences, however, are of two kinds, being either actual or merely anticipated. In other words, an act may be mischievous in two ways – either in its actual results or in its tendencies. Hence it is that legal wrongs are of two kinds. The first consists of those in which the act is wrongful only by reason of accomplished harm which in fact ensues from it. The second consists of those in which the act is wrongful by reason of its mischievous tendencies, as recognised by the law, irrespective of the actual issue. In the first case there is no wrong or cause of action without proof of actual damage; in the second case it is sufficient to prove the act itself, even though in the event no harm has followed it.

For example, if A breaks his contract with B, it is not necessary for B to prove that he was thereby disappointed in his reasonable expectations, or otherwise suffered actual loss, for the law takes notice of the fact that breach of contract is an act of mischievous tendency, and therefore treats it as wrongful irrespective of the actual issue. The loss, if any, incurred by B is relevant to the measure of damages, but not to the existence of a cause of action. So if I walk across another man's field, or publish a libel upon him, I am responsible for the act without any proof of actual harm resulting from it. For trespass and libel belong to the class of acts which are judged wrongful in respect of their tendencies, and not merely in respect of their results. In other cases, on the contrary, actual damage is essential to the cause of action. Slander, for example, is in general not actionable without proof of some loss sustained by the plaintiff, although libel is actionable *per se*. So if by negligent driving I expose others to the risk of being run over, I am not deemed guilty of any civil wrong until an accident actually happens. The dangerous tendency of the act is not in this case considered a sufficient ground of civil liability.

With respect to this distinction between wrongs which do and those which do not, require proof of actual damage, it is to be noticed that criminal wrongs commonly belong to the latter class. Criminal liability is usually sufficiently established by proof of some act which the law deems dangerous in its tendencies, even though the issue is in fact harmless. The formula of the criminal law is usually: "If you do this, you will be held liable in all events," and not "If you do this, you will be held liable if any harm ensues." An unsuccessful attempt is a ground of criminal liability, no less than a completed offence. So also dangerous and careless driving are criminal offences, though no damage ensues. This, however, is not invariably so, for criminal responsibility, like civil, sometimes depends on the accident of the event. If I am negligent in the use of fire-arms, and kill some one in consequence, I am criminally liable for manslaughter; but if by good luck my negligence results in no accomplished mischief, I am free from all responsibility.

As to civil liability, no corresponding general principle can be laid down. In some cases proof of actual damage is required, while in other cases there is no such necessity; and the matter pertains to the detailed exposition of the law, rather than to legal theory. It is to be noted, however, that whenever this requirement exists, it imports into the administration of civil justice an element of capriciousness from which the criminal law is commonly free. In point of criminal responsibility men are judged by their acts and by the mischievous

tendencies of them, but in point of civil liability they are often judged by the actual event. If I attempt to execute a wrongful purpose, I am criminally responsible whether I succeed or not; but my civil liability will often depend upon the accident of the result. Failure in a guilty endeavour amounts to innocence. Instead of saying: "Do this, and you will be held accountable for it," the civil law often says: "Do this if you wish, but remember that you do it at your peril, and if evil consequences chance to follow, you will be answerable for them."

### ***Damnum sine Injuria***

Although all wrongs are, in fact or in legal theory, mischievous acts, the converse is not true. All damage done is not wrongful. There are cases in which the law will suffer a man knowingly and wilfully to inflict harm upon another, and will not hold him accountable for it. Harm of this description – mischief that is not wrongful because it does not fulfil even the material conditions of responsibility – is called *damnum sine injuria*, the term *injuria* being here used in its true sense of an act contrary to law (*in jus*), not in its modern and corrupt sense of harm.

Cases of *damnum sine injuria* fall under two heads. There are, in the first place, instances in which the harm done to the individual is nevertheless a gain to society at large. The wrongs of individuals are such only because, and only so far as, they are at the same time the wrongs of the whole community; and so far as this coincidence is imperfect, the harm done to an individual is *damnum sine injuria*. The special result of competition in trade may be ruin to many; but the general result is, or is deemed to be, a gain to society as a whole. Competitors, therefore, do each other harm but not injury. So a landowner may do many things on his own land which are detrimental to the interests of adjoining proprietors. He may so excavate his land as to withdraw the support required by the buildings on the adjoining property; he may prevent the access of light to the windows of those buildings; he may drain away the water which supplies his neighbour's well. These things are harmful to individuals; but it is held to serve the public interest to allow a man within wide limits, to do as he pleases with his own.

The second head of *damnum sine injuria* includes all those cases in which, although real harm is done to the community, yet, owing to its triviality, or to the difficulty of proof, or to any other reason, it is considered inexpedient to attempt its prevention by the law. The mischief is of such a nature that the legal remedy would be worse than the disease.

### **The place and time of an act**

Chiefly, though not exclusively, in consequence of the territorial limits of the jurisdiction of courts, it is often material to determine the place in which the act is done. In general this inquiry presents no difficulty, but there are two cases which require special consideration. The first is that in which the act is done partly in one place and partly in another. If a man standing on the English side of the Border fires at and kills a man on the Scottish side, has he committed murder in England or in Scotland? If a contract is made by correspondence between a merchant in London and another in Paris, is the contract made in England or in France. If by false representation made in Melbourne a man obtains goods in Sydney, is the offence of obtaining goods by false pretences committed in Victoria or in New South Wales? As a matter of fact and of strict logic the correct answer in all these cases is that the act is not

done either in the one place or in the other. He who in England shoots a man in Scotland commits murder in Great Britain, regarded as a unity, but not in either of its parts taken in isolation. But no such answer is allowable in law; for, so long as distinct territorial areas of jurisdiction are recognised, the law must assume that it is possible to determine with respect to every act the particular area within which it is committed.

What locality, therefore, does the law attribute to acts which thus fall partly within one territorial division and partly within another? There are three possible answers. It may be said that the act is committed in both places, or solely in that in which it has its commencement, or solely in that in which it is completed. The law is free to choose such one of these three alternatives as it thinks fit in the particular case. The last of them seems to be that which is adopted for most purposes. It has been held that murder is committed in the place in which the death occurs [*Reg. v. Coombes* (1786) 1 Lea.Cr.C. 388], and not also in the place in which the act causing the death is done, but the law on these points is not free from doubt [*Reg. v. Armstrong* (1875) 13 Cox C.C. 184; *Reg. v. Keyn* (1876) 2 Ex. D. 63]. Berge, "Criminal Jurisdiction and the Territorial Principle" (1932) 30 Mich. L. Rev. 238, argues that every state in which part of the act or its consequence occurs has or should have concurrent jurisdiction. A contract is made in the place where it is completed, that is to say, where the offer is accepted [*Cowan v. O'Connor* (1888) 20 Q.B.D. 640], or the last necessary signature to the document is affixed [*Muller & Co.'s Margarine Ltd. v. Inland Revenue Commissioners* (1900) 1 Q.B. 310]. The offence of obtaining goods by false pretences is committed in the place in which the goods are obtained [*Reg. v. Ellis* (1899) 1 Q.B. 230; *R. v. Harden* (1963) 1 W.B. 8] and not in the place where the false pretence is made. The question is fully discussed in the case of *Reg. v. Keyn* (1876) 2 Ex. D. 63, in which the captain of a German steamer was tried in England for manslaughter by negligently sinking an English ship in the channel and drowning one of its passengers. One of the minor questions in the case was that of the place in which the offence was committed. Was it on board the English ship or on board the German steamer, or on board neither of them? Four of the Judges of the Court for Crown Cases Reserved, namely, Denman J., Bramwell B., Coleridge C.J. and Cockburn C.J., agreed that if the offence had been wilful homicide it would have been committed on the English ship.

A second case in which the determination of the locality of an act gives rise to difficulty is that of negative acts. In what place does a man omit to pay a debt or to perform a contract? The true answer is apparently that a negative act takes place where the corresponding positive act *ought* to have taken place. An omission to pay a debt occurs in the place where the debt is payable. If I make in England a contract to be performed in France, my failure to perform it takes place in France and not in England. The presence of a negative act is the absence of the corresponding positive act, and the positive act is absent from the place in which it ought to have been present.

### **The time of an act**

The position of an act in time is determined by the same considerations as its position in space. An act which begins today and is completed tomorrow is in truth done neither today nor tomorrow, but in that space of time which includes both. But if necessary the law may date it from its commencement, or from its completion, or may regard it as continuing

through both periods. For most purposes the date of an act is the date of its completion, just as its place is the place of its completion.

A negative act is done at the time at which the corresponding positive act ought to have been done. The date of the non-payment of a debt is the day on which it becomes payable.

### **Causation**

A system of law, as we have seen, may hold a man liable either for performing acts which are dangerous in tendency or for causing actual damage or injury. In the latter type of case liability is imposed on him for the damage in fact resulting from his act; he will not normally be held accountable for damage in no way caused by his own behaviour. Causation then is a concept which plays an important part in legal discourse.

It is, however, a difficult concept, and the common law cases on causation do not make the discussion of the problem any easier. For though courts readily agree that such questions must be decided on common-sense principles rather than on the basis of abstruse philosophical theory, the language which they use in actually deciding them is often of a highly metaphorical and figurative character, owing little to common sense or common speech. So intractable at times has the problem of causation seemed, that there is a temptation to suggest that lawyers should discard inquiries into causation and concentrate rather on the question of responsibility. Instead of investigating whether the defendant's act was the cause of the plaintiff's injuries, they should inquire whether the defendant ought to be held responsible; and this type of question can be answered, it is said, according to policy and without regard to the conceptual difficulties inherent in the notion of cause.

Tempting as this suggestion is, it offers hopes which are in fact illusory. It is hard to see how questions of responsibility can be decided without first deciding questions of causation. If A carelessly drops a lighted match on the floor of B's house and the house is burned to the ground, we should not hold A liable if it transpired that C had simultaneously been setting fire to another part of the house or that the house had at that very moment been struck by lightning. If A is to be held responsible for the damage to B's house, he must first be shown to have caused it. Indeed the idea of compensation is that of making amends for damage which one has *caused* to another, not that of being an insurer of all the damage which may befall that other from any cause. Similar principles obtain in the criminal law. If X shoots at Y and Y falls dead, we should not, despite X's wrongful intention, convict him of the murder or manslaughter of Y if we found that the death had been caused by a shot fired from some other gun or by a sudden heart attack occurring before the shot was fired.

But while in criminal and civil cases responsibility often depends on causation, no rule of logic dictates this principle. In logic other solutions are equally possible. In civil law a man could be held liable to another whenever he is careless and regardless of whether he has caused damage to him or not. In criminal law a man could be held equally guilty whether he has succeeded or not in his intentions. But this is not the position adopted by the common law.

Now the legal concept of causation is often said to be based on the common sense notion of cause. On this point three observations may be made. First, while this notion plays a considerable part in common speech, common speech itself provides no neat analysis of the

concept. We can look to common sense for the usage of the term *cause* but not for an explanatory description of this usage; the latter is to be found by philosophical reflection on such usage. Consequently in so far as the legal concept is built on the foundation of the ordinary notion, it is built on a notion which has not been explicitly defined or analysed by common sense. Secondly, the legal concept, though based on the ordinary notion, will diverge from it on account of the need for lawyers to provide answers to questions for which common sense has no solution. If A wrongfully loads B's luggage on the wrong train and the train is derailed and the luggage damaged, has A caused this damage? This is not the sort of question which arises in ordinary day-to-day conversation, nor is it one which could be readily answered according to the ordinary notion of causation. It is, however, just the sort of problem that courts and lawyers have to grapple with.

Thirdly, a distinction must be drawn between explanatory and attributive inquiries, both of which are involved in causal investigations. If a house has been burnt down, the main point of an inquiry may be to discover how this happened; if a man is found dead, the *post mortem* inquiry serves to investigate what he died of. This sort of explanatory inquiry is complete when all the facts leading up to the incident have been discovered. The inquiry about the house in the example above would be complete once we knew the house was full of inflammable gas, that a stone was thrown through the window, and that its impact on the floor inside caused a spark which ignited the gas. The *post mortem* would be complete if it was established that the man had been stabbed, that he had been taken to hospital and injected with an antibiotic to which he was allergic and that the injection had set up a fatal reaction. But attributive inquiries begin where explanations leave off. Once we know what happened to the house, we are now in a position to ask whether the conflagration was caused by the throwing of the stone. Once we know the man died, we can inquire whether the stabbing caused the death. And here the scientist, the pathologist and the detective can no longer assist, for at this stage we no longer need more facts; we need to assess the situation in the light of the facts we have.

Now law courts often have to engage in both kinds of investigation. First, evidence may have to be heard to establish how the accident happened. Then in the light of its findings of fact, a court may have to decide whether the defendant's act or omission should be regarded as the cause of the plaintiff's damage or the victim's injury; and it is this second sort of question which constitutes the legal question about causation and which involves the problem of defining what counts as a cause for legal purposes. Typically the lawyer is concerned to decide whether, in a case where damage results to B from a conjunction of A's act and some other circumstance, as in the examples given, A can be said to have caused the damage. Here the legal problem is to discover the criteria for asserting that the additional circumstance prevents the act from being the cause of the damage; and this is another facet of the general problem of finding out the criteria for regarding one event as the cause of another, because where some combining circumstance prevents an act from qualifying as the cause of some resulting damage, such a circumstance will usually itself be regarded as the cause.

Ordinarily, where some event results from a combination of factors and we wish to identify one of these factors as the cause, we fasten on two different types of occurrence which we tend to regard as causes. We look upon (a) abnormal factors, and (b) human acts

(and perhaps those of animals) as causes. If a house burns down, the fire obviously results from a combination of factors, one of which is the presence of oxygen. This, however, would not be regarded as the cause of the fire unless its presence was abnormal in the circumstances. A fire in a laboratory might be said to be caused by the presence of oxygen, if this was a part of the laboratory from which oxygen was generally excluded and into which oxygen was introduced by accident. But what will be considered to be the cause of the burning of the house is, not the presence of oxygen, but either some unusual event or circumstance (*e.g.*, an electrical short-circuit) or else some human act (*e.g.*, the setting fire to the house by some person).

Why is it that abnormal events and human acts are regarded as causes *par excellence* is more a question for philosophy than for jurisprudence, but where either of such factors is to be found, it is clear that a special point has been reached by any investigation. For once either of these has been detected, we have a factor which we can seek to eliminate from future situations, thereby avoiding such incidents later on, and part of the point of identifying such factors as causes is to single them out as final stopping-places of the inquiry.

In law, where we have the typical problem of deciding whether even A is the cause of event B or whether “the chain of causation has been snapped” by some *novus actus interveniens*, X, we may expect to find that the event X is regarded as serving the causal connection wherever X is either some abnormal circumstance or some deliberate human act. If A stabs B and B is taken to hospital, where, despite the fact that he is shown to be allergic to terramycin, he is nevertheless injected with a large dose of it, then his treatment and not the stab wound would qualify in common law as the cause of B’s death; for the treatment was quite abnormal in the circumstances. Or if on his way to hospital B had been strangled by C, here again A’s attack would be prevented from being the cause; for the cause of the death would now be C’s deliberate act.

Many of the reported cases appear to work on these principles without explicitly acknowledging them. Where an abnormal circumstance or event is not held to sever the causal connection, it will usually be found that the circumstance, though abnormal, was known to the defendant, who sought to take advantage of it. As the law puts it, intended consequences are never too remote. A difficult case to fit into any theory is that of *Re Polemis* where the defendants were held liable for damage resulting from a combination of factors. The defendant’s servant carelessly dropped a plank into the ship’s hold, the plank struck a spark, and the spark ignited petrol vapour whose presence in the hold was unsuspected. The defendants were held liable for the loss by fire of the ship. Hart and Honore suggested that while an abnormal circumstance or event normally “snaps the chain of causation,” an abnormal circumstance will only do so if its occurrence is subsequent to the defendant’s act and not if it is simultaneous with it. Here the abnormal circumstance, the presence of the vapour, already existed before the defendants’ servant dropped the plank. But *Re Polemis* has since been disapproved by the Privy Council in the case of the *Wagon Mound*, which it seems, will be taken as depriving the former case of any binding authority in English law. It seems then that any abnormal circumstance contributing to the result may sever the causal connection, regardless of the time of its occurrence. To this there is one exception, enshrined in the common law rule that you must take the plaintiff as you find him. If you



wrongfully injure someone and it turns out that he has some condition of which you are unaware and which renders the injury more serious, you will nevertheless be held responsible for all the damage suffered. If you wilfully or negligently bump into a man who, unknown to you, has an egg-shell skull and who thereby suffers grave injury, you are liable for all the injury suffered. Where the abnormal circumstance consists in a condition of the plaintiff himself, it will not sever the causal link, for in this respect the law takes the view that if you injure people by negligence or by design, then you act at your peril.

Cases in which the alleged *novus actus interveniens* consists of some human act are often cases in which the defendant contends that the plaintiff himself caused the damage which he suffered. The decisions on these and other cases on this problem suggest that though the courts regard a human act by the plaintiff or some third party as preventing the defendant's act from being the cause, they will not so regard an act (whether by the plaintiff or a third party) as severing the causal link if this act was in some way not wholly free. If, as in the rescue cases, the act was done out of a legal or a moral duty; if the act was forced on the plaintiff by the danger in which the defendant placed him; or if the act was an automatic and natural reaction – in such cases it will not suffice to prevent the defendant's act from counting as the cause of the damage.

### ***Mens rea***

We have seen that the conditions of penal liability are sufficiently indicated by the maxim, *Actus non facit reum, nisi mens sit rea*. A man is responsible, not for his acts in themselves, but for his acts coupled with the *mens rea* or guilty mind with which he does them. Before imposing punishment, the law must be satisfied of two things: first, that an act has been done which by reason of its harmful tendencies or results is fit to be repressed by way of penal discipline; and secondly, that the mental attitude of the doer towards his deed was such as to render punishment effective as a deterrent for the future, and therefore just. The form which *mens rea* assumes will depend on the provisions of the particular legal system. Criminal liability may require the wrongful act to be done intentionally or with some further wrongful purpose in mind, or it may suffice that it was done recklessly; and in each case the mental attitude of the doer is such as to make punishment effective. If he intentionally chose the wrong, penal discipline will furnish him with a sufficient motive to choose the right instead for the future. If, on the other hand, he committed the forbidden act without wrongful intent, but yet realising the possibility of the harmful result, punishment will be an effective inducement to better conduct in the future.

Yet there are other cases in which, for sufficient or insufficient reasons, the law is content with a lower form of *mens rea*. This is the case, as was already noticed, with crimes of negligence. A person may be held responsible for some crimes if he did not do his best as a reasonable man to avoid the consequence in question. Sometimes, however, the law goes even beyond this; holding a man responsible for his acts, independently altogether of any wrongful state of mind or culpable negligence. Wrongs which are thus independent of fault may be distinguished as wrongs of *strict liability*.

It follows that in respect of the requirement of faults, wrongs are of three kinds:-

(1) Intentional or Reckless Wrongs, in which the *mens rea* amounts to intention, purpose, design, or at least foresight. In such wrongs defences like mistake operate to negative the existence of *mens rea*.

(2) Wrongs of Negligence, in which the *mens rea* assumes the less serious form of mere carelessness, as opposed to wrongful intent or foresight. With these wrongs defences such as mistake will only negative *mens rea* if the mistake itself is not negligent.

(3) Wrongs of Strict Liability, in which the *mens rea* is not required, neither wrongful intent nor culpable negligence being recognised as a necessary condition of responsibility; and here defences like mistake are of no avail.

We shall deal with these three classes of wrongs, and these three forms of liability, in the order mentioned.

### **Intention**

An intention is the purpose or design with which an act is done. This may consist of an intention to perform some further act, an intention to bring about certain consequences or perhaps merely an intention to do the act itself. My intention in buying a gun may be to kill someone with it; my intention in shooting at him may be to cause his death; but if the latter act is described not as shooting at him but as killing him, then my intention can be said to be to do this very thing, to kill him.

An unintentional act is one lacking such purpose or design. To do something unintentionally is to do it without meaning to do it. Through inadvertence I may disregard a traffic signal; through forgetfulness I may omit to pay a debt. An act such as killing, which consists of a cause and an effect, may be unintentional when the actor brings about consequences which he does not intend. I may shoot X dead by accident, being unaware that the wind will alter the direction of my shot. I may kill him by mistake, wrongly imagining him to be someone else. In the former case I fail to foresee the consequences, in the latter I am ignorant of some of the circumstances.

Whether an act is to be termed intentional or unintentional must depend partly on the description of the act itself. If in the latter case above my act is described as shooting at X, then it qualifies as intentional. If it is described as killing X, it must qualify as unintentional, for I did not intend to kill X. In a sense such acts are partly intentional and partly unintentional, and many acts fall into this category. If I trespass on A's land believing it to be my own, I intend to enter upon land which in fact belongs to A but I do not intend to enter upon land belonging to A. If a woman marries again during the lifetime of her husband believing him to be dead, she does not commit bigamy, for though she intends to marry again while her husband is in fact alive, she does not intend to marry again while her husband is in fact alive, she does not intend to marry again during her husband's lifetime. Where an act is in part intentional and in part unintentional, liability, if it exists at all, must either be absolute or be based on recklessness or negligence.

Where the intention consists of an intention to produce certain consequences, this is sometimes explained as a combination of foresight and desire. But while intended consequences must be foreseen – for one cannot aim at a consequence which is unforeseen –

the converse is not true. Consequences can be foreseen without being intended. A doctor may administer certain treatment, knowing that it will be painful but that it will cure the patient. To show that in such a case the doctor cannot be said (without further evidence) to intend to cause the patient pain, we may construct another example where the pain would be intended. Suppose for instance that the doctor pricks the patient's skin to test his perception of pain: here there is a deliberate intention to cause pain as a means to some further end.

Where a consequence is expected, it is usually intended but this need not be the case. An operating surgeon may know very well that his patient will probably die of the operation; yet he does not intend the fatal consequence which he expects. He intends the recovery which he hopes for but does not expect.

Consequences which are intended are normally also expected, but this is not always so. One can be said to intend a consequence which is foreseen as possible but highly improbable. If I fire a rifle in the direction of a man a mile away, I may know perfectly well that the chance of hitting him is not in a thousand; I may fully expect to miss him; nevertheless I intend to hit him if this is what I am trying to do.

Finally intention is not identical with desire. I may desire something with all my heart, but unless I do something by way of aiming at it I cannot be said to intend it. Conversely I can be said to intend something without desiring it. A thing may be intended, not for its own sake but merely as the means to an end. Here the end is intended and desired, while the means, though intended may perhaps not be desired; indeed it may be utterly indifferent to me or even undesired. If I kill a man in order to rob him, it may be that I do not desire his death but would much prefer to be able to achieve my objective in some other way. The doctor who inflicts pain to test for pain perception will not normally have an actual desire to inflict pain but will on the contrary regret the necessity of it.

We have seen that consequences which are foreseen as certain or highly probable need not be, but usually are, intended. A system of law, however, could provide that a man be held liable for such consequences, even though he did not intend them. In the first place, such a rule would obviate the need for difficult inquiries into the mental element. But secondly, and more important, the rule could be justified on the ground that a man should not do acts which he foresees on the ground that a man should not do acts which he foresees will involve consequential harm to others, whether or not he intends to cause this harm. Such behaviour is clearly reckless or blameworthy, unless the risk can be justified by reason of the social interest of the act itself. An operation which is known to be likely to prove fatal will be justifiable if it is carried out to remedy some highly dangerous condition; it would hardly be justified if performed simply to remove a birthmark or scar. With regard to murder English law adopts the rule that a person is responsible for consequences foreseen as the certain or highly probable outcome of his act, regardless of whether he intended them. Thus, if I do an act which I know is very likely to kill Smith and he dies as a result, I cannot be heard to say that I did not intend his death. Indeed the law has gone further and provided that one may be liable for consequences foreseeable by the reasonable man as certain or highly probable, whether or not the actor himself foresaw them. Thus if I intentionally do some unlawful act on a man which I do not realise, but which a reasonable man would realise, is highly likely to cause death or serious injury to him, this is enough to render me guilty of murder if he dies.

In this respect foreseen, and even foreseeable consequences, are put on the same footing as consequences which are intended.

This, however, does not apply to cases involving mere knowledge of statistical probability where there is no certainty in the concrete instance. A manufacturer establishes a factory in which he employs many workmen who are daily exposed to the risk of dangerous machinery or processes. He knows for a certainty that from time to time fatal accidents will, notwithstanding all precautions, occur to the workmen so employed. A military commander orders his troops into action, well knowing that many of them will lose their lives. Such consequences are certainly not intended and would hardly qualify as the result of recklessness. For it is not necessarily reckless to incur a risk if an adequate social advantage is to be gained from the enterprise.

Both in this special connection and generally then it is to be observed that the law may, and sometimes does, impute liability, outside the strict definition of intention, for what is called constructive intention. Consequences which are in fact the outcome of negligence merely are sometimes in law dealt with as intentional. Thus he who intentionally does grievous bodily harm to another, though with no desire to kill him, or certain expectation of his death, is guilty of murder if death ensues. It does not seem possible to lay down any general principle as to the cases in which such a constructive intention beyond the scope of his actual intention is thus imputed by law to a wrongdoer. This is a matter pertaining to the details of the legal system. It is sometimes said, indeed, that a person is presumed in law to intend the natural or necessary results of his actions [*R. v. Harvey* (1823) 2 B. & C. 264: "A party must be considered in point of law to intend that which is the necessary or natural consequence of that which he does." Cf. *Freeman v. Pope* (1870) 5 Ch. App. 540; *Ex parte Mercer* (1886) 17 Q.B.D. 298]. This, however, is much too wide a statement, for, if true, it would eliminate from the law the distinction between intentional and negligent wrongdoing, merging all negligence in constructive wrongful intent. A statement much nearer the truth is that the law frequently – though by no means invariably – treats as intentional all consequences due to that form of negligence which is distinguished as recklessness – all consequences, that is to say, which the actor foresees as the probable results of his wrongful act. But some crimes, such as attempt, conspiracy, rape and treason, generally require intention and cannot be committed by recklessness merely. In the law of tort, recklessness is equated with intention in deceit (*Derry v. Peek* (1889) 14 App. Cas. 337)]. We have seen that on occasions the law may even dispense with the need for actual foresight on the part of the actor, and provide that the latter shall be deemed to foresee such consequences as a reasonable man in the actor's position would have foreseen [*D.P.P. v. Smith* (1961) A.C. 290]. It seems, however, that the courts may minimise the effect of this case and require proof of actual foresight on the part of the actor himself and regard the "reasonable man" test as evidential only [*Hardy v. Motor Insurers' Bureau* (1964) 2 Q.B. 745]. The foresight of the reasonable man is of course an obviously useful evidential test whereby to infer that the actor himself foresaw, but the rule just mentioned has transformed it into a presumption of law which cannot, it seems, be rebutted. The result is the existence in law of a type of constructive recklessness.

It may also be observed that in English law, especially criminal law, the intention that is material is usually the generic and not the specific intent. Thus if A shoots at B intending to kill him, but the shot actually kills C, this is held to be murder of C. So also if A throws a stone at one window and breaks another, it is held to be malicious damage to the window actually broken. This doctrine, which is known as the doctrine of transferred malice, applies only where the harm intended and the harm done are of the same kind. If A throws a stone at a human being and unintentionally breaks a window, he cannot be convicted of malicious damage to the window.

### **Motives**

A wrongful act is seldom intended and desired for its own sake. The wrongdoer has in view some ulterior object which he desires to obtain by means of it. The evil which he does to another, he does and desires only for the sake of some resulting good which he will obtain for himself. The desire for this good is the motive of his act.

Motives, though closely related and similar to intentions, differ from intentions in certain respects. First, an intention relates to the immediate objectives of an act, while a motive relates to the object or series of objects for the sake of which the act is done. The immediate intent of the thief is to appropriate another person's money, while his ulterior objective may be to buy food with it or to pay a debt. Secondly, a man's motive for an act consists in a desire for something which will confer a real or imagined benefit of some kind on the actor himself, whereas his intention need not relate to some personal interest of this kind. The point of asking what a man intends is to discover what he is trying to achieve. The point of asking for his motive is to find out what personal advantage he is seeking to gain; and a motiveless act is one aimed at no such personal advantage.

In explaining a man's motives we may sometimes describe them in either specific or general terms. The thief in the example above may be said to steal to buy food, or to steal out of necessity. So acts may be said to be done for revenge, out of curiosity and so on, all of which are common mental states relating to a future state of affairs desired by the actor as in some way benefiting him. Intentions cannot be described in such general terms.

The objective of one wrongful act may be the commission of another. I may make a die with intent to coin bad money; I may coin bad money with intent to utter it; I may utter it with intent to defraud. Each of these acts is or may be a distinct criminal offence, and the intention of any one of them is immediate with respect to that act itself, but ulterior with respect to all that go before it in the series.

A person's ulterior intent may be complex instead of simple; he may act from two or more concurrent motives instead of from one only. He may institute a prosecution, partly from a desire to see justice done, but partly also from ill-will towards the defendant. He may pay one of his creditors preferentially on the eve of bankruptcy, partly from a desire to benefit him at the expense of the others, and partly from a desire to gain some financial advantage for himself. Now the law, as we shall see later, sometimes makes liability for an act depend upon the motive with which it is done. The Bankruptcy Act, for example, regards as fraudulent any payment made by a debtor immediately before his bankruptcy with intent to prefer one of his creditors to the others. In all such cases the presence of mixed or concurrent motives raises a

difficulty of interpretation. The phrase “with intent to,” or its equivalents, may mean any one of at least four different things: (1) That the intent referred to must be the sole or exclusive intent; (2) that it is sufficient if it is one of several concurrent intents; (3) that it must be the chief or dominant intent, any others being subordinate or incidental; (4) that it must be a determining intent, that is to say, an intent in the absence of which the act would not have been done, the remaining purposes being insufficient motives by themselves. It is a question of construction which of these meanings is the true one in the particular case.

### **Malice**

Closely connected with the law and theory of intentional wrongdoing is the legal use of the word malice. In a narrow and popular sense this term means ill-will, spite, or malevolence; but its legal significance is much wider. Malice means in law wrongful intention or recklessness. Any act done with one of these mental elements is, in the language of the law, malicious, and this legal usage has etymology in its favour. The Latin *malitia* means badness, physical or moral – wickedness in disposition or in conduct – not specifically or exclusively ill-will or malevolence; hence the malice of English law, including all forms of evil purpose, design, intent or motive.

We have seen, however, that we must distinguish between the immediate intention with which an act is done and its ulterior purpose or motive. The term malice is applied in law to both these, and the result is a somewhat puzzling ambiguity which requires careful notice. When we say that an act is done maliciously, we mean one of two distinct things. We mean either that it is done intentionally (or alternatively recklessly), or that it is done with some wrongful motive. In the phrases malicious homicide and malicious injury to property, malicious is merely a collective term for intention and recklessness. I burn down a house maliciously if I burn it on purpose, or realising the possibility that what I do will set it on fire. There is here no reference to any ulterior purpose or motive. But, on the other hand, malicious prosecution does not mean any intentional prosecution; it means, more narrowly, a prosecution inspired by some motive of which the law disapproves. A prosecution is malicious, for example, if its ulterior intent is the extortion of money from the accused. So, also, with the malice which is needed to make a man liable for defamation on a privileged occasion; I do not utter defamatory statements maliciously simply because I utter them intentionally.

Although the word *malitia* is not unknown to the Roman lawyers, the usual and technical name for wrongful intent is *dolus*, or more specifically *dolus malus*. *Dolus* and *culpa* are the two forms of *mens rea*. In a narrower sense, however, *dolus* includes merely that particular variety of wrongful intent which we term fraud – that is to say, the intent to deceive. From this limited sense it was extended to cover all forms of wilful wrongdoing. The English term fraud has never received an equally wide extension. It resembles *dolus*, however, in having a double use. In its narrower sense it means deceit, as we have just said, and is commonly opposed to force. In a wider sense it includes all forms of dishonesty, that is to say, all wrongful conduct inspired by a desire to derive profit from the injury of others. In this sense fraud is commonly opposed to malice in its popular sense. I act fraudulently when the motive of my wrongdoing is to derive some material gain for myself, whether by way of deception, force, or otherwise. But I act maliciously when my motive is the pleasure of doing harm to

another rather than the acquisition of any material advantage for myself. To steal property is fraudulent; to damage or destroy it is malicious.

### **Relevance and Irrelevance of motives**

We have already seen in what way and to what extent a man's immediate intent is material in a question of liability. As a general rule no act is a sufficient basis of responsibility unless it is done either willfully or negligently. Intention and negligence are the two alternative conditions of penal liability.

We have now to consider the relevance or materiality, not of the immediate, but of the ulterior intent. To what extent does the law take into account the motives of a wrongdoer? To what extent will it inquire, not merely what the defendant has done, but why he has done it? To what extent is malice, in the sense of improper motive, an element in legal wrongdoing?

In answer to this question we may say generally (subject, however, to very important qualifications) that in law a man's motives are irrelevant. As a general rule no act otherwise lawful becomes unlawful because done with a bad motive; and conversely no act otherwise unlawful is excused or justified because of the motives of the doer, however good. The law will judge a man by what he does, not by the reasons for which he does it.

"It is certainly," says Lord Herschell [*Allen v. Flood* (1898) A.C. at p. 123], "a general rule of our law that an act *prima facie* lawful is not unlawful and actionable on account of the motives which dictated it." So it has been said [*Corporation of Bradford v. Pickles* (1895) A.C. 587, at p. 598]: "No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious." "Much more harm than good," says Lord Macnaghten [*Allen v. Flood* (1898) A.C. 92 at p. 152], "would be done by encouraging or permitting inquiries into motives when the immediate act alleged to have caused the loss for which redress is sought is in itself innocent or neutral in character and one which anybody may do or leave undone without fear of legal consequences. Such an inquisition would I think be intolerable."

An illustration of this irrelevance of motives is the right of a landowner to do harm to adjoining properties in certain defined ways by acts done on his own land. He may intercept the access of light to his neighbour's windows, or withdraw by means of excavation the support which his land affords to his neighbour's house, or drain away the water which would otherwise supply his neighbour's well. His right to do all these things depends in no way on the motive with which he does them. The law cares nothing whether his acts are inspired by an honest desire to improve his own property, or by a malevolent impulse to damage that of others. He may do as he pleases with his own.

### **Exception to the irrelevance of motives**

Criminal attempts constitute the first of the exceptions to the rule that a person's ulterior intent or motive is irrelevant in law. Every attempt is an act done with intent to commit the offence so attempted. The existence of this ulterior intent or motive is the essence of an attempt, and can render unlawful an otherwise lawful act. So, if a man standing beside a haystack strikes a match, this act, which will be quite lawful and innocent if done with the

purpose of lighting his pipe, will be unlawful and criminal if done with the purpose of setting fire to the haystack; for then it will constitute the crime of attempted arson. A second exception comprises all those cases in which a particular intent forms part of the definition of a criminal offence. Burglary, for example, consists in breaking and entering a dwelling-house by night with intent to commit a felony therein. So forgery consists in making a false document with intent to defraud. In all such instances the ulterior intent is the source, in whole or part, of the mischievous tendency of the act, and is therefore material in law.

In civil as opposed to criminal liability the ulterior objective is very seldom relevant. In almost all cases the law looks to the act alone, and makes no inquiries into the motives from which it proceeds. There are, however, certain exceptions even in the civil law. There are cases where it is thought expedient in the public interest to allow certain specified kinds of harm to be done to individuals, so long as they are done for some good and sufficient reason; but the ground of this privilege falls away so soon as it is abused for bad ends. In such cases, therefore, malice is an essential element in the cause of action. Examples of wrongs of this class are defamation (in cases of privilege) and malicious prosecution. In these instances the plaintiff must prove malice, because in all of them the defendant's act is one which falls under the head of *damnum sine injuria* so long, but so long only, as it is done with good intent.

It should also be observed that though motives are seldom relevant to determine the legality or otherwise of an act, yet, once it is shown that an illegal act has been committed, the motives of the defendant may become highly relevant. In a criminal case, where the penalty for the offence is not fixed by law, the defendant's motives may be an important factor for the court to take into account in deciding on sentence. In a civil case the defendant's motives may be taken into account where the court decides to award aggravated damages.

### ***Jus necessitatis***

We shall conclude our examination of the theory of wilful wrongdoing by considering a special case in which motive operates as a ground of excuse. This is the case of the *jus necessitatis*. So far as the abstract theory of responsibility is concerned, an act which is necessary is not wrongful, even though done with full and deliberate intention. It is a familiar proverb that necessity knows no law: *Necessitas non habet legem*.

Necessity, however, does not mean inevitability. An act which can in no possible manner be avoided and as to which the actor has no choice cannot properly be regarded as an act in the full sense at all. An act which is necessary, on the other hand, is one where the actor could have chosen otherwise but where he had highly compelling reasons for the choice he made. A situation of so-called necessity is, in analysis, one in which there is a competition of values – on the one hand, the value of obedience to the general principles of law, and, on the other hand, some value regarded as possessing a higher claim in the particular circumstances. Here, the law itself permits a departure from its own general rules. For example, it would be lawful in an emergency to damage the property of another in order to save life.

Another factor operating to admit the defence of necessity is that it commonly involves the presence of some motive of such exceeding strength as to overcome any fear that can be inspired by the threat of legal penalties. The *jus necessitatis* is the right of a man to do that



from which he cannot be dissuaded by any terror of legal punishment. Where threats are necessarily ineffective, they should not be made, and their fulfilment is the infliction of needless and uncompensated evil.

The common illustration of this right of necessity where punishment would be ineffective is the case of two drowning men clinging to a plank that will not support more than one of them. It may be the moral duty of him who has no one dependent on him to sacrifice himself for the other who is a husband or a father; it may be the moral duty of the old to give way to the young. But it is idle for the law to lay down any other rule save this, that it is the right of the stronger to use his strength for his own preservation. Another familiar case of necessity is that in which shipwrecked sailors are driven to choose between death by starvation on the one side and murder and cannibalism on the other. A third case is that of crime committed under the pressure of illegal threats of death or grievous bodily harm. "If," says Hobbes, "a man by the terror of present death be compelled to do a fact against the law, he is totally excused; because no law can oblige a man to abandon his own preservation."

It is to be noticed that the test of necessity in these cases is not the powerlessness of any possible, but that of any reasonable punishment. It is enough if the lawless motives to an act will necessarily countervail the fear of any penalty which it is just and expedient that the law should threaten. If burning alive were a fit and proper punishment for petty theft, the fear of it would probably prevent a starving wretch from stealing a crust of bread; and the *jus necessitatis* would have no place. But we cannot place the rights to property at so high a level. There are cases, therefore, in which the motives to crime cannot be controlled by any reasonable punishment. In such cases morality demands that no punishment be administered, since it seems morally unjust to punish a man for doing something which he or any ordinary man could not resist doing – *i.e.*, could not morally resist doing, even given the countervailing motive of the maximum punishment reasonable for the offence.

It may be submitted that where necessity involves a choice of some value higher than the value of obedience to the letter of the law, it is always a legal defence. Where, however, the issue is merely one of the futility of punishment, evidential difficulties prevent any but the most limited scope being permitted to the *jus necessitatis*. In how few cases can we say with any approach to certainty that the possibility of self-control is really absent, that there is no true choice between good and evil, and that the deed is one for which the doer is rightly irresponsible. In this conflict between the requirements of theory and the difficulties of practice the law has resorted to compromise. While in some few instances necessity is admitted as a ground of excuse, as for example in treason [*R. v. M'Growther* (1746) Foster 13; 18 St. Tr. 391], it is in most cases regarded as relevant to the measure rather than to the existence of liability. It is acknowledged as a reason for the reduction of the penalty, even to a nominal amount, but not for its total remission. Homicide as the blind fury of irresistible passion is not innocent, but neither is it murder; it is reduced to the lower level of manslaughter. Shipwrecked sailors who kill and eat their comrades to save their own lives are in law guilty of murder itself; but the clemency of the Crown will commute the sentence to a short term of imprisonment [*R. v. Dudley* (1884) Q.B.D. 273].

## Negligence

We have considered the first of the three classes into which injuries are divisible, namely those which are intentional or wilful, and we have now to deal with the second, namely, wrongs of negligence. In Roman law negligence is signified by the terms *culpa* and *negligentia*, as contrasted with *dolus* or wrongful intention. Care, or the absence of *negligentia* is *diligentia*. The use of the word diligence in this sense is obsolete in modern English, though it is still retained as an archaism of legal diction. In ordinary usage, diligence is opposed to idleness, not to carelessness.

Negligence is culpable carelessness. "It is," says Willies J. [*Grill v. General Iron Screw Colliery Co.* (1866) L.R. 1 C.P. at p. 612], "the absence of such care as it was the duty of the defendant to use." What then is meant by carelessness? It is clear, in the first place, that it excludes wrongful intention. These are two contrasted and mutually inconsistent mental attitudes of a person towards his acts and their consequences. No result which is due to carelessness can have been also intended. Nothing which was intended can have been due to carelessness [*Kettlewell v. Watson* (1882) 21 Ch.D. 685, at p. 706: "Fraud imports design and purpose; negligence imports that you are acting carelessly and without any design"].

It is to be observed, in the second place, that carelessness or negligence does not necessarily consist in thoughtlessness or inadvertence. This is doubtless the commonest form of it, but it is not the only form. If I do harm, not because I intended it, but because I was thoughtless and did not advert to the dangerous nature of my act, or foolishly believed that there was no danger, I am certainly guilty of negligence. But there is another form of negligence, in which there is no thoughtlessness or inadvertence whatever. If I drive furiously down a crowded street, I may be fully conscious of the serious risk to which I expose other persons. I may not intend to injure any of them, but I knowingly and intentionally expose them to the danger. Yet if a fatal accident happens, I am liable, at the most, not for willful, but for negligent homicide. When I consciously expose another to the risk of wrongful harm, but without any wish to harm him, and harm actually ensues, it is inflicted not willfully, since it was not desired, nor inadvertently, since it was foreseen as possible or even probable, but nevertheless negligently.

Negligence then is failure to use sufficient care, and this failure may result from a variety of factors. A negligent motorist for example may be careless in several different ways. Through inadvertence he may fail to notice what is happening and what the probable consequences of his conduct will be. Through miscalculation he may misjudge his speed, that of other road-users, the width of the road and other conditions. He may drive carelessly by reason of poor vision, innate clumsiness or lack of motoring skill. Or he may err in none of these ways; he may simply appreciate the risks involved and decide to take them, and insofar as we deem it wrong to take the risk we shall hold him negligent in so doing. This latter type of negligence differs from the others in that the defendant deliberately takes a risk which he fully appreciates; and the greater our feeling that the risk should not have been incurred, the grosser in our estimation is the negligence, until we arrive at the point where a flagrantly unjustifiable risk has been incurred and this we stigmatize as recklessness. The practical importance of this is that, as already seen, recklessness is frequently for legal purposes classed with intention.

### The duty of care

Carelessness is not culpable, or a ground of legal liability, save in those cases in which the law has imposed a duty of carefulness. In all other cases complete indifference as to the interests of others is allowable. No general principle can be laid down, however, with regard to the existence of this duty, for this is a matter pertaining to the details of the concrete legal system, and not to abstract theory. Carelessness is lawful or unlawful, as the law sees fit to provide. In the criminal law liability for negligence is quite exceptional. Speaking generally, crimes are wilful wrongs, the alternative form of *mens rea* being deemed an insufficient ground for the rigour of criminal justice. This, however, is not invariably the case, negligent homicide, for example, being a criminal offence. In the civil law, on the other hand, no such distinction is commonly drawn between the two forms of *mens rea*. In general we may say that whenever an act would be a civil wrong if done intentionally, it is also a civil wrong if done negligently. When there is a legal duty not to do a thing on purpose, there is commonly a legal duty to take care not to do it accidentally. To this rule, however, there are certain exceptions – instances in which wrongful intent, or at least recklessness, is the necessary basis even of civil liability. In these cases a person is civilly responsible for doing harm wilfully, but is not bound to take any care not to do it. He must not, for example deceive another by any wilful or reckless falsehood, but unless there are special circumstances giving rise to a duty of care, he is not answerable for false statements which he honestly believes to be true, however negligent he may be in making them.

### The standard of care

Carelessness may exist in any degree, and in this respect it differs from the other form of *mens rea*. Intention either exists or it does not; there can be no question of the degree in which it is present. The degree of carelessness varies directly with the risk to which other persons are exposed by the act in question. He is careless, who, without intending evil, nevertheless exposes others to the danger of it, and the greater the danger the greater the carelessness. The risk depends, in its turn, on two things; first, the magnitude of the threatened evil, and second, the probability of it. The greater the evil is, and the nearer it is, the greater is the carelessness of him who creates the danger.

Inasmuch, therefore, as carelessness varies in degree, it is necessary to know what degree of it is requisite to constitute culpable negligence. What measure of care does the law demand? What amount of anxious consideration for the interests of others is a legal duty, and within what limits is indifference lawful?

We have first to notice a possible standard of care which the law might have adopted but has not. It does not demand the highest degree of care of which human nature is capable. I am not liable for harm ignorantly done by me, merely because by some conceivable exercise of prudential foresight I might have anticipated the event and so avoided it. Nor am I liable because, knowing the possibility of harm, I fail to take every possible precaution against it. The law demands not that which is possible, but that which is reasonable in view of the magnitude of the risk. Were men to act on any other principle than this, excess of caution would paralyse the business of the world. The law, therefore, allows every man to expose his fellows to a certain measure of risk, and to do so even with full knowledge. If an explosion

occurs in my powder mill, I am not necessarily liable to those injured inside the mill, even though I established and carried on the industry with full knowledge of its dangerous character. This is a degree of indifference to the safety of other men's lives and property which the law deems permissible because not excessive. Inasmuch as the carrying of firearms and the driving of automobiles are known to be the occasions of frequent harm, extreme care and the most scrupulous anxiety as to the interests of others would prompt a man to abstain from those dangerous form of activity. Yet it is expedient in the public interest that those activities should go on, and therefore that men should be exposed to the incidental risks of them. Consequently the law does not insist on any standard of care which would include them within the limits of culpable negligence. It is for the law to draw the line as best it can, so that while prohibiting unreasonable carelessness, it does not at the same time demand unreasonable care.

On the other hand it is not sufficient that I have acted in good faith to the best of my judgment and belief, and have used as much care as I myself believed to be required of me in the circumstances of the case. The question in very case is not whether I honestly thought my conduct sufficiently careful, but whether in fact it attained the standard of due care established by law.

What standard then does the law actually adopt? It demands the amount of care which is reasonable in the circumstances of the particular case [*Ford v. L. & S.W. Ry.* (1862) 2 F. & F. 790]. This obligation to use reasonable care is very commonly expressed by reference to the conduct of a "reasonable man" or of an "ordinarily prudent man," meaning thereby a reasonably prudent man. "Negligence," it has been said [*Blyth v. Birmingham Water Works Co.* (1956) 25 L.J. Ex. At 213], "is the omitting to do something that a reasonable man would do, or the doing something which a reasonable man would not do." "We ought," it has been said [*Vaughan v. Menlove* (1837) 3 Bing. N.C. 475], "to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe... The care taken by a prudent man has always been the rule laid down." The reference to the "ordinary man" does not mean that it is in all cases a defence to show that the defendant behaved as the average man would have behaved, for there are instances where the court has considered that even the usual standard of conduct falls short of the "reasonable" minimum [Salmond, *Torts* (14<sup>th</sup> ed.), 296-297]. "Reasonable" in short, seems to refer not to the average standard, but to the standard that the jury or judge think ought to have been observed in the particular case.

In determining the standard to be required, there are two chief matters for consideration. The first is the magnitude of the risk to which other persons are exposed, while the second is the importance of the object to be attained by the dangerous form of activity. The reasonableness of any conduct will depend upon the proportion between these two elements. To expose others to danger for a disproportionate object is unreasonable, whereas an equal risk for a better cause may lawfully be run without negligence. By driving trains at the rate of fifty miles an hour, railway companies have caused many fatal accidents which could quite easily have been avoided by reducing the speed to ten miles, but this additional safety would be attained at too great a cost o f public convenience, and therefore in neglecting this precaution the companies do not fall below the neglecting this precaution the companies do not fall below the standard of reasonable care and are not guilty of negligence.

In conclusion, a word may be said upon the maxim *Imperitia culpae adnumeratur*. It is a settled principle of law that the want of skill or of professional competence amounts to negligence. He who will exercise any trade or profession must bring to the exercise of it such a measure of skill and knowledge as will suffice for reasonable efficiency, and he who has less than this practises at his own risk. At first sight this maxim may seem to require a degree of care far in excess of what is reasonably to be expected of the ordinary person, but further consideration will show that this is not so. The ignorant physician who kills his patient, or the unskilled blacksmith who lames the horse shod by him, is legally responsible, not because he is ignorant, or unskillful, for skill and knowledge may be beyond his reach—but because, being unskillful or ignorant, he ventures to under-take a business which calls for qualities which he does not possess. No man is bound in law to be a good surgeon or a capable attorney, but all men are bound not to act as surgeons or attorneys until and unless they are good and capable as such.

### **Degrees in negligence**

Where a system of law recognises only one standard of care, it does not follow that it must recognise only one degree of negligence. For since negligence consists in falling below the standard of care recognised by law, the further the defendant falls below this, the greater his negligence.

We have already seen that in assessing whether a man is guilty of negligence regard must be had to the seriousness of the danger to which his actions expose others, to the degree of probability that the danger would occur and to the importance of the object of the defendant's own activity. Clearly the greater the danger and the greater its likelihood, the greater the defendant's carelessness in not taking precautions against it; and conversely the more important and socially valuable his own objective, the smaller his carelessness. There are degrees of negligence then and these could be taken into account by law for both criminal and civil purposes. In crimes of negligence the law could provide that the greater the negligence the greater the punishment. We have seen that English law does not recognise many offences of negligence, but an acceptance of the different gradations of carelessness can be found in the law relating to road traffic. Here a distinction is drawn between ordinary negligence, criminal negligence and gross negligence. Ordinary negligence is such failure to use care as would render a person civilly but not criminally liable; criminal negligence is a greater failure and a greater falling below the standard of care, and renders a man guilty of a driving offence—and even within this category the law distinguishes between the less negligent offence of careless driving and the more negligent offence of dangerous driving; gross negligence is a yet greater fall below the standard and is such a wholly unreasonable failure to take care as to make the defendant guilty not only of a driving offence but also, in the event of his conduct resulting in another person's death, of manslaughter.

Equally for civil purposes the law could take account of different degrees of negligence. It could provide that the greater the defendant's negligence, the greater the compensation he must make to the plaintiff. This, however, is not the position adopted by English law, which for civil purposes recognises only one standard of care at all, he is bound to take that amount of it which is deemed reasonable under the circumstances; and the absence of this care is culpable negligence. Although this is probably a correct statement of English law, attempts

have been made to establish two or even three distinct standards of care and degrees of negligence. Some authorities, for example, distinguish between gross negligence (*culpa lata*) and slight negligence (*culpa levis*), holding that a person is sometimes liable for the former only, and at other times even for the latter. In some cases we find even a threefold distinction maintained, negligence being either gross, ordinary, or slight. These distinctions are based partly upon Roman law, and partly upon a misunderstanding of it, and notwithstanding some judicial dicta to the contrary we may say with some confidence that no such doctrine is known to the law of England. The distinctions so drawn are hopelessly indeterminate and impracticable. On what principle are we to draw the line between gross negligence and slight? Even were it possible to establish two or more standards, there seems no reason of justice or expediency for doing so. The single standard of English law is sufficient for all cases. Why should any man be required to show more care than is reasonable under the circumstances, or excused if he shows less?

In connection with this alleged distinction between gross and slight negligence it is necessary to consider the celebrated doctrine of Roman law to the effect that the former (*culpa lata*) is equivalent to wrongful intention (*dolus*)-a principle which receives occasional expression and recognition in English law also. *Magna culpa dolus est*, said the Romans. In its literal interpretation, indeed, this is untrue, for we have already seen that the two forms of *mens rea* are wholly inconsistent with each other, and that no degree of carelessness can amount to design or purpose. Yet the proposition, though inaccurately expressed, has a true signification. Although *real* negligence, however gross, cannot amount to intention, *alleged* negligence may. Alleged negligence which, if real, would be exceedingly gross, is probably not negligence at all, but wrongful purpose. Its grossness raises a presumption against its reality. For we have seen that carelessness is measured by the magnitude and imminence of the threatened mischief. Now the greater and more imminent the mischief, the more probable is it that it is intended. Genuine carelessness is very unusual and unlikely in extreme cases. Men are often enough indifferent as to remote or unimportant dangers to which they expose others, but serious risks are commonly avoided by care unless the mischief is desired and intended. The probability of a result tends to prove intention and therefore to disprove negligence. If a new-born child is left to die from want of medical attention or nursing, it *may* be that its death is due to negligence only, but it is more probable that it is due to wrongful purpose and malice aforethought. He who strikes another on the head with an iron bar *may* have meant only to wound or stun, and not to kill him, but the probabilities are the other way.

In certain cases, as has already been indicated in dealing with the nature of intention, the presumption of fact that a person intends the probable consequences of his actions has hardened into a presumption of law and become irrebuttable. In those cases that which is negligence in fact is deemed wrongful intent in law. It is constructive, though not actual intent. The law of homicide supplies us with an illustration. Murder is wilful homicide, and manslaughter is negligent homicide, but the boundary line as drawn by the law is not fully coincident with that which exists in fact. Thus, an intent to cause grievous bodily harm is imputed as an intent to kill, if death ensues. The justification of such conclusive presumptions of intent is twofold. In the first place, as already indicated, very gross negligence is probably in truth not negligence at all, but wrongful purpose; and in the second place, even if it is truly

negligence, yet by reason of its grossness it is as bad as intent, in point of moral deserts, and therefore may justly be treated and punished as if it were intent. The law, accordingly, will sometimes say to a defendant: "Perhaps, as you allege, you were merely negligent and had not actual wrongful purpose; nevertheless you will be dealt with just as if you had, and it will be conclusively presumed against you that your act was wilful. For your deserts are not better than if you had in truth intended the mischief which you have so recklessly caused. Moreover it is exceedingly probable, notwithstanding your disclaimer, that you did intend it; therefore no endeavour will be made on your behalf to discover whether you did or not."

### **The subjective and objective theories of negligence**

There are two rival theories of the meaning of the term negligence. According to one, negligence is a state of mind; according to the other, it is not a state of mind but merely a type of conduct. These opposing views may conveniently be distinguished as the subjective and objective theories of negligence. The one view was adopted by Sir John Salmond, the other by Sir Frederick Pollock. We shall consider in turn the arguments for each view, and then attempt an evaluation of them.

(1) *The subjective theory of negligence.* Sir John Salmond's view was that a careless person is a person who does not *care*. Although negligence is not synonymous with thoughtlessness or inadvertence, it is nevertheless, on this view, essentially an attitude of *indifference*. Now indifference is exceedingly apt to produce thoughtlessness or inadvertence; but it is not the same thing, and may exist without it. If I am indifferent as to the results of my conduct, I shall very probably fail to acquire adequate foresight and consciousness of them; but I may, on the contrary, make a very accurate estimate of them and yet remain equally indifferent with respect to them.

Negligence, therefore, on this view, essentially consists in the *mental attitude of undue indifference with respect to one's conduct and its consequences*.

(2) *The objective theory of negligence.* The other theory is that negligence is not a subjective, but an objective fact. It is not a particular state of mind or form of the *mens rea* at all, but a particular kind of conduct. It is a breach of the duty of taking care, and to take care means to take precautions against the harmful results of one's actions, and to refrain from unreasonably dangerous kinds of conduct. To drive at night without lights is negligence, because to carry lights is a mental attitude or state of mind than to take cold is. This view obtains powerful support from the law of tort, where it is clearly settled that negligence means a failure to achieve the objective standard of the reasonable man. If the defendant has failed to achieve this standard it is no defence for him to show that he was anxious to avoid doing harm and took the utmost care of which he was capable. The same seems to hold good in criminal law.

The truth contained in the subjective theory is that in certain situations any conclusions as to whether a man had been negligent will depend partly on conclusions as to his state of mind. In criminal law a sharp distinction is drawn between intentionally causing harm and negligently causing harm, and in deciding whether the accused is guilty of either we must have regard to his knowledge, aims, motives and so on. Cases of apparent negligence may, upon examination of the party's state of mind, turn out to be cases of wrongful intention. A

trap door may be left unbolted, in order that one's enemy may fall through it and so die. Poison may be left unlabelled, with intent that some one may drink it by mistake. A ship's captain may wilfully cast away his ship by the neglect of the ordinary rules of good seamanship. A father who neglects to provide medicine for his sick child may be guilty of wilful murder, rather than of mere negligence. In none of these cases, nor indeed in any others, can we distinguish between intentional and negligent wrongdoing, save by looking into the mind of the offender and observing his subjective attitude towards his act and its consequences. Externally and objectively, the two classes of offences are indistinguishable.

The subjective theory then has the merit of making clear the distinction between intention and negligence. The wilful wrongdoer desires the harmful consequences, and therefore does the act in order that they may ensue. The negligent wrongdoer does not desire the harmful consequences, but in many cases is careless (if not wholly, yet unduly) whether they ensue or not, and therefore does the act notwithstanding the risk that they may ensue. The wilful wrongdoer is liable because he desires to do the harm; the negligent wrongdoer may be liable because he does not sufficiently desire to avoid it. He who will excuse himself on the ground that he meant no evil is still open to the reply: Perhaps you did not, but at all events you might have avoided it if you had sufficiently desired so to do; and you are held liable not because you desired the mischief, but because you were careless and indifferent whether it ensued or not.

But to identify negligence with any one state of mind is a confusion and an oversimplification. We have seen that negligence consists in failure to comply with a standard of care and that such failure can result from a variety of factors, including ignorance, inadvertence and even clumsiness. Now while it is true that these may often result from indifference, there is no reason to suppose that they must in all cases arise from this source. To imagine otherwise is to salvage the subjective theory that negligence consists in the mental attitude of indifference at the expense of adopting a hypothesis which has no particular plausibility and no special merit other than that of supporting the subjective theory itself. In fact if wrongful intention is not in issue, and the question is simply whether the defendant caused the harm without any fault on his part or by his unintentional fault, the question is to be settled by ascertaining whether his conduct conformed to the standard of the reasonable man. In this case the state of his mind is not quite irrelevant. For the standard of care represents the degree of care which should be used in the circumstances, and his knowledge or lack of knowledge may be relevant in assessing what the circumstances were. The question may then be whether a reasonable man, knowing only what the defendant knew, would have acted as did the defendant.

But his state of mind is not conclusive. In certain circumstances it may be held in law that a reasonable man would know things that the defendant did not know, and the defendant will be blamed for not knowing and held liable because he ought to know. In such cases the law relating to negligence requires the defendant at his peril to come up to an objective standard and declines "to take his personal equation into account".

### **The theory of strict liability**



We now proceed to consider the third class of wrongs, namely, those of strict liability. These are the acts for which a man is responsible irrespective of the existence of either wrongful intent or negligence. They are the exceptions to the general requirement of fault. It may be thought, indeed, that in the civil as opposed to the criminal law, strict liability should be the rule rather than the exception. It may be said: "It is clear that in the criminal law liability should in all ordinary cases be based upon the existence of *mens rea*. No man should be punished criminally unless he knew that he was doing wrong, or unless, at least, a reasonable person in his shoes could have avoided the harmful result by taking reasonable care. Inevitable mistake or accident should be a good defence. But why should the same principle apply to civil liability? If I do another man harm why should I not be made to pay for it? What does it matter to him whether I did it wilfully, or negligently, or by inevitable accident? In either case I have actually done the harm, and therefore should be bound to *undo* it by paying compensation. For the essential aim of civil proceedings is redress for harm suffered by the plaintiff, not punishment for wrong done by the defendant; therefore the rule of *mens rea* should be deemed inapplicable."

It is clear, however, that this is not the law of England, and it seems equally clear that there is not sufficient reason why it should be. For unless damages are at the same time a deserved penalty inflicted upon the defendant, they are not to be justified as being a deserved recompense awarded to the plaintiff. In the first place they in no way undo the wrong or restore the former state of things. The wrong is done and cannot be undone. If by accident I burn down another man's house, the only result of enforcing compensation is that the loss has been transferred from him to me; but it remains as great as ever for all that. The mischief done has been in no degree abated. Secondly, the idea of compensation is related to that of fault, for it consists in the restoring of a balance by the person who has disturbed it; but if the defendant from whom compensation is sought is not at fault, he can hardly be taken to have disturbed the balance which needs to be redressed. If I am not in fault, there is not more reason why I should insure other persons against the harmful issues of my own activity, than why I should insure them against lightning or earthquakes. Unless some definite gain is to be derived by transferring loss from one head to another, sound reason, as well as the law, requires that the loss should lie where it falls.

### **The extent of strict liability**

Although the requirement of fault is general throughout the civil and criminal law, there are numerous exceptions to it. The considerations on which these are based are various, but the most important is the difficulty of procuring adequate proof of intention or negligence. In the majority of instances, indeed, justice requires that this difficulty be honestly faced; but in certain special cases it is circumvented by a provision that proof of intention or negligence is unnecessary and that liability is strict. In this way we shall certainly punish some who are innocent, but in the case of civil liability this is not a very serious matter—since men know that in such cases they act at their peril, and are content to take the risk—while in respect of criminal liability such a provision applies only in the case of less serious offences. Whenever, therefore, the strict doctrine of *mens rea* would too seriously interfere with the administration of justice by reason of the evidential difficulties involved in it, the law tends to establish a form of strict liability. Nevertheless, strict liability in criminal law remains open to serious

objection. A man should, we feel, be given a reasonable chance to conform his conduct to the requirements of law. It is true that some mistakes and some accidents are culpable and would not have occurred but for the defendant's negligence. Others, however, could not have been avoided however, much care had been taken, and to penalise a man for unavoidable mistakes or accidents is to fail to afford him a reasonable opportunity of complying with the law. The difficulty of procuring adequate proof of intention or negligence could be met quite simply by allowing the defendant to shoulder the burden of proving his innocence. In this event it would be for him to show that any accident or mistake on his part was not culpable. This unfortunately is not the present position in English law, which recognises many offences of strict liability.

In proceeding to consider the chief instances of strict liability we find that the matter falls into three divisions, namely-(1) Mistake of Law, (2) Mistake of Fact, and (3) Accident.

### **Mistake of law**

It is a principle recognised not only by our own but by other legal systems that ignorance of the law is no excuse for breaking it. *Ignorantia juris neminem excusat*. The rule is also expressed in the form of a legal presumption that every one knows the law. The presumption is irrebuttable: no diligence of inquiry will avail against it, as no inevitable ignorance or error will serve for justification. Whenever a man is thus held accountable for breaking a law which he did not know, and which he could not by due care have acquired a knowledge of, we have a type of strict liability.

The reasons rendered for this somewhat rigorous principle are three in number. In the first place, the law is in legal theory definite and knowable; it is the duty of every man to know that part of it which concerns him; therefore innocent and inevitable ignorance of the law is impossible. Men are conclusively presumed to know the law, and are dealt with as if they did know it, because in general they can and ought to know it.

In the second place, even if invincible ignorance of the law is in fact possible, as indeed it is, the evidential difficulties in the way of the judicial recognition of such ignorance are insuperable, and for the sake of any benefit derivable therefrom it is not advisable to weaken the administration of justice by making liability dependent on well-known inscrutable conditions touching knowledge or means of knowledge of the law. Who can say of any man whether he knew the law, or whether during the course of his past life he had an opportunity of acquiring a knowledge of it by the exercise of due diligence?

Thirdly and lastly, the law is in most instances derived from and in harmony with the rules of natural justice. It is a public declaration by the state of its intention to maintain by force those principles of right and wrong which have already a secure place in the moral consciousness of men. The common law is in great part nothing more than common honesty and common sense. Therefore although a man may be ignorant that he is breaking the law, he knows very well in most cases that he is breaking the rule of right. If now to his knowledge lawless, he is at least dishonest and unjust. He has little ground of complaint, therefore, if the law refuses to recognise his ignorance as an excuse, and deals with him according to his moral deserts. He who goes about to harm others when he believes that he can do so within the limits of the law, may justly be required by the law to know those limits at his peril. This is

not a form of activity that need be encouraged by any scrupulous insistence on the formal conditions of legal responsibility.

It must be admitted, however, that while each of these considerations is valid and weighty, they do not constitute an altogether sufficient basis for so stringent and severe a rule. None of them goes the full length of the rule. that the law is knowable throughout by all whom it concerns is an ideal rather than a fact in any system as indefinite and mutable as our own. That it is impossible to distinguish invincible from negligent ignorance of the law is by no means wholly true. It may be doubted whether this inquiry is materially more difficult than many which courts of justice undertake without hesitation; and here again the difficulty of proving the defendant's knowledge of the law could be surmounted by providing that the defendant should bear the burden of establishing non-negligent ignorance. That he who breaks the law of the land disregards at the same time the principles of justice and honesty is in many instances far from truth. In a complex legal system a man requires other guidance than that of common sense and a good conscience. The fact seems to be that the rule in question, while in general sound, does not in its full extent and uncompromising rigidity admit of any sufficient justification. Indeed, it may be said that certain exceptions to it are in course of being developed, particularly in respect of the defence of "claim of right" in criminal law.

### **Mistake of fact**

In respect of the influence of ignorance or error upon legal liability, we have inherited from Roman law a familiar distinction between law and fact. By reason of his ignorance of the law no man will be excused, but it is commonly said that inevitable ignorance of fact is a good defence. This, however, is far from an accurate statement of English law. It is much more nearly correct to say that mistake of fact is an excuse only within the sphere of the criminal law, while in the civil law responsibility is commonly strict in this respect. So far as civil liability is concerned, it is a general principle of our law that he who intentionally or semi-intentionally interferes with the person, property, reputation, or other rightful interests of another does so at his peril, and will not be heard to allege that he believed in good faith and on reasonable grounds in the existence of some circumstance which justified his act. If I trespass upon another man's land, it is no defence to me that I believed it on good grounds to be my own. If in absolute innocence and under an inevitable mistake of fact I meddle with another's goods, I am liable for all loss incurred by the true owner. If, intending to arrest A, I arrest B by mistake instead, I am liable to him, notwithstanding the greatest care taken by me to ascertain his identity. If I falsely but innocently make a defamatory statement about another, I am liable to him however careful I may have been to ascertain the truth. There are, indeed, exceptions to this rule of strict civil liability for mistake of fact, but they are not of such number or importance as to cast any doubt on the validity of the general principle.

In the criminal law, on the other hand, the matter is otherwise, and it is here that the contrast between mistake of law and mistake of fact finds its true application. Absolute criminal responsibility for a mistake of fact is quite exceptional. An instance of it is the liability of him who abducts a girl under the legal age of consent. Inevitable mistake as to her age is no defence; he must take the risk.

A word may be said as to the historical origin of this failure of English law to recognise inevitable mistake as a ground of exemption from civil liability. Ancient modes of procedure and proof were not adapted for inquiries into mental conditions. By the practical difficulties of proof early law was driven to attach exclusive importance to overt acts. The subjective elements of wrongdoing were largely beyond proof or knowledge, and were therefore disregarded as far as possible. It was a rule of our law that intent and knowledge were not matters that could be proved or put in issue. "It is common learning", said one of the judges of King Edward IV, "that the intent of a man will not be tried, for the devil himself knoweth not the intent of a man". The sole question which the courts would entertain was whether the defendant did the act complained of. Whether he did it ignorantly or with guilty knowledge was entirely immaterial. This rule, however, was restricted to civil liability. It was early recognised that criminal responsibility was too serious a thing to be imposed upon an innocent man simply for the sake of avoiding a difficult inquiry into his knowledge and intention. In the case of civil liability, on the other hand, the rule was general. The success with which it has maintained itself in modern law is due in part to its undeniable utility in obviating inconvenient or even impracticable inquiries, and in part to the influence of the conception of redress in minimising the importance of fault as a condition of penal liability.

### **Accident**

Unlike mistake, inevitable accident is commonly recognised by our law as a ground of exemption from liability. It is needful, therefore, to distinguish accurately between these two things, for they are near of kin. Every act which is not done intentionally is done either accidentally or by mistake. It is done accidentally when the consequences are unintended. It is done by mistake, when the consequences are intended but the actor is ignorant of some material circumstance. If I drive over a man in the dark because I do not know that he is in the road, I injure him accidentally; but if I procure his arrest, because I mistake him for some one who is liable to arrest, I injure him, not accidentally, but by mistake. In the former case I did not intend the harm at all, while in the latter case I fully intended it, but falsely believed in the existence of a circumstance which would have served to justify it. So if by insufficient care I allow my cattle to escape into my neighbour's field, their presence there is due to accident; but if I put them there because I wrongly believe that the field is mine, their presence is due to mistake. In neither case did I intend to wrong my neighbour, but in the one case my intention failed as to the consequence, and in the other as to the circumstance.

Accident, like mistake, is either culpable or inevitable. It is culpable when due to negligence, but inevitable when the avoidance of it would have required a degree of care exceeding the standard demanded by the law. Culpable accident is no defence, save in those exceptional cases in which wrongful intent is the exclusive and necessary ground of liability. Inevitable accident is commonly a good defence, both in the civil and in the criminal law.

To this rule, however, there are, at least, in the civil law, important exceptions. These are cases in which the law insists that a man shall act at his peril, and shall take his chance of accidents happening. If he desires to keep wild beasts, or to construct a reservoir of water or to accumulate upon his land any substance which will do damage to his neighbours if it escapes (he will do all these things *suo periculo* (though none of them are *per se* wrongful), and will answer for all ensuing damage, notwithstanding consummate care. So also every

man is strictly responsible for the trespasses of his cattle. If my horse or my ox escapes from my land to that of another man, I am answerable for it without any proof of negligence.

### **Vicarious responsibility**

Hitherto we have dealt exclusively with the conditions of liability, and it is needful now to consider its incidence. Normally and naturally the person who is liable for a wrong is he who does it. Yet both ancient and modern law admit instances of vicarious liability in which one man is made answerable for the acts of another. In more primitive systems, however, the impulse to extend vicariously the incidence of liability receives free scope in a manner altogether alien to modern notions of justice. It is in barbarous times considered a very natural thing to make every man answerable for those who are kin to him. In the Mosaic legislation it is deemed necessary to lay down the express rule that "Fathers shall not be put to death for the fathers; every man shall be put to death for his own sin". Plato in his *Laws* does not deem it needless to emphasise the same principle. Furthermore, so long as punishment is conceived rather as expiatory, retributive, and vindictive, than as deterrent and reformatory, it might seem reasonable for the incidence of liability to be determined by *consent*, and for a guilty man to provide a substitute to bear his penalty and to provide the needful satisfaction to the law. Guilt must be wiped out by punishment but there is no reason why the victim should be one person rather than another.

Morally, however, such proceedings would be indefensible. Most people would agree that punishment, since it consists of the infliction of pain, must be justified, for to inflict pain without justification is immoral and itself an evil. Now it is justifiable to punish an offender, provided that the punishment is not out of all proportion to the offence, because the evil inflicted is a means to a greater good, i.e., the protection of society; because the wrongdoer has forfeited, of his own volition, the right not to have evil inflicted on him, since he might have abstained from his wrongdoing; and because the punishment may serve to turn him away from his wrongdoing. But where punishment is inflicted on some person other than the actual offender, the law is treating the victim as a mere means to an end. In such a case the victim's own conduct is not in question, nor is there any suggestion of reforming the victim himself; he is being penalised merely for the greater good of others. And this is to regard him as less than a person; it is to use him as a thing. In so far as the law is in harmony with morality it will avoid vicarious liability in criminal law, and in English criminal law vicarious liability, though existing, is exceptional.

Modern civil law recognises vicarious liability in two chief classes of cases. In the first place, masters are responsible for the acts of their servants done in the course of their employment. In the second place, representatives of dead men are liable for deeds done in the flesh by those whom they represent. We shall briefly consider each of these two forms.

It has been sometimes said that the responsibility of a master for his servant has its historical source in the responsibility of an owner for his slave. This, however, is certainly not the case. The English doctrine of employer's liability is of comparatively recent growth. It has its origin in the legal presumption, gradually become conclusive that all acts done by a servant in and about his master's business are done by his master's express or implied authority, and are therefore in truth the acts of the master for which he may be justly held

responsible. No employer will be allowed to say that he did not authorise the act complained of, or event that it was done against his express injunctions, for he is liable none the less. This conclusive presumption of authority has now, after the manner of such presumptions, disappeared from the law, after having permanently modified it by establishing the principle of employer's liability. Historically, as we have said, this is a fictitious extension of the principle, *Qui facit per alium facit per se*. Formally, it has been reduced to the laconic maxim, *Respondeat superior*.

The rational basis of this form of vicarious liability is in the first place evidential. There are such immense difficulties in the way of proving actual authority, that it is necessary to establish a conclusive presumption of it. A word, a gesture, or a tone may be a sufficient indication from a master to his servant that some lapse from the legal standard of care or honesty will be deemed acceptable service. Yet who could prove such a measure of complicity? Who could establish liability in such a case, were evidence of authority required, or evidence of the want of it admitted.

A further reason for the vicarious responsibility of employers is that employers usually are, while their servants usually are not, financially capable of the burden of civil liability. It is felt, probably with justice, that a man who is able to make compensation for the hurtful results of his activities should not be enabled to escape from the duty of doing so by delegating the exercise of these activities to servants or agents from whom no redress can be obtained. Such delegation confers upon impecunious persons means and opportunities of mischief which would otherwise be confined to those who are financially competent. It disturbs the correspondence which would otherwise exist between the capacity of doing harm and the capacity of paying for it. It is requisite for the efficacy of civil justice that this delegation of powers and functions should be permitted only on the condition that he who delegates them shall remain answerable for the acts of his servants, as he would be for his own.

A second form of vicarious responsibility is that of living representatives for the acts of dead men. There is no doubt that criminal responsibility must die with the wrongdoer himself, but with respect to penal redress the question is not free from difficulty. For in this form of liability there is a conflict between the requirements of the two competing principles of punishment and compensation. The former demands the termination of liability with the life of the wrongdoer, while the latter demands its survival. In this dispute the older common law approved the first of those alternatives. The received maxim was: *Actio personalis moritur cum persona*. A man cannot be punished in his grave; therefore it was held that all actions for penal redress, being in their true nature instruments of punishment, must be brought against the living offender and must die with him. Modern opinion rejects this conclusion, and by various statutory provisions the old rule has been almost entirely abrogated. It is considered that although liability to afford of punishment, it should depend in point of *continuance* upon those of compensation. For when this form of liability has once come into existence, it is a valuable right of the person wronged; and it is expedient that such rights should be held upon a secure tenure, and should not be subject to extinction by a mere irrelevant accident such as the death of the offender. There is no sufficient reason for drawing any distinction in point of survival between the right of a creditor to recover his debt and the right of a man who has

been injured by assault or defamation to recover compensation for the loss so suffered by him.

As a further argument in the same sense, it is to be observed that it is not strictly true that a man cannot be punished after his death. Punishment is effective not at the time it is inflicted, but at the time it is threatened. A threat of evil to be inflicted upon a man's descendants at the expense of his estate will undoubtedly exercise a certain deterrent influence upon him; and the apparent injustice of so punishing his descendants for the offences of their predecessor is in most cases no more than apparent. The right of succession is merely the right to acquire the dead man's estate, subject to all charges which, on any grounds, and apart altogether from the interests of the successors themselves, may be imposed upon it.

### **The measure of criminal liability**

We have now considered the conditions and the incidence of penal liability. It remains to deal with the measure of it, and here we must distinguish between criminal and civil wrongs, for the principles involved are fundamentally different in the two cases.

In considering the measure of criminal liability it will be convenient to bestow exclusive attention upon the deterrent purpose of the criminal law, remembering, however, that the conclusions so obtained are subject to possible modification by reference to those other purposes of punishment which we thus provisionally disregard.

Were men perfectly rational, so as to act invariably in accordance with an enlightened estimate of consequences, the question of the measure of punishment would present no difficulty. A draconian simplicity and severity would be perfectly effective. It would be possible to act on the Stoic paradox that all offences involve equal guilt, and to visit with the utmost rigour of the law every deviation, however slight, from the appointed way. In other words, if the deterrent effect law would be that which by the most extreme and indiscriminating severity effectually extinguished crime. Were human nature so constituted that a threat of burning all offenders alive would certainly prevent all breaches of the law, then this would be an effective penalty for all offences from high treason to petty larceny. So greatly, however, are men moved by the impulse of the moment, rather than by a rational estimate of future good and evil, and so ready are they to face any future evil which falls short of the inevitable, that the utmost rigour is sufficient only for the diminution of crime, not for the extinction of it. It is needful, therefore, in judging the merits of the law, to subtract from the sum of good which results from the partial failure of prevention and the consequent necessity of fulfilling those threats of evil by which the law had hoped to effect its purpose. The perfect law is that in which the difference between the good and the evil is at a maximum in favour of the good, and the rules as to the measure of criminal liability are the rules for the attainment of this maximum. It is obvious that it is not attainable by an indefinite increase of severity. To substitute hanging for imprisonment as the punishment for petty theft would doubtless diminish the frequency of this offence, but it is certain that the evil so prevented would be so far outweighed by that which the law would be called on to inflict in the cases in which its threats proved unavailing.

In every crime there are three elements to be taken into account in determining the appropriate measure of punishment. These are (1) the motives to the commission of the offence, (2) the magnitude of the offence, and (3) the character of the offender.

1. ***The motive of the offence.*** Other things being equal, the greater the temptation to commit a crime the greater should be the punishment. This is an obvious deduction from the first principles of criminal liability. The object of punishment is to counteract by the establishment of contrary and artificial motives the natural motives which lead to crime. The stronger these natural motives the stronger must be the counteractives which the law supplies. If the profit to be derived from an act is great, or the passions which lead men to it are violent, a corresponding strength or violence is an essential condition of the efficacy of repressive discipline. We shall see later, however, that this principle is subject to a very important limitation, and that there are many cases in which extreme temptation is a ground of extenuation rather than of increased severity of punishment.

2. ***The magnitude of the offence.*** Other things being equal, the greater the offence, that is to say the greater the sum of its evil consequences or tendencies, the greater should be its punishment. At first sight, indeed, it would seem that this consideration is irrelevant. Punishment, it may be thought, should be measured solely by the profit derived by the offender, not by the evils caused to other persons; if two crimes are equal in point of motive, they should be equal in point of punishment, notwithstanding the fact that one of them may be many times more mischievous than the other. This, however, is not so, and the reason is twofold.

(a) The greater the mischief of any offence the greater is the punishment which it is profitable to inflict with the hope of preventing it. For the greater this mischief the less is the proportion which the evil of punishment bears to the good of prevention, and therefore the greater is the punishment which can be inflicted before the balance of good over evil attains its maximum. Assuming the motives of larceny and of homicide to be equal, it may be profitable to inflict capital punishment for the latter offence, although it is certainly unprofitable to inflict it for the former. The increased measure of prevention that would be obtained by such severity would, in view of the comparatively trivial nature of the offence, be obtained at too great a cost.

(b) A second and subordinate reason for making punishment vary with the magnitude of the offence is that, in those cases in which different offences offer themselves as alternatives to the offender, an inducement is thereby given for the preference of the least serious. If the punishment of burglary is the same as that of murder, the burglar has obvious motives for not stopping at the lesser crime. If an attempt is punished as severely as a completed offence, why should any man repent of his half-executed purposes?

3. ***The character of the offender.*** The worse the character or disposition of the offender the more severe should be his punishment. Badness of disposition is constituted either by the strength of the impulses to crime, or by the weakness of the impulses towards law-abiding conduct. One man may be worse than another because of the greater strength and prevalence within him of such anti-social passions as anger, covetousness, or malice; or his badness may lie in a deficiency of those social impulses and instincts which are the springs of right conduct



in normally constituted men. In respect of all the graver forms of law-breaking, for one man who abstains from them for fear of the law there are thousands who abstain by reason of quite other influences. Their sympathetic instincts, their natural affections, their religious beliefs, their love of the approbation of others, their pride and self-respect, render superfluous the threatenings of the law. In the degree in which these impulses are dominant and operative, the disposition of a man is good; in a degree in which they are wanting or inefficient, it is bad.

In both its kinds badness of disposition is a ground for severity of punishment. If a man's emotional constitution is such that normal temptation acts upon him with abnormal force, it is for the law to supply in double measure the counteractive of penal discipline. If he is so made that the natural influences towards well-doing fall below the level of average humanity, the law must supplement them by artificial influences of a strength that is needless in ordinary cases.

Any fact, therefore, which indicates depravity of disposition is a circumstance of aggravation and calls for a penalty in excess of that which would otherwise be appropriate to the offence. One of the most important of these facts is the repetition of crime by one who has been already punished. The law rightly imposes upon habitual offenders penalties which bear no relation either to the magnitude or to the profit of the offence. A punishment adapted for normal men is not appropriate for those who, by their repeated defiance of it prove their possession of abnormal natures. A second case in which the same principle is applicable is that in which the mischief of an offence is altogether disproportionate to any profit to be derived from it by the offender. To kill a man from mere wantonness, or merely in order to facilitate the picking of his pocket, is a proof of extraordinary depravity beyond anything that is imputable to him who commits homicide only through the stress of passionate indignation or under the influence of great temptation. A third case is that of offences from which normal humanity is adequately dissuade by such influences as those of natural affection. To kill one's father is in point of magnitude no worse a crime than any other homicide, but it has at all times been viewed with greater abhorrence, and by some laws punished with greater severity, by reason of the depth of depravity which it indicates in the offender. Lastly it is on the same principle that wilful offences are punished with greater rigour than those which are due merely to negligence.

An additional and subordinate reason for making the measure of liability upon the character of the offender is that badness of disposition is commonly accompanied by deficiency of sensibility. Punishment must increase as sensibility diminishes. The more depraved the offender the less he feels the shame of punishment; therefore the more he must be made to feel the pain of it. A certain degree of even physical insensibility is said to characterise those who commit crimes of violence; and the indifference with which death itself is faced by those who in the callousness of their hearts have not scrupled to inflict it upon others is a matter of amazement to normally constituted men.

We are now in a position to deal with a question which we have already touched upon but deferred for fuller consideration, namely the apparent paradox involved in the rule that punishment must increase with the temptation to the offence. As a general rule this proposition is true; but it is subject to a very important qualification. For in certain cases the temptation to which a man succumbs may be of such a nature as to rebut that presumption of

bad disposition which would in ordinary circumstances arise from the commission of the offence. He may, for example, be driven to the act not by the strength of any bad or self-regarding motives, but by that of his social or sympathetic impulses. In such a case the greatness of the temptation, considered in itself, demands severity of punishment, but when considered as a disproof of the degraded disposition which usually accompanies wrongdoing it demands leniency; and the latter of these two conflicting considerations may be of sufficient importance to outweigh the other. If a man remains honest until he is driven in despair to steal food for his starving children, it is perfectly consistent with the deterrent theory of punishment to deal with him less severely than with him who steals from no other motive than cupidity. He who commits homicide from motives of petty gain, or to attain some trivial purpose, deserves to be treated with the utmost severity, as a man thoroughly callous and depraved. But he who kills another in retaliation for some intolerable insult or injury need not be dealt with according to the measure of his temptations, but should rather be excused on account of them.

### **The measure of civil liability**

We have seen that penal redress involves both the compensation of the person injured and the punishment, in a sense, of the wrongdoer. Yet in measuring civil liability the law attaches more importance to the principle of compensation than to that of fault. For it is measured exclusively by the magnitude of the offence, that is to say, by the amount of loss inflicted by it. Apart from some exceptions it takes no account of the character of the offender, and so visits him who does harm through some trivial want of care with as severe a penalty as if his act had been prompted by deliberate malice. Similarly it takes no account of the motives of the offence; he who has everything and he who has nothing to gain are equally punished, if the damage done by them is equal. Finally, it takes no account of probable or intended consequences, but solely of those which actually ensue; wherefore the measure of a wrongdoer's liability is not the evil which he meant to do, but that which he has succeeded in doing. If one man is made to pay higher damages than another, it is not because he is more guilty, but because he has had the misfortune to be more successful in his wrongful purposes, or less successful in the avoidance of unintended issues.

Yet it is not to be suggested that this form of civil liability is unjustifiable. Penal redress possesses advantages more than sufficient to counterbalance any such objections to it. More especially it possesses this, that while other forms of punishment, such as imprisonment, are uncompensated evil, penal redress is the gain of him who is wronged as well as the loss of the wrongdoer.

Further, this form of remedy gives to the persons injured a direct interest in the efficient administration of justice—an interest which is almost absent in the case of the criminal law. It is true, however, that the law of penal redress, taken by itself, falls so far short of the requirements of a rational scheme of punishment that it would by itself be totally insufficient. In all modern and developed bodies of law its operation is supplemented, and its deficiencies made good, by a co-ordinate system of criminal liability. These two together, combined in due proportions, constitute a very efficient instrument for the maintenance of justice.

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## *CIVIL AND CRIMINAL JUSTICE<sup>1</sup>*

The distinction between crimes and civil wrongs is roughly that crimes are public wrongs and civil wrongs are private wrongs. As Blackstone says: “Wrongs are divisible into two sorts or species, private wrongs and public wrongs. The former are an infringement or privation of the - private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries; the latter are a breach and violation of public rights and duties which affect the whole community considered as a community; and are distinguished by the harsher appellation of crimes and misdemeanours”. A crime then is an act deemed by law to be harmful to society in general, even though its immediate victim is an individual. Murder injures primarily the particular victim, but its blatant disregard of human life puts it beyond a matter of mere compensation between the murderer and the victim’s family. Those who commit such acts are proceeded against by the state in order that, if convicted, they may be punished. Civil wrongs such as breach of contract or trespass to land are deemed only to infringe the rights of the individual wronged and not to injure society in general, and consequently the law leaves it to the victim to sue for compensation in the courts.

English law, however, has certain features which prevent us drawing a clear line between these two kinds of wrong. First, there are some wrongs to the state and therefore public wrongs, which are nevertheless by law regarded as civil wrongs. A refusal to pay taxes is an offence against the state, and is dealt with at the suit of the state, but it is a civil wrong for all that, just as a refusal to repay money lent by a private person is a civil wrong. The breach of a contract made with the state is no more a criminal offence than is the breach of a contract made with a subject. An action by the state for the recovery of a debt, or for damages, or for the restoration of public property, or for the enforcement of a public trust, is purely civil, although in each case the person injured and suing is the State itself.

Secondly, some civil wrongs can cause greater general harm than some criminal offences. The negligence of a contractor resulting in widespread injury and damage may be far more harmful than a petty theft. Furthermore, the same act may be a civil injury and a crime, both forms of remedy being available. This is true, for instance, of libel and assault.

From a practical standpoint the importance of the distinction lies in the difference in the legal consequences of crimes and civil wrongs. Civil justice is administered according to one set of forms, criminal justice according to another set. Civil justice is administered in one set of courts, criminal justice in a somewhat different set. The outcome of the proceedings, too, is generally different. Civil proceedings, if successful, result in a judgment for damages, or in a judgment for the payment of a debt or (in a penal action) a penalty, or in an injunction or decree of specific performance, or in an order for the delivery of possession of land, or in a decree of divorce, or in an order of mandamus, prohibition, or certiorari, or in a writ of habeas corpus, or in other forms of relief known distinctively as civil. Criminal proceedings, if successful, result in one of a number of punishments, ranging from hanging to a fine, or in a

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<sup>1</sup> P.J. Fitzgerald, *Salmond on Jurisprudence* 91-106 (12<sup>th</sup> ed., 1966).

binding over to keep the peace, release upon probation, or other outcome known to belong distinctively to criminal law.

Even here, however, the distinction is not clear-cut. For criminal proceedings may result in an order against the accused to make restitution or compensation, while civil proceedings may result in an award of exemplary or punitive damages. It remains true, however, that the basic objective of criminal proceedings is punishment, and that the usual goal of civil proceedings is non-punitive.

Here we must notice that peculiarity of English law, the penal action. At one time it was a frequent practice, when it was desired to repress some type of conduct thought to be harmful, to do so by the machinery of the civil rather than of the criminal law. The means so chosen was called a penal action, as being brought for the recovery of a penalty; and it might be brought, according to the wording of the particular statute creating the penal action, either by the Attorney-General on behalf of the state, or by a common informer on his own account. A common informer was anyone who should first sue the offender for the penalty, but those of the Attorney-General continue unaffected. Moreover, there are several instances, under old statutes, where a person who has suffered a wrong (for instance, in being kept out of possession by his former tenant) is allowed to recover multiple damages by way of penalty. Since penal actions follow all the forms of civil actions, and are governed by the same rules, we must regard them as civil actions, and ignore for the purpose of classification their resemblances to criminal law.

### **The Purpose of Criminal Justice : Punishment**

We can look at punishment from two different aspects. We can regard it as a method of protecting society by reducing the occurrence of criminal behaviour, or else we can consider it as an end in itself. Punishment can protect society by deterring potential offenders, by preventing the actual offender from committing further offences and by reforming and turning him into a law-abiding citizen. The problem of punishment consists largely of the competing claims of these three different approaches.

Some would regard punishment as before all things a deterrent. Offences are committed by reason of a conflict between the interests, real or apparent, of the wrongdoer and those of society at large. Punishment prevents offences by destroying this conflict of interests to which they owe their origin - by making all deeds which are injurious to others injurious also to the doers of them - by making every offence, in the words of Locke, "an ill bargain to the offender". Men do injustice because they have no sufficient motive to seek justice, which is the good of others rather than that of the doer of it. The purpose of the criminal law is to supply by art the motives which are thus wanting in the nature of things.

Where punishment is disabling or preventive, its aim is to prevent a repetition of the offence by rendering the offender incapable of its commission. The most effective method of disablement is the death penalty. Imprisonment has not only a deterrent (and possibly reformatory) value, but it serves also as a temporary preventive measure. Less dramatic forms of disablement are such measures as disqualification orders; for instance, a person may be disqualified from driving and so forbidden by law to put himself in such a position as to be able to commit motoring offences.

Deterrence acts on the motives of the offender, actual or potential; disablement consists primarily in physical restraint. Reformation, by contrast, seeks to bring about a change in the offender's character itself so as to reclaim him as a useful member of society. Whereas deterrence looks primarily at the potential criminal outside the dock, reformation aims at the actual offender before the bench. In this century increasing weight has been attached to this aspect. Less frequent use of imprisonment, the abandonment of short sentences, the attempt to use prison as a training rather than a pure punishment, and the greater employment of probation, parole and suspended sentences are evidence of this general trend. At the same time there has been growing concern to investigate the causes of crime and the effects of penal treatment.

Plainly there is a conflict between these different approaches to punishment. The purely reformatory theory admits only such forms of punishment as are subservient to the education and discipline of the criminal, and rejects all those which are profitable only as deterrent or disabling. Death is in this view no fitting penalty; we must cure our criminals, not kill them. Other forms of corporal punishment are rejected as brutalising and degrading both to those who suffer and those who inflict them. The deterrent theory, by contrast, would reject as totally unfitted for any penal system any measures inadequate to dissuade offenders from further offences. If criminals are sent to prison in order to be there transformed into good citizens by physical, intellectual and moral training, prisons must be turned into dwelling-houses far too comfortable to serve as any effectual deterrent to those classes from which criminals are chiefly drawn. Further difficulty arises with the incorrigible offender. Some men appear to be beyond the reach of any correctional influences and yet they cannot just be abandoned as totally unfit for punitive treatment of some sort. The protection of society demands at least a measure of disablement to restrain such persons from further harmful activity. The problem ultimately is that suitable methods of reformation might well act not to deter but positively to encourage the commission of crime, whereas on the other hand punishments apt to deter potential offenders may, instead of reclaiming the actual offender, turn him into a hardened criminal.

Between these competing views we have in practice to find a working compromise. Single-minded pursuance of any one of these particular aims of punishment could lead to disaster. The present tendency to stress the reformatory element is a reaction against the former tendency to neglect it altogether, and like most reactions it falls into the falsehood of extremes. It is an important truth, unduly neglected in times past, that to a very large extent criminals are not normal and healthy human beings, and that crime is in great measure the product of physical and mental abnormality and degeneracy. It has been too much the practice to deal with offenders on the assumption that they are ordinary types of humanity. Too much attention has been paid to the crime, and too little to the criminal. Yet we must be careful not to fall into the opposite extreme. If crime has become the monopoly of the abnormal and the degenerate, or even the mentally unsound, the fact must be ascribed to the selective influence of a system of criminal justice based on a sterner principle than that of reformation. The more efficient the coercive action of the state becomes, the more successful it is in restraining all normal human beings from the dangerous paths of crime, and the higher becomes the proportion of degeneracy among those who break the law. Even with our present imperfect

methods the proportion of insane persons among murderers is very high; but if the state could succeed in making it impossible to commit murder in a sound mind without being indubitably hanged for it afterwards, murder would soon become, with scarcely an exception, limited to the insane.

If, after this consummation had been reached, the opinion were advanced that inasmuch as all murderers are insane, murder is not a crime which needs to be suppressed by the strong arm of the penal law, and pertains to the sphere of medicine rather than to that of jurisprudence, the fallacy of the argument would be obvious. Were the state to act on any such principle, the proposition that all murderers are insane would very rapidly cease to be true. The same fallacy, though in a less obvious form, is present in the more general argument that, since the proportion of disease and degeneracy among criminals is so great, the reformatory function of punishment should prevail over, and in a great measure exclude, its deterrent and coercive functions. For it is chiefly through the permanent influence and operation of these latter functions, partly direct in producing a fear of evildoing, partly indirect in establishing and maintaining those moral habits and sentiments which are possible only under the shelter of coercive law, that crime has become limited, in such measure as it has, to the degenerate, the abnormal, and the insane. Given an efficient penal system, crime is too poor a bargain to commend itself, save in exceptional circumstances, to any except those who lack the self-control, the intelligence, the prudence or the moral sentiments of the normal man. But apart from criminal law in its sternest aspects, and apart from that positive morality which is largely the product of it, crime is a profitable industry, which will flourish exceedingly, and be by no means left as a monopoly to the feebler and less efficient members of society.

Although the general substitution of the reformatory for the deterrent principle would lead to disaster, it may be argued that the substitution is possible and desirable in the special case of the abnormal and degenerate. It is not possible to draw any sharp line of distinction between the normal and the degenerate human being. It is difficult enough in the case of insanity and diminished responsibility; but the difficulty would be a thousand-fold increased had we to take account of every lapse from the average type. The law is necessarily a rough and ready instrument, and men must be content in general to be judged and dealt with by it on the basis of their common humanity, and not on that of their special idiosyncrasies. Special difficulty arises with persons who are psychopaths, persons incapable of being influenced by social, penal and medical measures. Of these it has been said that the inadequacy or deviation or failure to adjust to ordinary social life is not a mere wilfulness or badness which can be threatened or thrashed out of the individual so involved, but constitutes a true illness for which we have no specific explanation. In England the defence of diminished responsibility has been held to extend to a psychopath suffering from abnormal difficulty in controlling his impulses, and psychopathy is now recognised as one of the types of mental disorder by the Mental Health Act, 1959.

It is needful, then, in view of modern theories and tendencies, to insist on the importance of the deterrent element in criminal justice. The reformatory element must not be overlooked, but neither must it be allowed to assume undue prominence. How much prominence it may be allowed is a question of time, place and circumstance. In the case of youthful criminals and first offenders, the chances of effective reformation are greater than in that of adults who have fallen into crime more than once, and the rightful importance of the reformatory principle is

therefore greater also. Some crimes, such as sexual offences, admit more readily of reformatory treatment than others. In orderly and law-abiding communities concessions may be safely made in the interests of reformation, which in more turbulent societies would be fatal to the public welfare.

Now while the deterrent, preventive and reformatory theories regard punishment as aiming at some further end, the retributive theory regards it rather as an end in itself. According to this view, it is right and proper, without regard to ulterior consequences, that evil should be returned for evil, and that as a man deals with others so should he himself be dealt with. An eye for an eye and a tooth for a tooth is deemed a plain and self-sufficient rule of natural justice. Punishment as so regarded is no longer a mere instrument for the attainment of the public welfare, but has become an end in itself.

Retribution means basically that the wrongdoer pays for his wrongdoing. The suffering which he undergoes restores the balance which his original crime disturbed. This notion is clearly connected with that of revenge. The latter consists of injury inflicted by way of retaliation by one person on another who has wronged him, and plainly requires the existence of a victim as well as a wrongdoer. Retribution might be thought of as an extension of this, society itself feeling sympathy with the victim and sharing his desire for vengeance. But when revenge gives way to retribution, the emphasis is no longer on assuaging the victim's feelings but on seeing that the wrongdoer gets his deserts. There is also the idea, connected with, but different from, revenge, that it would be unjust for the wrongdoer to enjoy undeserved happiness at the expense of his victim. Moreover, retribution can apply even in the absence of a personal victim. Divine retribution, for instance, does not necessarily presuppose the actual injury of the deity. Again, society's exaction of retribution for an offence does not entail that society itself has been harmed by the offender's act.

It is questionable, however, whether retribution can be justified. Since punishment involves inflicting suffering on another, *prima facie* it is wrong and stands in need of justification. Deterrence, prevention and reformation provide a justification in that suffering is inflicted in order that society can protect itself. For just as it is morally permissible for an individual to use force to defend himself, so, too, society is surely at liberty morally to act in its own defence. The idea, however, that punishment can be justified, not as a means to some laudable end, but as an end in itself, is far from obvious. To force a wrongdoer to compensate his victim may be justified as a means of alleviating the latter's suffering and as bringing about a more just state of affairs between the two, but to exact retribution in order to force offenders to balance the accounts of abstract justice is surely to arrogate to ourselves functions to which we are not entitled.

Society's desire for retribution cannot of course be wholly disregarded. Indeed it is arguable that such desire is necessary for the health of the community and the effectiveness of the law. A society which felt neither anger nor indignation at outrageous conduct would hardly enjoy an effective system of law. But while righteous social anger can fulfil a useful purpose, it must be remembered first that of all procedures the least desirable is to deal with an offender in the heat of the moment; and, secondly, that such anger carries no self-evident title to satisfaction - it may, for example, be based on factual error. While it may be difficult

for the authorities to disregard popular clamour, authority is at its best when refusing to bow to it and persisting in acting as itself thinks right.

Akin to the idea of retribution is that of expiation. On this view, crime is done away with, cancelled, blotted out or expiated by the suffering of its appointed penalty. To suffer punishment is to pay a debt due to the law that has been violated. Guilt *plus* punishment is equal to innocence. "The wrong", it has been said, "whereby he has transgressed the law of right, has incurred a debt. Justice requires that the debt be paid, that the wrong be expiated...This is the first object of punishment - to make satisfaction to outraged law". This conception marks a stage in the transformation of revenge into criminal justice. Until this transformation is complete, the remedy of punishment is more or less assimilated to that of redress. Revenge is the right of the injured person. The penalty of wrongdoing is a debt which the offender owes to his victim, and when the punishment has been endured the debt is paid, the liability is extinguished, innocence is substituted for guilt, and the *vinculum juris* forged by crime is dissolved. The object of true redress is to restore the position demanded by the rule of right, to substitute justice for injustice, to compel the wrongdoer to restore to the injured person that which is his own. A like purpose is assigned to punishment, so long as it is imperfectly differentiated from that of retributive vengeance, which is in some way a reparation for wrongdoing. The fact that in the expiatory theory satisfaction is conceived as due rather to the outraged majesty of the law than to the victim of the offence, merely marks a further stage in the refinement and purification of the primitive conception.

Expiation, however, is no easier to justify morally than retribution. To compel the wrongdoer to compensate or make restitution to his victim seems reasonable, but the suggestion that we should compel him to make restitution in the abstract to no actual person suffers not only from a mysticism that should have no place in law and politics but also from the fatal objection that there is no moral right for mere men to enforce this sort of abstract payment.

Enshrined in the retributive and expiatory theories, however, are claims which should not be disregarded. The former, which regards punishment as balanced against an offence, acts as an important limiting principle generally in the penal context. Without accepting the view that punishment should be inflicted *because of* the offence (and nothing more), we may nevertheless accept that punishment should *not* be inflicted *unless there has been an offence* and that the punishment should not be out of proportion to that offence. Likewise, the notion of expiation has its own particular value. While not subscribing to the theory that criminals should be punished in order to make them "pay their due", we may still argue that, once their punishment is over, the slate should be wiped clean; in these days when punishment is tending towards individualisation and when the prisoner's previous convictions and record are becoming increasingly important, this is a claim that should not be overlooked.

### **Civil Justice: Primary and Sanctioning Rights**

We proceed now to the consideration of civil justice and to the analysis of the various forms assumed by it. The first distinction to be noticed is that the right enforced in civil proceedings is either a Primary or a Sanctioning right. A sanctioning right is one which arises out of the violation of another source than wrongs. Thus my right not to be libelled or



assaulted is primary; but my right to obtain pecuniary compensation from one who has libelled or assaulted me is sanctioning my right to the fulfilment of a contract made with me is primary; but my right to damages for its breach is sanctioning.

The administration of civil justice, therefore, falls into two parts, according as the right enforced belongs to the one or the other of these two classes. Sometimes it is impossible for the law to enforce the primary right; sometimes it is possible but not expedient. If by negligence I destroy another man's property, his right to this property is necessarily extinct and no longer enforceable. The law, therefore, gives him in substitution for it a new and sanctioning right to receive from me the pecuniary value of the property that he has lost. If on the other hand I break a promise of marriage, it is still possible, but it is certainly not expedient, that the law should specifically enforce the right, and compel me to enter into that marriage; and it enforces instead a sanctioning right of pecuniary satisfaction. A sanctioning right almost invariably consists of a claim to receive money from the wrongdoer, and we shall here disregard any other forms, as being quite exceptional.

The enforcement of a primary right may be conveniently termed specific enforcement. For the enforcement of a sanctioning right there is no very suitable generic term, but we may venture to call it sanctional enforcement.

Examples of specific enforcement are proceedings whereby a defendant is compelled to pay a debt, to perform a contract, to restore land or chattels wrongfully taken or detained, to refrain from committing or continuing a trespass or nuisance or to repay money received by mistake or obtained by fraud. In all these cases the right enforced is the primary right itself, not a substituted sanctioning right. What the law does is to insist on the specific establishment or re-establishment of the actual state of things required by the rule of right, not of another state of things which may be regarded as its equivalent or substitute.

Sanctioning rights may be divided into two kinds by reference to the purpose of the law in creating them. This purpose is either (1) the imposition of a pecuniary penalty upon the defendant for the wrong which he has committed, or (2) the provision of pecuniary compensation for the plaintiff in respect of the damage which he has suffered from the defendant's wrongdoing. Sanctioning rights, therefore, are either (1) rights to exact and receive a pecuniary penalty, or (2) rights to exact and receive damages or other pecuniary compensation.

The first of these kinds is rare in modern English law - though it was at one time of considerable importance both in our own and in other legal systems. But it is sometimes the case even yet, that the law creates and enforces a sanctioning right which has in it no element of compensation to the person injured, but is appointed solely as a punishment for the wrongdoer. This is so where a pecuniary penalty is payable to the state. We have already sufficiently discussed these "penal actions".

The second form of sanctioning right - the right to pecuniary compensation or damages - is in modern law by far the more violation of a private right gives rise, in him whose right it is, to a sanctioning right to receive compensation for the injury so done to him. Such compensation must itself be divided into two kinds, which may be distinguished as Restitution and Penal Redress. In respect of the person injured, indeed, these two are the same

in their nature and operation; but in respect of the wrongdoer they are very different. In restitution the defendant is compelled to give up the pecuniary value of some benefit which he has wrongfully obtained at the expense of the plaintiff; as when he who has wrongfully taken or detained another's goods is made to pay him the pecuniary value of them, or when he who has wrongfully enriched himself at another's expense is compelled to account to him for all money so obtained.

Penal redress, on the other hand, is a much more common and important form of legal remedy than mere restitution. The law is seldom content to deal with a wrongdoer by merely compelling him to restore all benefits which he has derived from his wrong; it commonly goes further, and compels him to pay the amount of the plaintiff's loss; and this may far exceed the profit, if any, which he has himself received. It is clear that compensation of this kind has a double aspect and nature; from the point of view of the plaintiff it is compensation and nothing more, but from that of the defendant it is a penalty imposed upon him for his wrongdoing. The compensation of the plaintiff is in such cases the instrument which the law uses for the punishment of the defendant, and because of this double aspect it is here called penal redress. Thus if I burn down my neighbour's house by negligence, I must pay him the value of it. The wrong is then undone with respect to him, indeed, for he is put in as good a position as if it had not been committed. Formerly he had a house, and now he has the worth of it. But the wrong is not undone with respect to me, for I am the poorer by the value of the house, and to this extent I have been punished for my negligence.

Some of the American "realists" assert that only sanctioning rights have "reality", at any rate if we put aside cases of specific enforcement like the equitable remedies of specific performance and injunction. Thus, specific performance apart, there is no primary right that another shall perform his contract with me: there is simply a sanctioning right that he shall pay me damages if he breaks it. It is true that in fact if other party breaks his contract, the law enforces my primary right by bringing into play my sanctioning right to damages. To conclude from this, however, that there are no primary rights at all is to betray confusion as to what a right is and to mistake a right for the method of its enforcement. One might equally say that the sanctioning right to damages is not a right, because its violation may in some cases only be enforced by attachment for contempt of court and again in some cases not be enforceable at all. Equally misguided is it to argue that there are no primary duties and that in the contract case the only duty is to pay damages if I do not perform. Under the existing rules of contract, which specify that I ought to perform my contract, I have a primary duty. If I break this contract and then pay damages, I am still in breach of my primary duty. The fact that its breach now imposes on me another duty does not mean that I had no original primary duty.

So far in this section we have been considering the judicial enforcement of rights, that is to say, their enforcement through the medium of the courts. In addition there are various forms of extra-judicial enforcement, sometimes known as self-help. As with judicial enforcement, extra-judicial enforcement may be either specific or sanctional, though in English law all the examples save one are of specific enforcement. The rights of a landowner, of the owner of a chattel, and of anyone in respect of nuisances, can be specifically enforced without resort to the courts by the ejection of trespassing persons and things, the recaption of chattels, and the abatement of nuisances. The right of personal security can be enforced by self-defence and by the defence of

others. The payment of debts can be enforced in appropriate cases through distress for rent and the assertion of liens. The only instance of extra-judicial sanction enforcement in English law is distress damage feasant, that is, the right to seize animals or inanimate chattels that are doing damage to or (perhaps) encumbering land, and to keep them by way of security until compensation is paid.

### **Secondary Functions of Courts of Law**

Hitherto we have confined our attention to the administration of justice in the narrowest and most proper sense of the term. In this sense it means, as we have seen, the application by the state of the sanction of physical force to the rules of justice. It is the forcible defence of rights and suppression of wrongs. The administration of justice properly so called, therefore, involves in every case two parties, the plaintiff and the defendant, a right claimed or a wrong complained of by the former as against the latter, a judgment in favour of the one or the other, and execution of this judgment by the power of the state if need be. We have now to notice that the administration of justice in a wider sense includes all the functions of courts of justice, whether they conform to the foregoing type or not. It is to administer justice in the strict sense that the tribunals of the state are established, and it is by reference to this essential purpose that they must be defined. But when once established, they are found to be useful instruments, by virtue of their constitution, procedure, authority, or special knowledge, for the fulfilment of other more or less analogous functions. To these secondary and non-essential functions, the term administration of justice has been extended. They are miscellaneous and indeterminate in character and number, and tend to increase with the advancing complexity of modern civilisation. They fall chiefly into four groups:

(1) **Actions against the state.** The courts of law exercise, in the first place, the function of adjudicating upon claims made by subjects against the state itself. If a subject claims that a debt is due to him from the Crown, or that the Crown has broken a contract with him, or wrongfully detains his property, he is at liberty to take proceedings in a court of law - formerly by petition of right but now by an ordinary action - for the determination of his rights in the matter. Although the action is tried as if it were a claim between subjects (with some procedural variations), and although the outcome may be a judgment by the court that the plaintiff is entitled to damages, we must notice that the element of coercive force is lacking. The state is the judge in its own cause, and cannot exercise constraint against itself. Nevertheless in the wider sense the administration of justice includes proceedings against the state, no less than a criminal prosecution or an action for debt or damages against a private individual.

(2) **Declarations of right.** The second form of judicial action which does not conform to the essential type is that which results, not in any kind of coercive judgment, but merely in a declaration of a primary right. A litigant may claim the assistance of a court of law, not because his rights have been violated, but because they are uncertain. What he desires may be not any remedy against an adversary for the violation of a right, but an authoritative declaration that the right exists. Such a declaration may be the ground of subsequent proceedings in which the right, having been violated, receives enforcement, but in the meantime there is no enforcement nor any claim to it. Examples of declarations of nullity of marriage, declarations of the legality or illegality of the conduct of state officers, advice to

trustees or executors as to their legal powers and duties, and the authoritative interpretation of wills and statutes.

(3) **Administrations.** A third form of secondary judicial action includes all those cases in which courts of justice undertake the management and distribution of property. Examples are the administration of a trust, the liquidation of a company by the court, and the realisation and distribution of an insolvent estate.

(4) **Titles of right.** The fourth and last form includes all those cases in which judicial decrees are employed as the means of creating, transferring, or extinguishing rights. Instances are a decree of divorce or judicial separation, an adjudication of bankruptcy, an order of discharge in bankruptcy, a decree of foreclosure against a mortgagor, an order appointing or removing trustees, a grant of letters of administration, and vesting or charging orders. In all these cases the judgment or decree operates, not as the remedy of a wrong, but as the title of a right.

These secondary forms of judicial action are to be classed under the head of the *civil* administration of justice. Here, as in its other uses, the term civil is merely residuary; civil justice is all that is not criminal.

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## **PERSONALITY**

### ***The Rights of Animals and Unborn Generations*** \*

EVERY PHILOSOPHICAL PAPER must begin with an unproved assumption. Mine is the assumption that there will still be a world five hundred years from now, and that it will contain human beings who are very much like us. We have it within our power now, clearly, to affect the lives of these creatures for better or worse by contributing to the conservation or corruption of the environment in which they must live. I shall assume furthermore that it is psychologically possible for us to care about our remote descendants, that many of us in fact do care, and indeed that we ought to care. My main concern then will be to show that it makes sense to speak of the rights of unborn generations against us, and that given the moral judgment that we ought to conserve our environmental inheritance for them, and its grounds, we might well say that future generations *do* have rights correlative to our present duties toward them. Protecting our environment now is also a matter of elementary prudence, and insofar as we do it for the next generation already here in the persons of our children, it is a matter of love. But from the perspective of our remote descendants it is basically a matter of justice, of respect for their rights. My main concern here will be to examine the concept of a right to better understand how that can be.

#### **THE PROBLEM**

To have a right is to have a claim<sup>1</sup> *to* something and *against* someone, the recognition of which is called for by legal rules or, in the case of moral rights, by the principles of an enlightened conscience. In the familiar cases of rights, the claimant is a competent adult human being, and the claimee is an officeholder in an institution or else a private individual, in either case, another competent adult human being. Normal adult human beings, then, are obviously the sorts of beings of whom rights can meaningfully be predicated. Everyone would agree to that, even extreme misanthropes who deny that anyone in fact has rights. On the other hand, it is absurd to say that rocks can have rights, not because rocks are morally inferior things unworthy of rights (that statement makes no sense either), but because rocks belong to a category of entities of whom rights cannot be meaningfully predicated. That is not to say that there are no circumstances in which we ought to treat rocks carefully, but only that the rocks themselves cannot validly claim good treatment from us. In between the clear cases of rocks and normal human beings, however, is a spectrum of less obvious cases, including some bewildering borderline ones. Is it meaningful or conceptually possible to ascribe rights to our dead ancestors? to individual animals? to whole species of animals? to plants? to idiots and madmen? to fetuses? to generations yet unborn? Until we know how to settle these puzzling cases, we cannot claim fully to grasp the concept of a right, or to know the shape of

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\* Joel Feinberg, "The Rights of Animals and Unborn Generations" in *Philosophy & Environmental Crisis* by William T. Blackstone (ed.), pp. 43-68 (1974).

<sup>1</sup> I shall leave the concept of a claim unanalyzed here, but for a detailed discussion, see my "The Nature and Value of Rights," *Journal of Value Inquiry* 4 (Winter 1971): 263-277.

its logical boundaries.

One way to approach these riddles is to turn one's attention first to the most familiar and unproblematic instances of rights, note their most salient characteristics, and then compare the borderline cases with them, measuring as closely as possible the points of similarity and difference. In the end, the way we classify the borderline cases may depend on whether we are more impressed with the similarities or the differences between them and the cases in which we have the most confidence. It will be useful to consider the problem of individual animals first because their case is the one that has already been debated with the most thoroughness by philosophers so that the dialectic of claim and rejoinder has now unfolded to the point where disputants can get to the end game quickly and isolate the crucial point at issue. When we understand precisely what *is* at issue in the debate over animal rights, I think we will have the key to the solution of all the other riddles about rights.

### **INDIVIDUAL ANIMALS**

Almost all modern writers agree that we ought to be kind to animals, but that is quite another thing from holding that animals can claim kind treatment from us as their due. Statutes making cruelty to animals a crime are now very common, and these, of course, impose legal duties on people not to mistreat animals; but that still leaves open the question whether the animals, as beneficiaries of those duties, possess rights correlative to them. We may very well have duties *regarding* animals that are not at the same time duties *to* animals, just as we may have duties regarding rocks, or buildings, or lawns, that are not duties *to* the rocks, buildings, or lawns. Some legal writers have taken the still more extreme position that animals themselves are not even the directly intended beneficiaries of statutes prohibiting cruelty to animals. During the nineteenth century, for example, it was commonly said that such statutes were designed to protect human beings by preventing the growth of cruel habits that could later threaten human beings with harm too. Prof. Louis B. Schwartz finds the rationale of the cruelty-to-animals prohibition in its protection of animal lovers from affronts to their sensibilities. "It is not the mistreated dog who is the ultimate object of concern," he writes. "Our concern is for the feelings of other human beings, a large proportion of whom, although accustomed to the slaughter of animals for food, readily identify themselves with a tortured dog or horse and respond with great sensitivity to its sufferings."<sup>2</sup> This seems to me to be factitious. How much more natural it is to say with John Chipman Gray that the true purpose of cruelty-to-animals statutes is "to preserve the dumb brutes from suffering."<sup>3</sup> The very people whose sensibilities are invoked in the alternative explanation, a group that no doubt now includes most of us, are precisely those who would insist that the protection belongs primarily to the animals themselves, not merely to their own tender feelings. Indeed, it would be difficult even to account for the existence of such feelings in the absence of a belief that the animals deserve the protection in their own right and for their own sakes.

Even if we allow, as I think we must, that animals are the intended direct beneficiaries of

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<sup>2</sup> Louis B. Schwartz, "Morals, Offenses and the Model Penal Code," *Columbia Law Review* 63 (1963): 673.

<sup>3</sup> John Chipman Gray, *The Nature and Sources of the Law*, 2d ed. (Boston: Beacon Press, 1963), p. 43.

legislation forbidding cruelty to animals, it does not follow directly that animals have legal rights, and Gray himself, for one,<sup>4</sup> refused to draw this further inference. Animals cannot have rights, he thought, for the same reason they cannot have duties, namely, that they are not genuine "moral agents." Now, it is relatively easy to see why animals cannot have duties, and this matter is largely beyond controversy. Animals cannot be "reasoned with" or instructed in their responsibilities; they are inflexible and unadaptable to future contingencies; they are subject to fits of instinctive passion which they are incapable of repressing or controlling, postponing or sublimating. Hence, they cannot enter into contractual agreements, or make promises; they cannot be trusted; and they cannot (except within very narrow limits and for purposes of conditioning) be blamed for what would be called "moral failures" in a human being. They are therefore incapable of being moral subjects, of acting rightly or wrongly in the moral sense, of having, discharging, or breaching duties and obligations.

But what is there about the intellectual incompetence of animals (which admittedly disqualifies them for duties) that makes them logically unsuitable for rights? The most common reply to this question is that animals are incapable of *claiming* rights on their own. They cannot make motion, on their own, to courts to have their claims recognized or enforced; they cannot initiate, on their own, any kind of legal proceedings; nor are they capable of even understanding when their rights are being violated, of distinguishing harm from wrongful injury, and responding with indignation and an outraged sense of justice instead of mere anger or fear.

No one can deny any of these allegations, but to the claim that they are the grounds for disqualification of rights of animals, philosophers on the other side of this controversy have made convincing rejoinders. It is simply not true, says W. D. Lamont,<sup>5</sup> that the ability to understand what a right is and the ability to set legal machinery in motion by one's own initiative are necessary for the possession of rights. If that were the case, then neither human idiots nor wee babies would have any legal rights at all. Yet it is manifest that both of these classes of intellectual incompetents have legal rights recognized and easily enforced by the courts. Children and idiots start legal proceedings, not on their own direct initiative, but rather through the actions of, proxies or attorneys who are empowered to speak in their names. If there is no conceptual absurdity in this situation, why should there be in the case where a proxy makes a claim on behalf of an animal? People commonly enough make wills leaving money to trustees for the care of animals. Is it not natural to speak of the animal's right to his inheritance in cases of this kind? If a trustee embezzles money from the animal's account,<sup>6</sup> and a proxy speaking in the dumb brute's behalf presses the animal's claim, can he not be described as asserting the animal's *rights*? More exactly, the animal itself claims its rights through the vicarious actions of a human proxy speaking in its name and in its behalf. There appears to be no reason why we should require the animal to understand what is going on (so the argument concludes) as a condition for regarding it as a possessor of rights.

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<sup>4</sup> And W. D. Ross for another. See *The Right and the Good* (Oxford: Clarendon Press, 1930), app. r, pp. 48-56.

<sup>5</sup> W. D. Lamont, *Principles of Moral Judgment* (Oxford: Clarendon Press, 1946), pp. 83-85.

<sup>6</sup> Cf. H.J. McCloskey, "Rights," *Philosophical Quarterly* 15 (1965): 121, 124.

Some writers protest at this point that the legal relation between a principal and an agent cannot hold between animals and human beings. Between humans, the relation of agency can take two very different forms, depending upon the degree of discretion granted to the agent, and there is a continuum of combinations between the extremes. On the one hand, there is the agent who is the mere "mouthpiece" of his principal. He is a "tool" in much the same sense as is a typewriter or telephone; he simply transmits the instructions of his principal. Human beings could hardly be the agents or representatives of animals in this sense, since the dumb brutes could no more use human "tools" than mechanical ones.

On the other hand, an agent may be some sort of expert hired to exercise his professional judgment on behalf of, and in the name of, the principal. He may be given, within some limited area of expertise, complete independence to act as he deems best, binding his principal to all the beneficial or detrimental consequences. This is the role played by trustees, lawyers, and ghost-writers. This type of representation requires that the agent have great skill, but makes little or no demand upon the principal, who may leave everything to the judgment of his agent. Hence, there appears, at first, to be no reason why an animal cannot be a totally passive principal in this second kind of agency relationship.

There are still some important dissimilarities, however. In the typical instance of representation by an agent, even of the second, highly discretionary kind, the agent is hired by a principal who enters into an agreement or contract with him; the principal tells his agent that within certain carefully specified boundaries "You may speak for me," subject always to the principal's approval, his right to give new directions, or to cancel the whole arrangement. No dog or cat could possibly do any of those things. Moreover, if it is the assigned task of the agent to defend the principal's rights, the principal may often decide to release his claimer, or to waive his own rights, and instruct his agent accordingly. Again, no mute cow or horse can do that. But although the possibility of hiring, agreeing, contracting, approving, directing, canceling, releasing, waiving, and instructing is present in the typical (all-human) case of agency representation, there appears to be no reason of a logical or conceptual kind why that *must* be so, and indeed there are some special examples involving human principals where it is not in fact so. I have in mind legal rules, for example, that require that a defendant be represented at his trial by an attorney, and impose a state-appointed attorney upon reluctant defendants, or upon those tried *in absentia*, whether they like it or not. Moreover, small children and mentally deficient and deranged adults are commonly represented by trustees and attorneys, even though they are incapable of granting their own consent to the representation, or of entering into contracts, of giving directions, or waiving their rights. It may be that it is unwise to permit agents to represent principals without the latter's knowledge or consent. If so, then no one should ever be permitted to speak for an animal, at least in a legally binding way. But that is quite another thing than saying that such representation is logically incoherent or conceptually incongruous—the contention that is at issue.

H. J. McCloskey,<sup>7</sup> I believe, accepts the argument up to this point, but he presents a new and different reason for denying that animals can have legal rights. The ability to make claims,

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<sup>7</sup> Ibid.



whether directly or through a representative, he implies, is essential to the possession of rights. Animals obviously cannot press their claims on their own, and so if they have rights, these rights must be assertable by agents. Animals, however, cannot be represented, McCloskey contends, and not for any of the reasons already discussed, but rather because representation, in the requisite sense, is always of interests, and animals (he says) are incapable of having interests.

Now, there is a very important insight expressed in the requirement that a being have interests if he is to be a logically proper subject of rights. This can be appreciated if we consider just why it is that mere things cannot have rights. Consider a very precious "mere thing"-a beautiful natural wilderness, or a complex and ornamental artifact, like the Taj Mahal. Such things ought to be cared for, because they would sink into decay if neglected, depriving some human beings, or perhaps even all human beings, something of great value. Certain persons may even have as their own special job the care and protection of these valuable objects but we are not tempted in these cases to speak of "thing-rights" correlative to custodial duties, because, try as we might, we cannot think of mere things as possessing interests of their own. Some people may have a duty to preserve, maintain, or improve the Taj Mahal, but they can hardly have a duty to help or hurt it, benefit or aid it, succor or relieve it. Custodians may protect it for the sake of a nation's pride and art lovers' fancy; but they don't keep it in good repair for "its own sake," or for "its own true welfare," or "well-being." A mere thing, however valuable to others, has no good of its own. The explanation of that fact, I suspect, consists in the fact that mere things have no conative life: no conscious wishes, desires, and hopes; or urges and impulses; or unconscious drives, aims, and goals; or latent tendencies, direction of growth, and natural fulfillments. Interests must be compounded somehow out of conations; hence mere things have no interests. *A fortiori*, they have no interests to be protected by legal or moral rules. Without interests a creature can have no "good" of its own, the achievement of which can be its due. Mere things are not loci of value in their own right, but rather their value consists entirely in their being objects of other beings' interests.

So far McCloskey is on solid ground, but one can quarrel with his denial that any animals but humans have interests. I should think that the trustee of funds willed to a dog or cat is more than a mere custodian of the animal he protects. Rather his job is to look out for the interests of the animal and make sure no one denies it its due. The animal itself is the beneficiary of his dutiful services. Many of the higher animals at least have appetites, conative urges, and rudimentary purposes, the integrated satisfaction of which constitutes their welfare or good. We can, of course, with consistency treat animals as mere pests and deny that they have any rights; for most animals, especially those of the lower orders, we have no choice but to do so. But it seems to me nevertheless that in general, animals *are* among the sorts of beings of whom rights can meaningfully be predicated and denied.

Now, if a person agrees with the conclusion of the argument thus far, that animals are the sorts of beings that *can* have rights, and further, if he accepts the moral judgment that we ought to be kind to animals, only one further premise is needed to yield the conclusion that some animals do in fact have rights. We must now ask ourselves for whose sake ought, we to treat (some) animals with consideration and humaneness. If we conceive our duty to be one of obedience to authority, or to one's own conscience merely, or one of consideration for tender

human sensibilities only, then we might still deny that animals have rights, even though we admit that they are the kinds of beings that *can* have rights. But if we hold not only that we ought to treat animals humanely but also that we should do so for the animals' own sake that such treatment is something we owe animals as their due' something that can be claimed for them, something the withholding of which would be an injustice and a wrong, and not merely a harm, then it follows that we do ascribe rights to animals. I suspect that the moral judgments most of us make about animals do pass these phenomenological tests, so that most of us do believe that animals have rights, but are reluctant to say so because of the conceptual confusions about the notion of a right that I have attempted to dispel above.

Now we can extract from our discussion of animal rights a crucial principle for tentative use in the resolution of the other riddles about the applicability of the concept of a right, namely, that the sorts of beings who *can* have rights are precisely those who have (or can have) interests. I have come to this tentative conclusion for two reasons: (1) because a right holder must be capable of being represented and it is impossible to represent a being that has no interests, and (2) because a right holder must be capable of being a beneficiary in his own person, and a being without interests is a being that is incapable of being harmed or benefitted, having no good or "sake" of its own. Thus, a being without interests has no "behalf" to act in, and no "sake" to act for. My strategy now will be to apply the "interest principle," as we can call it, to the other puzzles about rights, while being prepared to modify it where necessary (but as little as possible), in the hope of separating in a consistent and intuitively satisfactory fashion the beings who can have rights from those which cannot.

### **DEAD PERSONS**

So far we have refined the interest principle but we have not had occasion to modify it. Applied to dead persons, however, it will have to be stretched to near the breaking point if it is to explain how our duty to honor commitments to the dead can be thought to be linked to the rights of the dead against us. The case against ascribing rights to dead men can be made very simply: a dead man is a mere corpse, a piece of decaying organic matter. Mere inanimate things can have no interests, and what is incapable of having interests is incapable of having rights. If, nevertheless, we grant dead men rights against us, we would seem to be treating the interests they had while alive as somehow surviving their deaths. There is the sound of paradox in this way of talking, but it may be the least paradoxical way of describing our moral relations to our predecessors. And if the idea of an interest's surviving its possessor's death is a kind of fiction, it is a fiction that most living men have a real interest in preserving.

Most persons while still alive have certain desires about what is to happen to their bodies, their property, or their reputations after they are dead. For that reason, our legal system has developed procedures to enable persons while still alive to determine whether their bodies will be used for purposes of medical research or organic transplantation, and to whom their wealth (after taxes) is to be transferred. Living men also take out life insurance policies guaranteeing that the accumulated benefits be conferred upon beneficiaries of their own choice. They also make private agreements, both contractual and informal, in which they receive promises that certain things will be done after their deaths in exchange for some present service or consideration. In all these cases promises are made to living persons that

their wishes will be honored after they are dead. Like all other valid promises, they impose duties on the promisor and confer correlative rights on the promisee.

How does the situation change after the promisee has died? Surely the duties of the promisor do not suddenly become null and void. If that were the case, and known to be the case, there could be no confidence in promises regarding posthumous arrangements; no one would bother with wills or life insurance companies to pay benefits to survivors, which are, in a sense, only conditional duties before a man dies. They come into existence as categorical demands for immediate action only upon the promisee's death. So the view that death renders them null and void has the truth exactly upside down.

The survival of the promisor's duty after the promisee's death does not prove that the promisee retains a right even after death, for we might prefer to conclude that there is one class of cases where duties to keep promises are not logically correlated with a promisee's right, namely, cases where the promisee has died. Still, a morally sensitive promisor is likely to think of his promised performance not only as a duty (i.e., a morally required action) but also as something owed to the deceased promisee as his due. Honoring such promises is a way of keeping faith with the dead. To be sure, the promisor will not think of his duty as something to be done for the promisee's "good," since the promisee, being dead, has no "good" of his own. We can think of certain of the deceased's interests, however, (including especially those enshrined in wills and protected by contracts and promises) as surviving their owner's death, and constituting claims against us that persist beyond the life of the claimant. Such claims can be represented by proxies just like the claims of animals. This way of speaking, I believe, reflects more accurately than any other an important fact about the human condition: we have an interest while alive that other interests of ours will continue to be recognized and served after we are dead. The whole practice of honoring wills and testaments, and the like, is thus for the sake of the living, just as a particular instance of it may be thought to be for the sake of one who is dead.

Conceptual sense, then, can be made of talk about dead men's rights; but it is still a wide open moral question whether dead men in fact have rights, and if so, what those rights are. In particular, commentators have disagreed over whether a man's interest in his reputation deserves to be protected from defamation even after his death. With only a few prominent exceptions, legal systems punish a libel on a dead man "only when its publication is in truth an attack upon the interests of living persons."<sup>8</sup> A widow or a son may be wounded, or embarrassed, or even injured economically, by a defamatory attack on the memory of their dead husband or father. In Utah defamation of the dead is a misdemeanor, and in Sweden a cause of action in tort. The law rarely presumes, however, that a dead man himself has any interests, representable by proxy, that can be injured by defamation, apparently because of the maxim that what a dead man doesn't know can't hurt him.

This presupposes, however, that the whole point of guarding the reputations even of living men, is to protect them from hurt feelings, or to protect some other interests, for example,

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<sup>8</sup> William Salmond, *Jurisprudence*, 12th ed., P. J. Fitzgerald ed (London: Sweet and Maxwell, 1966), p. 304.

economic ones, that do not survive death. A moment's thought, I think, will show that our interests are more complicated than that. If someone spreads a libelous description of me, without my knowledge, among hundreds of persons in a remote part of the country, so that I am, still without my knowledge, an object of general scorn and mockery in that group, I have been injured, even though I never learn what has happened. That is because I have an interest, so I believe, in having a good reputation *simpliciter*, in addition to my interest in avoiding hurt feelings, embarrassment, and economic injury. In the example, I do not know what is being said and believed about me, so my feelings are not hurt; but clearly if I did know, I would be enormously distressed. The distress would be the natural consequence of my belief that an interest other than my interest in avoiding distress had been damaged. How else can I account for the distress? If I had no interest in a good reputation as such, I would respond to news of harm to my reputation with indifference.

While it is true that a dead man cannot have his feelings hurt, it does not follow, therefore, that his claim to be thought of no worse than he deserves cannot survive his death. Almost every living person, I should think, would wish to have this interest protected after his death, at least during the lifetimes of those persons who were his contemporaries. We can hardly expect the law to protect Julius Caesar from defamation in the history books. This might hamper historical research and restrict socially valuable forms of expression. Even interests that survive their owner's death are not immortal. Anyone should be permitted to say anything he wishes about George Washington or Abraham Lincoln, though perhaps not everything is morally permissible. Everyone ought to refrain from malicious lies even about Nero or King Tut, though not so much for those ancients' own sakes as for the sake of those who would now know the truth about the past. We owe it to the brothers Kennedy, however, as their due, not to tell damaging lies about them to those who were once their contemporaries. If the reader would deny that judgment, I can only urge him to ask himself whether he now wishes his own interest in reputation to be respected, along with his interest in determining the distribution of his wealth, after his death.

### **FETUSES**

If the interest principle is to permit us to ascribe rights to infants, fetuses, and generations yet unborn, it can only be on the grounds that interests can exert a claim upon us even before their possessors actually come into being, just the reverse of the situation respecting dead men where interests are respected even after their possessors have ceased to be. Newly born infants are surely noisier than mere vegetables, but they are just barely brighter. They come into existence, as Aristotle said, with the capacity to acquire concepts and dispositions, but in the beginning we suppose that their consciousness of the world is a "blooming, buzzing confusion." They do have a capacity, no doubt from the very beginning, to feel pain, and this alone may be sufficient ground for ascribing both an interest and a right to them. Apart from that, however, during the first few hours of their lives, at least, they may well lack even the rudimentary intellectual equipment necessary to the possession of interests. Of course, this induces no moral reservations whatever in adults. Children grow and mature almost visibly in the first few months so that those future interests that are so rapidly emerging from the unformed chaos of their earliest days seem unquestionably to be the basis of their present rights. Thus, we say of a newborn infant that he has a right now to live and grow into his

adulthood, even though he lacks the conceptual equipment at this very moment to have this or any other desire. A new infant, in short, lacks the traits necessary for the possession of interests, but he has the capacity to acquire those traits, and his inherited potentialities are moving quickly toward actualization even as we watch him. Those proxies who make claims in behalf of infants, then, are more than mere custodians: they are (or can be) genuine representatives of the child's emerging interests, which may need protection even now if they are to be allowed to come into existence at all.

The same principle may be extended to "unborn persons." After all, the situation of fetuses one day before birth is not strikingly different from that a few hours after birth. The rights our law confers on the unborn child, both proprietary and personal, are for the most part, placeholders or reservations for the rights he shall inherit when he becomes a full-fledged interested being. The law protects a potential interest in these cases before it has even grown into actuality, as a garden fence protects newly seeded flower beds long before blooming flowers have emerged from them. The unborn child's present right to property, for example, is a legal protection offered now to his future interest, contingent upon his birth, and instantly voidable if he dies before birth. As Coke put it: "The law in many cases hath consideration of him in respect of the apparent expectation of his birth";<sup>9</sup> but this is quite another thing than recognizing a right actually to be born. Assuming that the child will be born, the law seems to say, various interests that he will come to have after birth must be protected from damage that they can incur even before birth. Thus prenatal injuries of a negligently inflicted kind can give the newly born child a right to sue for damages which he can exercise through a proxy-attorney and in his own name *after* he is born.

There are numerous other places, however, where our law seems to imply an unconditional right to be born, and surprisingly no one seems ever to have found that idea conceptually absurd. One interesting example comes from an article given the following headline by the *New York Times*: "Unborn Child's Right Upheld Over Religion."<sup>10</sup> A hospital patient in her eighth month of pregnancy refused to take a blood transfusion even though warned by her physician that "she might die at any minute and take the life of her child as well." The ground of her refusal was that blood transfusions are repugnant to the principles of her religion (Jehovah's Witnesses). The Supreme Court of New Jersey expressed uncertainty over the constitutional question of whether a non-pregnant adult might refuse on religious grounds a blood transfusion pronounced necessary to her own survival, but the court nevertheless

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<sup>9</sup> As quoted by Salmond, *Jurisprudence*, p. 303. Simply as a matter of policy the potentiality of some future interests may be so remote as to make them seem unworthy of present support. A testator may leave property to his unborn child, for example, but not to his unborn grandchildren. To say of the potential person presently in his mother's womb that he owns property now is to say that certain property must be held for him until he is "real" or "mature" enough to possess it. "Yet the law is careful lest property should be too long withdrawn in this way from the uses of living men in favor of generations yet to come; and various restrictive rules have been established to this end. No testator could now direct his fortune to be accumulated for a hundred years and then distributed among his descendants"-Salmond, *ibid*.

<sup>10</sup> *New York Times*, 17 June 1966, p. 1.

ordered the patient in the present case to receive the transfusion on the grounds that "the unborn child is entitled to the law's protection."

It is important to reemphasize here that the questions of whether fetuses do or ought to have rights are substantive questions of law and morals open to argument and decision. The prior question of whether fetuses are the kind of beings that can have rights, however, is a conceptual, not a moral, question, amenable only to what is called "logical analysis," and irrelevant to moral judgment. The correct answer to the conceptual question, I believe, is that unborn children are among the sorts of beings of whom possession of rights can meaningfully be predicated, even though they are (temporarily) incapable of having interests, because their future interests can be protected now, and it does make sense to protect a potential interest even before it has grown into actuality. The interest principle, however, makes perplexing, at best, talk of a noncontingent fetal right to be born; for fetuses, lacking actual wants and beliefs, have no actual interest in being born, and it is difficult to think of any other reason for ascribing any rights to them other than on the assumption that they will in fact be born.<sup>11</sup>

### CONCLUSION

For several centuries now human beings have run roughshod over the lands of our planet, just as if the animals who do live

there and the generations of humans who will live there had no claims on them whatever. Philosophers have not helped matters by arguing that animals and future generations are not the kinds of beings who can have rights now, that they don't presently qualify for membership, even "auxiliary membership," in our moral community. I have tried in this essay to dispel the conceptual confusions that make such conclusions possible. To acknowledge their rights is the very least we can do for members of endangered species (including our own). But that is something.

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<sup>11</sup> In an essay entitled "Is There a Right to be Born?" I defend a negative answer to the question posed, but I allow that under certain very special conditions, there can be a "right *not* to be born." See *Abortion*, ed. J. Fein- berg (Belmont, Calif.: Wadsworth, 1973).

## PERSONALITY

### *Theories of the Nature of 'Legal Persons'\**

Professor Wolff has observed that on the Continent legal writers may be grouped into two categories: those who have written on the nature of legal persons and those who have not yet done so. In dealing with some of these theories it is as well to bear in mind that the attitude of the law has not been consistent and also that there is a distinction between appreciating the unity of a group and the way the word 'person' is used.

#### **'Purpose' Theory**

This theory, that of Brinz primarily, and developed in England by Barker, is based on the assumption that 'person' is applicable only to human beings; they alone can be the subjects of jural relations. The so-called 'juristic' persons are not persons at all. Since they are treated as distinct from their human sub-stratum, if any, and since jural relations can only vest in human beings, they should be regarded simply as 'subjectless properties' designed for certain purposes. It should be noted that this theory assumes that other people may owe duties towards these 'subjectless properties' without there being correlative claims, which is not impossible, although critics have attacked the theory on this ground. As applied to ownership, the idea of ownerless ownership is unusual, but that is not necessarily an objection. The theory was designed mainly to explain the vacant inheritance, the *hereditas jacens*, of Roman law. It is not applicable to English law. Judges have repeatedly asserted that corporations, for instance, are 'persons', and it is this use of the word that needs explaining. If they say that these are 'persons', then to challenge this usage would amount simply to using the word differently from judges.

To Duguit 'purpose' assumed a different meaning. To him the endeavour of law in its widest sense is the achievement of social solidarity. The question is always whether a given group is pursuing a purpose which conforms with social solidarity. If it does, then all activities falling within that purpose deserve protection. He rejected the idea of collective will as unproven; but there can be, he said, a collective purpose.

#### **Theory of the 'Enterprise Entity'**

Related though somewhat removed from the above, is the theory of the enterprise entity'. The corporate entity, it is said, is based on the reality of the underlying enterprise. Approval by law of the corporate form establishes a *prima facie* case that the assets, activities and responsibilities of the corporation are part of the enterprise. Where there is no formal approval by law, the existence, extent of responsibility and so forth of the unit are determined by the underlying enterprise.

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\* R.W.M. Dias, *Jurisprudence* 265-270 (5<sup>th</sup> ed., 1994).

**'Symbolist' or 'Bracket' Theory**

According to Ihering the members of a corporation and the beneficiaries of a foundation are the only 'persons'. 'Juristic person' is but a symbol to help in effectuating the purpose of the group, it amounts to putting a bracket on the members in order to treat them as a unit. This theory, too, assumes that the use of the word 'person' is confined to human beings. It does not explain foundations for the benefit of mankind generally or for animals. Also-and this is not so much an objection as a comment-this theory does not purport to do more than to say what the facts are that underlie propositions such as, 'X & Co owe Y'. It takes no account of the policy of the courts in the varying ways in which they use the phrase, 'X and Co'; whether they will, for instance, lift the mask, ie remove the bracket, or not.

Closely related to this theory is that of Hohfeld, which may be considered next.

**Hohfeld's Theory**

Hohfeld drew a distinction between human beings and 'juristic persons'. The latter, he said, are the creation of arbitrary rules of procedure. Only human beings have claims, duties, powers and liabilities; transactions are conducted by them and it is they who ultimately become entitled and responsible. There are, however, arbitrary rules which limit the extent of their responsibility in various ways, eg to the amount of the shares. The 'corporate person' is merely a procedural form, which is used to work out in a convenient way for immediate purposes a mass of jural relations of a large number of individuals, and to postpone the detailed working out of these relations among the individuals *inter se* for a later and more appropriate occasion.

This theory is purely analytical and, like the preceding one, analyses a corporation out of existence. Although it is reminiscent of a person who feels that Hohfeld was advocating that corporations should be viewed in this way. He was only seeking to reduce the corporate concept to ultimate realities. What he said was that the use of group terminology is the means of taking account of mass individual relationships. It is to be noted, however, that he left unexplained the inconsistencies of the law; his theory was not concerned with that aspect of it. Finally, to say that corporate personality is a procedural form may seem to be rather a misleading use of the word 'procedural'. What seems to be meant is that the unity of a corporation is a convenient way of deciding cases in court.

**Kelsen's Theory**

Kelsen began by rejecting, for purposes of law, any contrast between human beings as 'natural persons' and 'juristic persons'. The law is concerned with human beings only in so far as their conduct is the subject of rules, duties and claims. the concept of 'person' is always a matter of law; the biological character of human beings is outside its province. Kelsen also rejected the definition of person as an 'entity' which 'has' claims and duties. the totality of claims and duties *is* the person in law; there is no entity distinct from them. Turning to corporations, he pointed out that it is the conduct of human beings that is the subject matter of claims and duties. A corporation is distinct from one of its members when his conduct is



governed not only by claims and duties, but also by a special set of rules which regulates his actions in relation to the other members of the corporation. It is this set of rules that constitutes the corporation. For example, whether the contract of an individual affects only him or the company of which he is a member will depend on whether or not the contract falls within the special set of rules regulating his actions in relation to his fellow members.

This theory is also purely analytical and accurate as far as it goes. It omits the policy factors that bring about variations in the attitude of the courts, and it does not explain why the special set of rules, of which Kelsen spoke, is invoked in the case of corporations, but not in partnerships. In fairness to Kelsen it must be pointed out that he expressly disclaimed any desire to bring in the policy aspects of the law. All he was concerned to do was to present a formal picture of the law, and to that extent he did what he set out to do.

### **'Fiction' Theory**

Its principal supporters are Savigny and Salmond. Juristic persons are only treated *as if* they are persons, ie human beings. It is thought that Sinibald Fieschi, who became Pope Innocent IV in 1243, was the first to employ the idea of *persona ficta*; '*cum collegium in causa universitatis fingatur una persona*'. It is clear that the theory presupposes that only human beings are 'properly' called 'persons'. Every single man and only the single man is capable of rights', declared Savigny; and again, 'The original concept of personality must coincide with the idea of man'. The theory appears to have originated during the Holy Roman Empire and at the height of Papal authority. Pope Innocent's statement may have been offered as the reason why ecclesiastical bodies could not be excommunicated or be capitally punished. All that the fiction theory asserts is that some groups and institutions are regarded as if they are persons and does not find it necessary to answer why. This gives it flexibility to enable it to accommodate the cases in English law where the mask is lifted and those where it is not, cases where groups are treated as persons for some purposes but not for others. The popularity of this theory among English writers is explained partly by this very flexibility, partly by its avoidance of metaphysical notions of 'mind' and 'will,' and partly by its non-political character.

### **'Concessions' Theory**

This is allied to the fiction theory and, in fact, supporters of the one tend also to support the other. Its main feature is that it regards the dignity of being a 'juristic person' as having to be conceded by the state, i.e. the law. The identification of 'law' with 'state' is necessary for this theory, but not for the fiction theory. It is a product of the era of the power of the national state, which superseded the Holy Roman Empire and in which the supremacy of the state was emphasised. It follows, therefore, that the concession theory has been used for political purposes to strengthen the state and to suppress autonomous bodies within it. No such body has any claim to recognition as a 'person.' It is a matter of discretion for the state. This is consistent with the deprivation of legal personality from outlaws; but on the other hand it is possible to argue that the common law corporations of English law discredit it somewhat though, even with these, there is a possibility of arguing that they are persons by virtue of a lost royal grant.

The 'realist' theory, of which Gierke is the principal exponent and Maitland a sympathiser, asserts that 'juristic persons' enjoy a real existence as a group. A group tends to become a unit and to function as such. The theory is of German origin. Until the time of Bismarck Germany consisted of a large number of separate states. Unification was their ideal, and the movement towards it assumed almost the character of a crusade. The very idea of unity and of collective working has never ceased to be something of a marvel, which may be one reason for the aura of mysticism and emotion which is seldom far from this theory.

The 'realist' theory opposes the concession theory. Human beings are persons without any concession from the state and, so the argument runs, so far as groups are 'real,' they too are automatically persons.

The 'organism' theory, with which the 'realist' theory is closely associated, asserts that groups are persons because they are 'organisms' and correspond biologically to human beings. This is based on a special use of the term 'organism' and the implications of such biological comparison can lead to absurdity. It is said that they have a 'real life'. Professor Wolff points out that if this were true, a contract between two companies whereby one is to go into voluntary liquidation would be void as an agreement to commit suicide. It is also said that they have a 'group will' which is independent of the wills of its component members. Professor Wolff has pointed out that the 'group will' is only the result of mutually influenced wills, which indeed every fictionist would admit. To say, on the other hand, that it is a single will is as much a fiction as ever the fictionists asserted. As Gray, quoting Windscheid, said, 'To get rid of the fiction of an attributed will, by saying that a corporation has a real general will, is to drive out one fiction by another.'

It has also been stated that group entities are 'real' in a different sense from human beings. The 'reality' is physical, namely the unity of spirit, purpose, interests, and organisation. Even so, it fails to explain the inconsistencies of the law with regard to corporations.

Connected with the realist theory is the 'Institutional' theory which marks a shift in emphasis from an individualist to a collectivist outlook. The individual is integrated into the institution and becomes part of it. The 'pluralist' form of this theory allowed the independent existence of many institutions within the supreme institution of the state. The 'fascist' form of it, however, gave it a twist so as to make the state the only institution, which integrated all others and allowed none to survive in an autonomous condition.

### **Conclusions**

In the first place, no one explanation takes account of all aspects of the problem, and criticism becomes easy. Two questions should be kept clear:

What does any theory set out to explain? and, What does one want a theory to explain? Those that have been considered are philosophical, political or analytical: they are not so much concerned with finding solutions to practical problems as with trying to explain the meaning of the word 'person'. Courts, on the other hand, faced with the solving of practical problems, have proceeded according to policy, not logic. The objectives of the law are not uniform. One of its main purposes in the case of human beings is to regulate behaviour; so there is, on the one hand, constant concern with the performance or non-performance of duties by individuals. With corporations the main purpose is the organise concerted activities and to

ascribe collective responsibility therefore; so there is, on the other hand, emphasis on collective powers and liabilities.

Secondly, as has been pointed out by more than one writer, English lawyers have not committed themselves to any theory. There is undoubtedly a good deal of theoretical speculation, but it is not easy to say how much of it affects actual decisions. Authority can sometimes be found in the same case to support different theories.

Thirdly, two linguistic fallacies appear to lie at the root of much of the theorising. One is that similarity of language form has masked shifts in meaning and dissimilarities in function. People *speak* of corporations in the same language that they use for human beings, but the word 'person' does not 'mean' the same in the two cases, either in point of what is referred to or function. The other fallacy is the persistent belief that words stand for things. Because the differences in function are obscured by the uniform language, this has led to some curious feats of argumentation to try and find some referent for the word 'person' when used in relation to corporation which is similar to the referent when the word is used in relation to human beings. A glance at the development of the word *persona*, set out at the beginning of this chapter, shows progressiveness in the ideas represented by it.

There is no 'essence' underlying the various uses of 'person'. The need to take account of the unity of a group and also to preserve flexibility are essential, but neither is tied to the word. The application of it to human beings is something which the law shares with ordinary linguistic usage, although its connotation is slightly different, namely a unit of jural relations. Its application to things other than human beings is purely a matter of legal convenience. Neither the linguistic nor legal usages of 'person' are logical. If corporations aggregate are 'persons', then partnerships and trade unions should be too. The error lies in supposing that there should always be logic. Unless this has been understood, the varied uses of the word will only make it a confusing and emotional irritant.

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***Shriomani Gurudwara Prabandhak Committee, Amritsar vs.  
Shri Som Nath Dass & Ors.,  
AIR 2000 SC 1421***

**MISRA, J.**, The question raised in this appeal is of far reaching consequences and is of great significance to one of the major religious followers of this country. The question is: whether the Guru Granth Sahib could be treated as a juristic person or not? If it is, then it can hold and use the gifted properties given to it by its followers out of their love, in charity. This is by creation of an endowment like others for public good, for enhancing the religious fervour, including feeding the poor etc.. Sikhism grew because of the vibrating divinity of Guru Nanakji and the 10 succeeding gurus, and the wealth of all their teachings is contained in Guru Granth Sahib. The last of the living guru was Guru Gobind Singhji who recorded the sanctity of Guru Granth Sahib and gave it the recognition of a living Guru. Thereafter, it remained not only a sacred book but is reckoned as a living guru. The deep faith of every earnest follower, when his pure conscience meets the divine under-current emanating from their Guru, produces a feeling of sacrifice and surrender and impels him to part with or gift out his wealth to any charity may be for gurdwaras, dharamshalas etc. Such parting spiritualises such follower for his spiritual upliftment, peace, tranquility and enlightens him with resultant love and universalism.

Such donors in the past, raised number of Gurdwaras. They gave their wealth in trust for its management to the trustees to subserve their desire. They expected trustees to faithfully implement the objectives for which the wealth was entrusted. When selfishness invades any trustee, the core of trust starts leaking out. To stop such leakage, legislature and courts step in. This is what was happening in the absence of any organised management of Gurdwaras, when trustees were either mismanaging or attempting to usurp such trusts. The Sikh Gurdwaras and Shrines Act 1922 (VI of 1922) was enacted to meet the situation. It seems, even this failed to satisfy the aspirations of the Sikhs. The main reason being that it did not establish any permanent committee of management for Sikh gurdwaras and did not provide for the speedy confirmation by judicial sanction of changes already introduced by the reforming party in the management of places of worship. This was replaced by the Sikh Gurdwaras Act, 1925 (Punjab Act No. 8 of 1925) under which the present case arises. This Act provided a legal procedure through which gurdwaras and shrines regarded by Sikhs as essential places of Sikh worship to be effectively and permanently brought under Sikh control and management, so as to make it consistent with the religious followings of this community.

About 56 persons of villages Bilaspur, Ghodani, Dhamot, Lapran and Buani situated in the Village Bilaspur, District Patiala moved petition under Section 7(1) of the said Act for declaration that the disputed property is a Sikh Gurdwara. The State Government through Notification No. 1702 G.P. dated 14th September, 1962 published the aforesaid petition in the Gazette including the boundaries of the said gurdwaras which were to be declared as Sikh Gurdwaras. Thereafter, a composite petition under Sections 8 and 10 of the said Act was filed by Som Dass son of Bhagat Ram, Sant Ram son of Narain Dass and Anant Ram son of Sham Dass of Village Bilaspur, District Patiala, challenging the same. They claimed it to be a dharamshala and Dera of Udasian being owned and managed by the petitioners and their

*Shriomani Gurudwara Prabandhak Committee, Amritsar vs. Shri Som Nath Dass & Ors.,*

predecessors since the time of their forefathers and that they being the holders of the same, received the said Dera in succession, in accordance with their ancestral share. They also claimed to be in possession of the land attached to the said Dera. They denied it to be a Sikh Gurdwara. This petition was forwarded by the Government to the Sikh Gurdwara Tribunal, hereinafter referred to as the Tribunal. In reply to the notice, the Shiromani Gurdwara Parbandhak Committee, hereinafter referred to as the SGPC (appellant), claimed it to be a Sikh Gurdwara, having been established by the Sikhs for their worship, wherein Guru Granth Sahib was the only object of worship and it was the sole owner of the gurdwara property. It denied this institution to be an Udasian Dera. However, appellant Committee challenged the *locus standi* of the respondent to file this objection to the notification. The appellants case was under Section 8 and objection could only be filed by any hereditary office-holders or by 20 or more worshippers of the gurdwara, which they were not.

The Tribunal held that the petitioners before it (respondents here), admitted in their cross-examination that the disputed premises was being used by them as their residential house that there was no object of worship in the premises, neither they were performing any public worship nor they were managing it. So it held they were not hereditary office holders, as they neither managed it nor performed any public worship. Thus, their petition under Section 8 was rejected on 9th February, 1965 by holding that they have no *locus standi*. Aggrieved by this they filed first appeal being FAO No. 40 of 1965 which was also dismissed by the High Court on 24th March, 1976, which became final. Thereafter, the Tribunal took the petition under Section 10 in which the stand of SGPC was that the land and the buildings were the properties of Gurdwara Sahib Dharamshala Guru Granth Sahib at Bilaspur. The respondents and their predecessors along with their family members had all along been its managers and they had no personal rights in it. The Tribunal framed two issues:

- (1) What right, title or interest have the petitioners in the property in dispute?
- (2) What right, title or interest has the notified Sikh Gurdwara in the property in dispute.

The Tribunal decided both issue No. 1 and issue No. 2 in favour of present appellants and held that the disputed property belonged to the SGPC. Thus respondents petition under Section 10 was also rejected on 4th September 1978. Tribunal's conclusion is reproduced hereinbelow:

The above discussion shows that the respondent-Committee has been successful in bringing its case rightly in Clauses 18 (1)(a) and 18(1)(d) of the Act and has been successful in discharging its onus as regards issue no. 2 and the issue is, i.e. who is the owner of the property in dispute consisting of Gurdwara building, the place of which is given in the Notification No. 1702 G.P. dated 14.9.68 at page 2527 and the agricultural land measuring 115 Bighas 12 Biswas the detail of which are given in the copy of Jamabandi for the year 1955-56 A.D. attached to the above-said Notification at page 2529 and is comprised of Khasra Nos. 456 min, 457, 451, 644 and 452 bearing Khawat No. 276 Khatauni nos. 524 to 527.

Aggrieved by this, respondents filed first appeal being FAO No. 449 of 1978. During its pendency, the SGPC on the basis of final order passed by the High Court in FAO No. 40 of 1965 against the order of the Tribunal rejecting Section 8 application, filed suit No. 94 of 1979 against the respondents under Section 25-A of the Act for the possession of the building

*Shriomani Gurudwara Prabandhak Committee, Amritsar vs. Shri Som Nath Dass & Ors.,*

and the land. The respondents contested the suit by raising objection about misdescription of the property in the plaint and also raising an issue about jurisdiction since the income from the gurdwara was more than Rs. 3,000/- per annum for which a committee was to be constituted before any suit could be filed. On contest, the said suit of SGPC was decreed and respondents' objections were rejected, against which the respondents filed FAO No. 2 of 1980. The High Court vide its order dated 11th February, 1980 directed this FAO No. 2 of 1980 to be listed for hearing along with FAO No. 449 of 1978. It is also relevant to refer to, which was also stated by the respondents in their petition before the Tribunal, that a notification under Section 9 of the Act was published declaring the disputed gurdwara to be a Sikh Gurdwara.

It is necessary to give some more facts to appreciate the contentions raised by the respective parties. In jamabandi Ex. P-1 of 1961-62 BK, (which would be 1904 AD) Mangal Dass and Sunder Dass, Bhagat Ram sons of Gopi Ram Faqir Udasi were mentioned as owners in possession of the land. They had also mortgaged part of this land to some other persons. This village Bilaspur where the disputed gurdwara exists formed part of the erstwhile Patiala Estate. The then ruler of the Patiala Estate issued Farman-

Shahi dated 18th April, 1921. Its contents are quoted hereunder:

In future, instructions be issued that so long the appointment of a Mahant is not approved by Ijlas-I-khas through Deori Mulla, until the time, the Mahant is entitled to receive turban, shawl or Bandhan or Muafi etc. from the Government, no property or Muafi shall be entered in his name in the revenue papers.

It should also be mentioned that the land which pertains to any Dera should not be considered as the property of any Mahant, nor the same should be shown in the revenue papers as the property of the Mahant, but these should be entered as belonging to the Dera under the management of the Mahant and that the Mahants shall not be entitled to sell or mortgage the land of the Dera. Revenue Department be also informed about it and the order be gazetted.

On Maghar 10, 1985 BK (1920 AD) at the instance of Rulia Singh and others the patwari made a report in compliance with the aforesaid Farman-e- Shahi for the change of the entries in favour of Guru Granth Sahib Barajman Dharamshala Deh. This was based on the enquiry and evidence produced before him. In this mutation proceeding which led to the mutation viz., Ex. P8, Narain Dass, Bhagat Ram and Atma Ram Sadh appeared before the Revenue Officer and stated that their ancestors got this land which was gift in charity (Punnarth) by the then proprietors of the village. This land was given to the ancestors of the respondent for the purpose that they should provide food and comfort to the travelers passing through this village. In the same proceeding Kapur Singh, Inder Singh Lambardars and other right-holders of the said village also stated that their fore-fathers had given this land in the name of Guru Granth Sahib Barajman Dharamshala Deh under the charge of these persons for providing food and comfort to the travelers. But Atma Ram and others, ancestors of respondents were not performing their duties. This default was for a purpose, which is revealed through the last settlement that they got this land entered in their personal names, in the revenue records against which a matter was pending before Deori Mualla in the mutation proceedings. Based

on the evidence, the Revenue Officer after enquiry recorded the finding that Atta Ram and others admitted that this land had been given to them without any compensation for providing food and shelter to the travelers which they were not performing. He further held that Atma Ram and others could not controvert the aforesaid assertion made by the villagers. So, based on this enquiry and evidence on record, he ordered the mutation, in the name of Guru Granth Sahib Barajman Dharamshala Deh by deleting the name of Atma Ram and others from the column of ownership of the land. He further observed, so far as the question of appointment of Manager or Mohatmim was concerned that it was to be decided by the Deori Mualla as the case about this was pending before the Deori Mualla. Similarly, in the other mutation No., 693 which is Ex. 9 in 27th Maghar 1983 (1926 AD) also, mutation was ordered by removal of the name of Narain Dass, Bhagat Ram sons of Gopi Ram in favour of

Guru Granth Sahib Barajman Dharamshala Deh. Since that date till the filing of the petitions by the respondents under Sections 8 and 10 of the Act entries in the ownership column of the land continued in the name of "Guru Granth Sahib Barajman Dharamshala Deh and no objection was filed either by the ancestors of respondents or respondents themselves.

It was for the first time objection was raised by respondents through their counsel before the High Court in FAO No. 449 of 1978 regarding validity of Ex.P8-9 contending that the entry in the revenue records in the name of Guru Granth Sahib was void as Guru Granth Sahib was not a juristic person. The case of the respondents was that the Guru Granth Sahib was only a sacred book of the Sikhs and it would not fall within the scope of the word, juristic person. On the other hand, with vehemence and force learned counsel for the appellant, SGPC submits that Guru Granth Sahib is a juristic person and hence it can hold property, can sue and be sued. On this question, whether Guru Granth Sahib is a juristic person, a difference arose between the two learned judges of the Bench of the High Court. Mr. Justice Tiwana held, it to be a juristic person and dismissed both the FAOs, namely, FAO No. 449 of 1978 and 2 of 1980 upholding the judgment of the Tribunal. On the other hand Mr. Justice Punchhi, (as he then was) recorded dissent and held, the Guru Granth Sahib not to be a juristic person, but did not decide the issue on merits. The case was then referred to a third judge, namely, Mr. Justice Tiwatia who agreed with the view of Mr. Justice Punchhi and held the Guru Granth Sahib not to be a juristic person. After recording this finding the learned judge directed that the FAO may be placed before the Division Bench for final disposal of the appeal on merits.

The question, whether Guru Granth Sahib is a juristic person is the main point which is argued in the present appeal to which we are called upon to adjudicate. It is relevant to mention here that after adjudication of the question whether the Guru Granth Sahib is a juristic person, the matter again went back to the same Bench which again gave rise to another conflict between Justice Tiwana and Mr. Justice Punchhi. Justice Tiwana held on merits that mutations were valid and respondents had no right to this property. But Mr. Justice Punchhi held to the contrary that the mutation was invalid and this property was the private property of the respondents. Thereafter, the said FAO No. 449 of 1978 and FAO No. 2 of 1980 were placed before the third judge, namely, Justice J.B.Gupta, who concurred with the view taken by Mr. Justice Punchhi, as he then was. He recorded the following conclusion:

In view of the findings that Guru Granth Sahib is not a juristic person, and that the

notification issued under section 9 was not conclusive, in view of the Full Bench Judgment of this Court in *Mahant Lachhman Dass Chela Mahant Moti Rams* case, the findings of the Tribunal are liable to be set aside. The Tribunal mainly based its findings on the mutations, Exhibits P.8 and P.9, which are in the name of Guru Granth Sahib, since Guru Granth Sahib is not a juristic person, any mutation sanctioned in its name in the present case was of no consequence. There is no other cogent evidence except the said mutations relied upon by the Tribunal in that behalf. Similar was the position as regards the building. In that behalf, the Tribunal relied upon the notification issued earlier. The same being not conclusive, there was not other reliable evidence to conclude that the building formed part of the Sikh Gurdwara, notified under Section. In these circumstances, I concur with the view taken by M.M.Punchhi, J. in the order dated December 16, 1986.

The foundation of his decision on merits is based on the finding that Guru Granth Sahib is not a juristic person and hence Exs. P8 and P9, the mutations in its name were not sustainable. The present appellants preferred Special Leave Petition No. 7803 of 1988 in this Court, which was dismissed in default on 16th November, 1995 and its restoration application was also dismissed on 19th August, 1996. In this petition it was specifically stated that the present Civil Appeal No. 3968 of 1987 is pending in this Court. However, it is significant as we have said above, the judgment of Mr. Justice Gupta concurring the judgment of Mr. Justice Punchhi, as he then was, was mainly on the basis that the mutation in the name in favour of Guru Granth Sahib Barajman Dharamshala Deh was void in as much as Guru Granth Sahib was not a juristic person. Thus the foundation of that decision rests on the question which we are considering.

The crux of the litigation now rests on the question, whether Guru Granth Sahib is a juristic person or not. Now, we proceed to consider this issue.

The very words Juristic Person connote recognition of an entity to be in law a person which otherwise it is not. In other words, it is not an individual natural person but an artificially created person which is to be recognised to be in law as such. When a person is ordinarily understood to be a natural person, it only means a human person. Essentially, every human person is a person. If we trace the history of a Person in the various countries we find surprisingly it has projected differently at different times. In some countries even human beings were not treated to be as persons in law. Under the Roman Law a Slave was not a person. He had no right to a family. He was treated like an animal or chattel. In French Colonies also, before slavery was abolished, the slaves were not treated to be legal persons. They were later given recognition as legal persons only through a statute. Similarly, in the U.S. the African-Americans had no legal rights though they were not treated as chattel.

In Roscoe Pounds Jurisprudence Part IV, 1959 Ed. at pages 192-193, it is stated as follows:

In civilized lands even in the modern world it has happened that all human beings were not legal persons. In Roman law down to the constitution of Antoninus Pius the slave was not a person. He enjoyed neither rights of family nor rights of patrimony. He was a thing, and as such, like animals, could be the object of rights of property. In the French colonies, before slavery was there abolished, slaves were put in the class of legal persons by the statute of



April 23, 1833 and obtained a somewhat extended juridical capacity by a statute of 1845. In the United States down to the Civil War, the free negroes in many of the states were free human beings with no legal rights.

With the development of society, where an individual interaction fell short, to upsurge social developments, cooperation of a larger circle of individuals was necessitated. Thus, institutions like corporations and companies were created, to help the society in achieving the desired result. The very constitution of State, municipal corporation, company etc. are all creations of the law and these Juristic Persons arose out of necessities in the human development. In other words, they were dressed in a cloak to be recognised in law to be a legal unit.

Corpus Juris Secundum, Vol. LXV, page 40 says: A natural person is a human being; a man, woman, or child, as opposed to a corporation, which has a certain personality impressed on it by law and is called an artificial person. In the C.J.S. definition, it is stated that the word person, in its primary sense, means natural person, but that the generally accepted meaning of the word as used in law includes natural persons and artificial, conventional, or juristic persons. Corpus Juris Secundum, Vol. VI, page 778 says: Artificial persons. Such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic. Salmond on Jurisprudence, 12th Edn., 305 says: A legal person is any subject-matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination.

Legal persons, being the arbitrary creations of the law, may be of as many kinds as the law pleases. Those which are actually recognised by our own system, however, are of comparatively few types. Corporations are undoubtedly legal persons, and the better view is that registered trade unions and friendly societies are also legal persons though not verbally regarded as corporations. If, however, we take account of other systems than our own, we find that the conception of legal personality is not so limited in its application, and that there are several distinct varieties, of which three may be selected for special mention.

1. The first class of legal persons consists of corporations, as already defined, namely, those which are constituted by the personification of groups or series of individuals. The individuals who thus form the corpus of the legal person are termed its members.

2. The second class is that in which the corpus, or object selected for personification, is not a group or series of persons, but an institution. The law may, if it pleases, regard a church or a hospital, or a university, or a library, as a person. That is to say, it may attribute personality, not to any group of persons connected with the institution, but to the institution itself.

3. The third kind of legal person is that in which the corpus is some fund or estate devoted to special uses a charitable fund, for example or a trust estate.

Jurisprudence by Paton, 3rd Edn., page 349 and 350 says: It has already been asserted that legal personality is an artificial creation of the law. Legal persons are all entities capable of being right-and-duty-bearing units-all entities recognised by the law as capable of being parties to a legal relationship. Salmond said: So far as legal theory is concerned, a person is

any being whom the law regards as capable of rights and duties.

Legal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol. Twenty men may form a corporation which may sue and be sued in the corporate name. An idol may be regarded as a legal persona in itself, or a particular fund may be incorporated. It is clear that neither the idol nor the fund can carry out the activities incidental to litigation or other activities incidental to the carrying on of legal relationships, e.g., the signing of a contract; and, of necessity, the law recognises certain human agents as representatives of the idol or of the fund. The acts of such agents, however (within limits set by the law and when they are acting as such), are imputed to the legal persona of the idol and are not the juristic acts of the human agents themselves. This is no mere academic distinction, for it is the legal persona of the idol that is bound to the legal relationships created, not that of the agent. Legal personality then refers to the particular device by which the law creates or recognizes units to which it ascribes certain powers and capacities.

Analytical and Historical Jurisprudence, 3rd Ed. At page 357 describes person: We may, therefore, define a person for the purpose of jurisprudence as any entity (not necessarily a human being) to which rights or duties may be attributed.

Thus, it is well settled and confirmed by the authorities on jurisprudence and courts of various countries that for a bigger thrust of socio-political-scientific development evolution of a fictional personality to be a juristic person became inevitable. This may be any entity, living, inanimate, objects or things. It may be a religious institution or any such useful unit which may impel the courts to recognise it. This recognition is for subserving the needs and faith of the society. A juristic person, like any other natural person is in law also conferred with rights and obligations and is dealt with in accordance with law. In other words, the entity acts like a natural person but only through a designated person, whose acts are processed within the ambit of law. When an idol was recognised as a juristic person, it was known it could not act by itself. As in the case of minor a guardian is appointed, so in the case of idol, a Shebait or manager is appointed to act on its behalf. In that sense, relation between an idol and Shebait is akin to that of a minor and a guardian. As a minor cannot express himself, so the idol, but like a guardian, the Shebait and manager have limitations under which they have to act. Similarly, where there is any endowment for charitable purpose it can create institutions like a church, hospital, gurudwara etc. The entrustment of an endowed fund for a purpose can only be used by the person so entrusted for that purpose in as much as he receives it for that purpose alone in trust. When the donor endows for an idol or for a mosque or for any institution, it necessitates the creation of a juristic person. The law also circumscribes the rights of any person receiving such entrustment to use it only for the purpose of such a juristic person. The endowment may be given for various purposes, may be for a church, idol, gurdwara or such other things that the human faculty may conceive of, out of faith and conscience but it gains the status of juristic person when it is recognised by the society as such.

In this background, we find that this Court in *Sarangadeva Periya Matam & Anr. Vs. Ramaswami Goundar (dead) by legal representatives*, AIR 1966 SC 1603, held that a Mutt was the owner of the endowed property and that like an idol the Mutt was a juristic person

and thus could own, acquire or possess any property. In *Masjid Shahid Ganj & Ors. Vs. Shiromani Gurudwara Prabandhak Committee, Amritsar*, AIR 1938 Lahore 369, a Full Bench of that High Court held that a mosque was a juristic person. This decision was taken in appeal to the Privy Council which confirmed the said judgment. There may be an endowment for a pious or religious purpose. It may be for an idol, mosque, church etc. Such endowed property has to be used for that purpose. The installation and adoration of an idol or any image by a Hindu denoting any god is merely a mode through which his faith and belief is satisfied. This has led to the recognition of an idol as a juristic person.

In *Som Prakash Rekhi Vs. Union of India & Anr.*, 1981 (1) SCC 449, this Court held that a legal person is any entity other than a human being to which the law attributes personality. It was stated: Let us be clear that the jurisprudence bearing on corporations is not myth but reality. What we mean is that corporate personality is a reality and not an illusion or fictitious construction of the law. It is a legal person. Indeed, a legal person is any subject-matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality is one of the most noteworthy feats of the legal imagination. Corporations are one species of legal persons invented by the law and invested with a variety of attributes so as to achieve certain purposes sanctioned by the law.

This Court in *Yogendra Nath Naskar Vs. Commissioner of Income Tax, Calcutta*, 1969 (1) SCC 555, held that the consecrated idol in a Hindu temple is a juristic person and approved the observation of West J. in the following passage made in *Manohar Ganesh Vs. Lakshmiram*, ILR 12 Bom 247; The Hindu Law, like the Roman Law and those derived from it, recognises not only incorporate bodies with rights of property vested in the Corporation apart from its individual members but also juridical persons called foundations. A Hindu who wishes to establish a religious or charitable institution may according to his law express his purpose and endow it and the ruler will give effect to the bounty or at least, protect it so far as any rate as is consistent with his own Dharma or conception or morality. A trust is not required for the purpose; the necessity of a trust in such a case is indeed a peculiarity and a modern peculiarity of the English Law. In early law a gift placed as it was expressed on the altar of God, sufficed it to convey to the Church the lands thus dedicated. It is consistent with the grants having been made to the juridical person symbolised or personified in the idol. Thus, a trust is not necessary in Hindu Law though it may be required under English Law.

In fact, there is a direct ruling of this Court on the crucial point. In *Pritam Dass Mahant Vs. Shiromani Gurudwara Prabandhak Committee*, 1984 (2) SCC 600, with reference to a case under Sikh Gurdwara Act, 1925 this Court held that the central body of worship in a Gurdwara is Guru Granth Sahib, the holy book, is a Juristic entity. It was held: From the foregoing discussion it is evident that the *sine qua non* for an institution being a Sikh gurdwara is that there should be established Guru Granth Sahib and the worship of the same by the congregation, and a Nishan Sahib as indicated in the earlier part of the judgment. There may be other rooms of the institution meant for other purposes but the crucial test is the existence of Guru Granth sahib and the worship thereof by the congregation and Nishan Sahib.

Tracing the ten Sikh gurus it records: They were ten in number each remaining faithful to

the teachings of Guru Nanak, the first Guru and when their line was ended by a conscious decision of Guru Gobind Singh, the last Guru, succession was invested in a collection of teachings which was given the title of Guru Granth Sahib. This is now the Guru of the Sikhs. xx xx The holiest book of the Sikhs is Guru Granth Sahib compiled by the Fifth Master, Guru Arjan. It is the Bible of Sikhs. After giving his followers a central place of worship, Hari-Mandir, he wanted to give them a holy book. So he collected the hymns of the first four Gurus and to these he added his own. Now this Sri Guru Granth Sahib is a living Guru of the Sikhs. Guru means the guide. Guru Granth Sahib gives light and shows the path to the suffering humanity. Where a believer in Sikhism is in trouble or is depressed he reads hymns from the Granth.

When Guru Gobind Singh felt that his worldly sojourn was near, he made the fact known to his disciples. The disciples asked him as to who would be their Guru in future. The Guru immediately placed five pies and a coconut before the holy Granth, bowed his head before it and said: The Eternal Father Willed, and I raised the Panth. All my Sikhs are ordained to believe the Granth as their preceptor. Have faith in the holy Granth as your Master and consider it the visible manifestation of the Gurus. He who hath a pure heart will seek guidance from its holy words.

The Guru repeated these words and told the disciple not to grieve at his departure. It was true that they would not see his body in its physical manifestation but he would be ever present among the Khalsas. Whenever the Sikhs needed guidance or counsel, they should assemble before the Granth in all sincerity and decide their future line of action in the light of teachings of the Master, as embodied in the Granth. The noble ideas embodied in the Granth would live for ever and show people the path to bliss and happiness. The aforesaid conspectus visualises how Juristic Person was coined to subserve to the needs of the society. With the passage of time and the changes in the socio-political scenario, collective working instead of individualised working became inevitable for the growth of the organised society. This gave manifestation to the concept of Juristic Person as an unit in various forms and for various purposes and this is now a well recognised phenomena. This collective working, for a greater thrust and unity gave birth to cooperative societies, for the success and implementation of public endowment it gave rise to public trusts and for purpose of commercial enterprises the juristic person of companies was created, so on and so forth. Such creations and many others were either statutory or through recognition by the courts.

Different religions of the world have different nuclei and different institutionalised places for adoration, with varying conceptual beliefs and faith but all with the same end. Each may have differences in the perceptive conceptual recognition of god but each religion highlights love, compassion, tolerance, sacrifice as a hallmark for attaining divinity. When one reaches this divine empire, he is beholden, through a feeling of universal brotherhood and love which impels him to sacrifice his wealth and belongings, both for his own bliss and for its being useful to a large section of the society. This sprouts charity, for public endowment. It is really the religious faith that leads to the installation of an idol in a temple. Once installed, it is recognised as a juristic person. The idol may be revered in homes but its juristic personality is only when it is installed in a public temple. Faith and belief cannot be judged through any judicial scrutiny. It is a fact accomplished and accepted by its followers. This faith

necessitated the creation of a unit to be recognised as a Juristic Person. All this shows that a Juristic Person is not roped in any defined circle. With the changing thoughts, changing needs of the society, fresh juristic personalities were created from time to time.

It is submitted for the respondent that decisions of courts recognised an idol to be a as juristic person but they did not recognise a temple to be so. So, on the same parity, a gurdwara cannot be a juristic person and Guru Granth Sahib can only a sacred book. It cannot be equated with an idol nor does Sikhism believe in worshipping any idol. Hence Guru Granth Sahib cannot be treated as a juristic person. This submission in our view is based on a misconception. It is not necessary for Guru Granth Sahib to be declared as a juristic person that it should be equated with an idol. When belief and faith of two different religions are different, there is no question of equating one with the other. If Guru Granth Sahib by itself could stand the test of its being declared as such, it can be declared to be so.

An idol is a Juristic Person because it is adored after its consecration, in a temple. The offerings are made to an idol. The followers recognise an idol to be symbol for God. Without the idol, the temple is only a building of mortar, cement and bricks which has no sacredness or sanctity for adoration. Once recognised as a Juristic Person, the idol can hold property and gainfully enlarge its coffers to maintain itself and use it for the benefit of its followers. On the other hand in the case of mosque there can be no idol or any images of worship, yet the mosque itself is conferred with the same sacredness as temples with idol, based on faith and belief of its followers. Thus the case of a temple without idol may be only brick, mortar and cement but not the mosque. Similar is the case with the Church. As we have said, each religion has different nuclei, as per their faith and belief for treating any entity as a unit.

Now returning to the question, whether Guru Granth Sahib could be a Juristic Person or not, or whether it could be placed on the same pedestal, we may first have a glance at the Sikh religion. To comprehend any religion fully may indeed be beyond the comprehension of any one and also beyond any judicial scrutiny for it has its own limitations. But its silver lining could easily be picked up. In the Sikh religion, Guru is revered as the highest reverential person. The first of such most revered Gurus was Guru Nanak Dev, followed by succeeding Gurus, the Tenth being the last living, viz., Guru Gobind Singh Ji. It is said that Adi Granth or Guru Granth Sahib was compiled by the Fifth Guru Arjun and it is this book that is worshiped in all the gurdwaras. While it is being read, people go down their knees to make reverential obeisance and place their offerings of cash and kind on it, as it is treated and equated to a living Guru. In the Book, *A History of the Sikhs* by Kushwant Singh, Vol. I, page 307:

The compositions of the gurus were always considered sacred by their followers. Guru Nanak said that in his hymns the true Guru manifested Himself, because they were composed at His orders and heard by Him (Var Asa). The fourth guru, Ram Das said: Look upon the words of the True Guru as the supreme truth, for God and the Creator hath made him utter the words: (Var Gauri). When Arjan formally installed the Granth in the Hari mandir, he ordered his followers to treat it with the same reverence as they treated their gurus. By the time of Guru Gobind Singh, copies of the Granth had been installed in most Gurdwaras. Quite naturally, when he declared the line of succession of gurus ended, he asked his followers to turn to the Granth for guidance and look upon it as the symbolic representation of the ten gurus. The Grant Sahib is the central object of worship in all Gurdwaras.

It is usually draped in silks and placed on a cot. It has an awning over it and, while it is being read, one of the congregations stands behind and waves a flywhisk made of Yaks hair. Worshippers go down on their knees to make obeisance and place offerings of cash or kind before it as they would before a king: for the Granth is to them what the gurus were to their ancestors the Sacha Badshah (the true Emperor). The very first verse of the Guru Granth Sahib reveals the infinite wisdom and wealth that it contains, as to its legitimacy for being revered as guru:- The First verse states: The creator of all is One, the only One. Truth is his name. He is doer of everything. He is without fear and without enmity. His form is immortal. He is unborn and self-illuminated. He is realized by Gurus grace.

The last living guru, Guru Gobind Singh, expressed in no uncertain terms that henceforth there would not be any living guru. The Guru Granth Sahib would be the vibrating Guru. He declared that henceforth it would be your Guru from which you will get all your guidance and answer. It is with this faith that it is worshiped like a living guru. It is with this faith and conviction, when it is installed in any gurudwara it becomes a sacred place of worship. Sacredness of Gurudwara is only because of placement of Guru Granth Sahib in it. This reverential recognition of Guru Granth Sahib also opens the hearts of its followers to pour their money and wealth for it. It is not that it needs it, but when it is installed, it grows for its followers, who through their obeisance to it, sanctify themselves and also for running the langer which is an inherent part of a Gurdwara.

In this background, and on over all considerations, we have no hesitation to hold that Guru Granth Sahib is a Juristic Person. It cannot be equated with an Idol as idol worship is contrary to Sikhism. As a concept or a visionary for obeisance, the two religions are different. Yet, for its legal recognition as a juristic person, the followers of both the religions give them respectively the same reverential value. Thus the Guru Granth Sahib it has all the qualities to be recognised as such. Holding otherwise would mean giving too restrictive a meaning of a juristic person, and that would erase the very jurisprudence which gave birth to it.

Now, we proceed to examine the judgment of the High Court which had held to the contrary. There was difference of opinion between the two Judges and finally the third Judge agreed with one of the differing Judges, who held Guru Granth Sahib to be not a Juristic Person. Now, we proceed to examine the reasonings for their holding so. They first erred, in holding that such an endowment is void as there could not be such a juristic person without appointment of a Manager. In other words, they held that a juristic person could only act through some one, a human agency and as in the case of an Idol, the Guru Granth Sahib also could not act without a manager. In our view, no endowment or a juristic person depends on the appointment of a Manager. It may be proper or advisable to appoint such a manager while making any endowment but in its absence, it may be done either by the trustees or courts in accordance with law. The property given in trust becomes irrevocable and if none was appointed to manage, it will be managed by the court as representing the sovereign. This can be done by the Court in several ways under Section 92, CPC or by handing over management to any specific body recognised by law. But the trust will not be allowed by the Court to fail. Endowment is when donor parts with his property for it being used for a public purpose and its entrustment is to a person or group of person in trust for carrying out the objective of such entrustment. Once endowment is made, it is final and it is irrevocable. It is the onerous duty

of the persons entrusted with such endowment, to carry out the objectives of this entrustment. They may appoint a manager in the absence of any indication in the trust or get it appointed through Court. So, if entrustment is to any juristic person, mere absence of manager would not negate the existence a juristic person. We, therefore, disagree with the High Court on this crucial aspect.

In Words and Phrases Permanent Edition, Vol. 14A, at page 167:- Endowment means property or pecuniary means bestowed as a permanent fund, as endowment of a college, hospital or library, and is understood in common acceptance as a fund yielding income for support of an institution.

The further difficulty the learned Judges of the High Court felt was that there could not be two Juristic Persons in the same building. This they considered would lead to two juristic persons in one place viz., gurudwara and Guru Granth Sahib. This again, in our opinion, is a misconceived notion. They are no two Juristic Persons at all. In fact, both are so interwoven that they cannot be separated as pointed by Tiwana, J. in his separate judgment. The installation of Guru Granth Sahib is the nucleus or nectar of any gurudwara. If there is no Guru Granth Sahib in a Gurdwara it cannot be termed as gurudwara. When one refers a building to be a gurudwara, he refers it so only because Guru Granth Sahib is installed therein. Even if one holds a Gurdwara to be a juristic person, it is because it holds the Guru Granth Sahib. So, there do not exist two separate juristic persons, they are one integrated whole. Even otherwise in *Ram Jankijee Deities and Ors. Vs. State of Bihar and Ors.*, 1999 [5] SCC 50, this Court while considering two separate deities, of Ram Jankijee and Thakur Raja they were held to be separate Juristic Persons. So, in the same precincts, as a matter of law, existence of two separate juristic persons were held to be valid.

Next it was the reason of the learned Judges that, if Guru Granth Sahib is a Juristic Person then every copy of Guru Granth Sahib would be a Juristic Person. This again in our considered opinion is based on erroneous approach. On this reasoning it could be argued that every idol at private places, or carrying it with one self each would become a Juristic Person. This is a misconception. An idol becomes a juristic person only when it is consecrated and installed at a public place for public at large. Every idol is not a juristic person. So every Guru Granth Sahib cannot be a juristic person unless it takes juristic role through its installation in a gurudwara or at such other recognised public place.

Next submission for the respondent is that Guru Granth Sahib is like any other sacred book, like Bible for Christians, Bhagwat Geeta and Ramayana for Hindus and Quran for Islamic followers and cannot be a Juristic Person. This submission also has no merit. Though it is true Guru Granth Sahib is a sacred book like others but it cannot be equated with these other sacred books in that sense. As we have said above, Guru Granth Sahib is revered in gurudwara, like a Guru which projects a different perception. It is the very heart and spirit of gurudwara. The reverence of Guru Granth on the one hand and other sacred books on the other hand is based on different conceptual faith, belief and application.

One other reason given by the High Court is that Sikh religion does not accept idolatry and hence Guru Granth Sahib cannot be a juristic person. It is true that the Sikh religion does not accept idolatry but, at the same time when the tenth guru declared that after him, the Guru

*Shriomani Gurudwara Prabandhak Committee, Amritsar vs. Shri Som Nath Dass & Ors.,*

Granth will be the Guru, that does not amount to idolatry. The Granth replaces the guru henceforward, after the tenth Guru.

For all these reasons, we do not find any strength in the reasoning of High Court in recording a finding that the Guru Grant Sahib not a Juristic Person. The said finding is not sustainable both on fact and law.

Thus, we unhesitatingly hold Guru Granth Sahib to be a Juristic Person.

Thus, in our considered opinion there would not be any useful purpose to remand the case. That apart since this litigation stood for a long time, we think it proper to examine it ourselves. Learned senior counsel for the respondents who argued with ability and fairness said that in fact the only question which arises in this case is whether Guru Granth Sahib is a juristic person. Examining the merits, we find that the mutation in the revenue papers in the name of Guru Granth Sahib was made as far back as in the year 1928, in the presence of the ancestors of respondents and no objection was raised by anybody till the filing of the present objection by the respondents as aforesaid under Section 8/10 of the 1925 Act. This is after a long gap of about forty years. Further, this property was given in trust to the ancestors of respondents for a specified purpose but they did not perform their obligation. It is also settled, once an endowment, it never reverts even to the donor. Then no part of these rights could be claimed or usurped by the respondents' ancestors who in fact were trustees. Hence for these reasons and for the reasons recorded by Mr. Justice Tiwana, even on merits, any claim to the disputed land by the respondents has no merit. Thus any claim over this disputed property by the respondents fails and is hereby rejected. We uphold the findings and orders passed by the Tribunal against which FAO No. 449 of 1978 and FAO No. 2 of 1980 was filed.

For the aforesaid reasons and in view of the findings which we have recorded, we hold that High Court committed a serious mistake of law in holding that the Guru Granth Sahib was not a juristic person and in allowing the claim over this property in favour of respondents. Accordingly, this appeal is allowed and the judgment and decree passed by the High Court dated 19-4-1985 and in FAO No. 449 of 1978 and FAO No. 2 of 1980 are hereby set aside. We uphold the orders passed by the Tribunal both under Section 10 of the said Act in Suit No. 449 of 1978. Appeal is, accordingly, allowed. Costs on the parties.

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## *Property*<sup>1\*</sup>

ECONOMIC life of the individual in society, as we know it, involves four claims. One is a claim to the control of certain corporeal things, the natural media on which human existence depends. Another is a claim to freedom of industry and contract as an individual asset, apart from free exercise of one's powers as a phase of personality, since in a highly organized society the general existence may depend to a large extent upon individual labor in specialized occupations, and the power to labor freely at one's chosen occupation may be one's chief asset. Third, there is a claim to promised advantages, to promised performances of pecuniary value by others, since in a complex economic organization with minute division of labor and enterprises extending over long periods, credit more and more replaces corporeal wealth as the medium of exchange and agency of commercial activity. Fourth, there is a claim to be secured against interference by outsiders with economically advantageous relations with others, whether contractual, social, business, official or domestic. For not only do various relations which have an economic value involve claims against the other party to the relation, which one may demand that the law secure, but they also involve claims against the world at large that these advantageous relations, which form an important part of the substance of the individual, shall not be interfered with. Legal recognition of these individual claims, legal delimitation and securing of individual interests of substance is at the foundation of our economic organization of society. In civilized society men must be able to assume that they may control, for purposes beneficial to themselves, what they have discovered and appropriated to their own use, what they have created by their own labor and what they have acquired under the existing social and economic order. This is a jural postulate of civilized society as we know it. The law of property in the widest sense, including incorporeal property and the growing doctrines as to protection of economically advantageous relations, gives effect to the social want or demand formulated in this postulate. So also does the law of contract in an economic order based upon credit. A social interest in the security of acquisitions and a social interest in the security of transactions are the forms of the interest in the general security which give the law most to do. The general safety, peace and order and the general health are secured for the most part by police and administrative agencies. Property and contract, security of acquisitions and security of transactions are the domain in which law is most effective and is chiefly invoked. Hence property and contract are the two subjects about which philosophy of law has had the most to say.

In the law of liability, both for injuries and for undertakings, philosophical theories have had much influence in shaping the actual law. If they have grown out of attempts to understand and explain existing legal precepts, yet they have furnished a critique by which to judge those precepts, to shape them for the future and to build new ones out of them or upon them. This is much less true of philosophical theories of property. Their role has not been critical or creative but explanatory. They have not shown how to build but have sought to satisfy men with what they had built already. Examination of these theories is an illuminating

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<sup>1</sup>\*Roscoe Pound, *An Introduction to the Philosophy of Law* (OUP 1930).

study of how philosophical theories of law grow out of the facts of time and place as explanations thereof and then are given universal application as necessarily explanatory or determinative of social and legal phenomena for all time and in every place. It has been said that the philosophy of law seeks the permanent or enduring element in the law of the time and place. It would be quite as true to say that it seeks to find in the law of the time and place a permanent or enduring picture of universal law.

It has been said that the individual in civilized society claims to control and to apply to his purposes what he discovers and reduces to his power, what he creates by his labor, physical or mental, and what he acquires under the prevailing social, economic or legal system by exchange, purchase, gift or succession. The first and second of these have always been spoken of as giving a "natural" title to property. Thus the Romans spoke of them as modes of "natural acquisition" by occupation or by specification (making a species, i.e., creation). Indeed, taking possession of what one discovers is so in accord with a fundamental human instinct that discovery and occupation have stood in the books ever since substantially as the Romans stated them. A striking example of the extent to which this doctrine responds to deep-seated human tendencies is afforded by the customs as to discovery of mineral on the public domain upon which American mining law is founded and the customs of the old whale-fishery as to fast-fish and loose-fish which were recognized and given effect by the courts. But there is a difficulty in the case of creation or specification in that except where the creation is mental only materials must be used, and the materials or tools employed may be another's. Hence Grotius reduced creation by labor to occupation, since if one made from what he discovered, the materials were his by occupation, and if not, the title of others to the materials was decisive. This controversy as to the respective claims of him who creates by labor and him who furnishes the materials goes back to the Roman jurists of the classical period. The Proculians awarded the thing made to the maker because as such it had not existed previously. The Sabinians awarded it to the owner of the materials because without materials the new thing could not have been made. In the maturity of Roman law a compromise was made, and various compromises have obtained ever since. In modern times, however, the claim of him who creates has been urged by a long line of writers beginning with Locke and culminating in the socialists. The Romans spoke of what one acquired under the prevailing social, economic or legal system as held by "civil" acquisition and conceived that the principle *suum cuique tribuere* secured the thing so acquired as being one's own.

Roman jurists recognized that certain things were not subject to acquisition in any of the foregoing ways. Under the influence of the Stoic idea of *naturalis ratio* they conceived that most things were destined by nature to be controlled by man. Such control expressed their natural purpose. Some things, however, were not destined to be controlled by individuals. Individual control would run counter to their natural purpose. Hence they could not be the subjects of private ownership. Such things were called *res extra commercium*. They might be excluded from the possibility of individual ownership in any of three ways. It might be that from their nature they could only be used, not owned, and from their nature they were adapted to general use. These were *res communes*. Or it might be that they were made for or from their nature they were adapted to public use, that is, use for public purposes by public functionaries or by the political community. These were *res publicae*. Again it might be

because they had been devoted to religious purposes or consecrated by religious acts inconsistent with private ownership. Such things were *res sanctae*, *res sacrae* and *res religiosae*. In modern law, as a result of the medieval confusion of the power of the sovereign to regulate the use of things (*imperium*) with ownership (*dominium*) and of the idea of the corporate personality of the state, we have made the second category into property of public corporations. And this has required modern systematic writers to distinguish between those things which cannot be owned at all, such as human beings, things which may be owned by public corporations but may not be transferred, and things which are owned by public corporations in full dominion. We are also tending to limit the idea of discovery and occupation by making *res nullius* (e.g., wild game) into *res publicae* and to justify a more stringent regulation of individual use of *res communes* (e.g., of the use of running water for irrigation or for power) by declaring that they are the property of the state or are "owned by the state in trust for the people." It should be said, however, that while in form our courts and legislatures seem thus to have reduced everything but the air and the high seas to ownership, in fact the so-called state ownership of *res communes* and *res nullius* is only a sort of guardianship for social purposes. It is *imperium*, not *dominium*. The state as a corporation does not own a river as it owns the furniture in the state house. It does not own wild game as it owns the cash in the vaults of the treasury. What is meant is that conservation of important social resources requires regulation of the use of *res communes* to eliminate friction and prevent waste, and requires limitation of the times when, places where and persons by whom *res nullius* may be acquired in order to prevent their extermination. Our modern way of putting it is only an incident of the nineteenth-century dogma that everything must be owned.

It is not hard to see how the Romans came to the distinction that has obtained in the books ever since. Some things were part of the Roman's *familia*, were used by him upon the public domain which he occupied or were traded by him to those with whom he had legal power of commercial intercourse. He acquired them by discovery, by capture in war, by labor in agriculture or as an artisan, by commercial transactions or by inheritance. For these things private actions lay. Other things were no part of his or of anyone's household. They were used for political or military or religious purposes or, like rivers, were put to use by everyone without being consumed thereby. As to these, the magisterial rather than the judicial power had to be invoked. They were protected or use of them was regulated and secured by interdicts. One could not acquire them so as to maintain a private action for them. Thus some things could be acquired and conveyed and some could not. In order to be valid, however, according to juristic theory the distinction must lie in the nature of things, and it was generalized accordingly.

In a time when large unoccupied areas were open to settlement and abundant natural resources were waiting to be discovered and developed, a theory of acquisition by discovery and appropriation of *res nullius*, reserving a few things as *res extra commercium*, did not involve serious difficulty. On the other hand, in a crowded world, the theory of *res extra commercium* comes to seem inconsistent with private property and the theory of discovery and occupation to involve waste of social resources. As to the latter, we may compare the law of mining and of water rights on the public domain, which developed along lines of discovery and reduction to possession under the conditions of 1849 and the federal legislation of 1866

and 1872, with recent legislation proceeding on ideas of conservation of natural resources. The former requires more consideration. For the argument that excludes some things from private ownership may seem to apply more and more to land and even to movables. Thus Herbert Spencer says, in explaining *res communes*:

“If one individual interferes with the relations of another to the natural media upon which the latter’s life depends, he infringes the like liberties of others by which his own are measured.”

But if this is true of air and of light and of running water, men will insist upon inquiring why it is not true of land, of articles of food, of tools and implements, of capital and even, it may be, of the luxuries upon which a truly human life depends. Accordingly, how to give a rational account of the so-called natural right of property and how to fix the natural limits of that right became vexed questions of philosophical jurisprudence.

Antiquity was content to maintain the economic and social status quo or at least to idealize it and maintain it in an ideal form. The Middle Ages were content to accept *suum cuique tribuere* as conclusive. It was enough that acquisition of land and movables and private ownership of them were part of the existing social system. Upon the downfall of authority, seventeenth- and eighteenth-century jurists sought to put natural reason behind private property as behind all other institutions. When Kant had undermined this foundation, the nineteenth-century philosophical jurists sought to deduce property from a fundamental metaphysical *datum*; the historical jurists sought to record the unfolding of the idea of private property in human experience, thus showing the universal idea; the utilitarian demonstrated private property by his fundamental test and the positivist established its validity and necessity by observation of human institutions and their evolution. In other words, here as elsewhere, when eighteenth-century natural law broke down, jurists sought to put new foundations under the old structure of natural rights, just as natural rights had been put as a new foundation to support institutions which theretofore had found a sufficient basis in authority.

Theories by which men have sought to give a rational account of private property as a social and legal institution may be arranged conveniently in six principal groups, each including many forms. These groups may be called: (1) Natural-law theories, (2) metaphysical theories, (3) historical theories, (4) positive theories, (5) psychological theories and (6) sociological theories.

Of the natural-law theories, some proceed on a conception of principles of natural reason derived from the nature of things, some on conceptions of human nature. The former continue the ideas of the Roman lawyers. They start with a definite principle found as the explanation of a concrete case and make it a universal foundation for a general law of property. As it has been put, they find a postulate of property and derive property therefrom by deduction. Such theories usually start either from the idea of occupation or from the idea of creation through labor. Theories purporting to be based on human nature are of three forms. Some proceed on a conception of natural rights, taken to be qualities of human nature reached by reasoning as to the nature of the abstract man. Others proceed upon the basis of a social contract

expressing or guaranteeing the rights derived by reason from the nature of man in the abstract. In recent thinking a third form has arisen which may be called an economic natural law. In this form of theory, a general foundation for property is derived from the economic nature of man or from the nature of man as an economic entity. These are modern theories of natural law on an economic instead of an ethical basis.

Grotius and Pufendorf may be taken as types of the older natural-law theories of property. According to Grotius, all things originally were *res nullius*. But men in society came to a division of things by agreement. Things not so divided were afterward discovered by individuals and reduced to possession. Thus things came to be subjected to individual control. A complete power of disposition was deduced from this individual control, as something logically implied therein, and this power of disposition furnished the basis for acquisition from others whose titles rested directly or indirectly upon the natural foundation of the original division by agreement or of subsequent discovery and occupation. Moreover, it could be argued that the control of an owner, in order to be complete, must include not only the power to give *inter vivos* but also the power to provide for devolution after death as a sort of postponed gift. Thus a complete system of natural rights of property was made to rest mediately or immediately upon a postulated original division by agreement or a subsequent discovery and occupation. This theory should be considered in the light of the facts of the subject on which Grotius wrote and of the time when he wrote. He wrote on international law in the period of expansion and colonization at the beginning of the seventeenth century. His discussion of the philosophical foundation of property was meant as a preliminary to consideration of the title of states to their territorial domain. As things were, the territories of states had come down in part from the past. The titles rested on a sort of rough adjustment among the invaders of the Roman empire. They could be idealized as the result of a division by agreement and of successions to, or acquisitions from, those who participated therein. Another part represented new "natural" titles based on discovery and occupation in the new world. Thus a Romanized, idealized scheme of the titles by which European states of the seventeenth century held their territories becomes a universal theory of property.

Pufendorf rests his whole theory upon an original pact. He argues that there was in the beginning a "negative community." That is, all things were originally *res communes*. No one owned them. They were subject to use by all. This is called a negative community to distinguish it from affirmative ownership by co-owners. He declares that men abolished the negative community by mutual agreement and thus established private ownership. Either by the terms of this pact or by a necessary implication what was not occupied then and there was subject to acquisition by discovery and occupation, or derivative acquisition of titles proceeding from the abolition of the negative community was conceived to be a further necessary implication.

In Anglo-American law, the justification of property on a natural principle of occupation of ownerless things got currency through Blackstone. As between Locke on the one side and Grotius and Pufendorf on the other, Blackstone was not willing to commit himself to the need of assuming an original pact. Apparently he held that a principle of acquisition by a temporary power of control co-extensive with possession expressed the nature of man in

primitive times and that afterwards, with the growth of civilization, the nature of man in a civilized society was expressed by a principle of complete permanent control of what had been occupied exclusively, including as a necessary incident of such control the *ius disponendi*. Maine has pointed out that this distinction between an earlier and a later stage in the natural right of property grew out of desire to bring the theory into accord with Scriptural accounts of the Patriarchs and their relations to the land grazed by their flocks. In either event the ultimate basis is taken to be the nature of man as a rational creature, expressed in a natural principle of control of things through occupation or in an original contract providing for such ownership.

With the revival of natural law in recent years a new phase of the justification of property upon the basis of human nature has arisen. This was suggested first by economists who deduced property from the economic nature of man as a necessity of the economic life of the individual in society. Usually it is coupled with a psychological theory on the one side and a social-utilitarian theory on the other side. In the hands of writers on philosophy of law it has often taken on a metaphysical color. From another standpoint, what are essentially natural-law theories have been advocated by socialists, either deducing a natural right of the laborer to the whole produce of his labor from a “natural” principle of creation or carrying out the idea of natural qualities of the individual human being to the point of denying all private property as a “natural” institution and deducing a general regime of *res communes* or *res publicae*.

Metaphysical theories of property are part of the general movement that replaced seventeenth- and eighteenth-century theories of natural rights, founded on the nature of the abstract man or on an assumed compact, by metaphysical theories. They begin with Kant. He first sets himself to justify the abstract idea of a law of property—the idea of a system of “external *meum* (mine) and *tuum* (thine).” Here, as everywhere else, he begins with the inviolability of the individual human personality. A thing is rightfully mine, he says, when I am so connected with it that anyone who uses it without my consent does me an injury. But to justify the law of property we must go beyond cases of possession where there is an actual physical relation to the object and interference therewith is an aggression upon personality. The thing can only be mine for the purposes of a legal system of *meum* and *tuum* where I will be wronged by another’s use of it when it is not actually in my possession. This raises in the first instance the question “How is a merely juridical or rational [as distinguished from a purely physical] possession possible?” He answers the question by a metaphysical version of the occupation theory of the eighteenth century. Conceding that the idea of a primitive community of things is a fiction, the idea of a logically original community of the soil and of the things upon it, he says, has objective reality and practical juridical reality. Otherwise mere objects of the exercise of the will, exempted therefrom by operation of law, would be raised to the dignity of free-willing subjects, although they have no subjective claim to be respected. Thus the first possessor founds upon a common innate right of taking possession, and to disturb him is a wrong. The first taking of possession has “a title of right” behind it in the principle of the original common claim to possession. It results that this taker obtains a control “realized by the understanding and independent of relations of space,” and he or those who derive from him may possess a parcel of land although remote from it physically. Such a

possession is only possible in a state of civil society. In civil society, a declaration by word or act that an external thing is mine and making it an object of the exercise of my will is “a juridical act.” It involves a declaration that others are under a duty of abstaining from the use of the object. It also involves an admission that I am bound in turn toward all others with respect to the objects they have made “externally theirs.” For we are brought to the fundamental principle of justice that requires each to regulate his conduct by a universal rule that will give like effect to the will of others. This is guaranteed by the legal order in civil society and gives us the regime of external mine and thine. Having thus worked out a theory of *meum* and *tuum* as legal institutions, Kant turns to a theory of acquisition, distinguishing an original and primary from a derived acquisition. Nothing is originally mine without a juridical act. The elements of this legal transaction of original acquisition are three: (1) “Prehension” of an object which belongs to no one; (2) an act of the free will interdicting all others from using it as theirs; (3) appropriation as a permanent acquisition, receiving a lawmaking force from the principle of reconciling wills according to a universal law, whereby all others are obliged to respect and act in conformity to the will of the appropriator with respect to the thing appropriated. Kant then proceeds to work out a theory of derivative acquisition by transfer or alienation, by delivery or by contract, as a legal giving effect to the individual will by universal rules, not incompatible with a like efficacy in action of all other wills. This metaphysical version of the Roman theory of occupation is evidently the link between the eighteenth century and Savigny’s aphorism that all property is founded in adverse possession ripened by prescription.

When Kant’s theory is examined it will be found to contain both the idea of occupation and the idea of compact. Occupation has become a legal transaction involving a unilateral pact not to disturb others in respect of their occupation of other things. But the pact does not derive its efficacy from the inherent moral force of a promise as such or the nature of man as a moral creature which holds him to promises. Its efficacy is not found in qualities of promises or of men, but in a principle of reconciling wills by a universal law, since that principle requires one who declares his will as to object A to respect the declaration of his neighbor’s will as to object B. On the other hand, the idea of creation is significantly absent. Writing at the end of the eighteenth century, in view of the ideas of Rousseau, who held that the man who first laid out a plot of ground and said, “This is mine,” should have been lynched, and of the interferences with vested rights in Revolutionary France, Kant was not thinking how those who had not might claim a greater share in what they produced but how those who had might claim to hold what they had.

Hegel develops the metaphysical theory further by getting rid of the idea of occupation and treating property as a realization of the idea of liberty. Property, he says, “makes objective my personal, individual will.” In order to reach the complete liberty involved in the idea of liberty, one must give his liberty an external sphere. Hence a person has a right to direct his will upon an external object and an object on which it is so directed becomes his. It is not an end in itself; it gets its whole rational significance from his will. Thus when one appropriates a thing, fundamentally he manifests the majesty of his will by demonstrating that external objects that have no wills are not self-sufficient and are not ends in themselves. It follows that the demand for equality in the division of the soil and in other forms of wealth is

superficial. For, he argues, differences of wealth are due to accidents of external nature that give to what A has impressed with his will greater value than to what B has impressed with his, and to the infinite diversity of individual mind and character that leads A to attach his will to this and B to attach his will to that. Men are equal as persons. With respect to the principle of possession they stand alike. Everyone must have property of some sort in order to be free. Beyond this, “among persons differently endowed inequality must result and equality would be wrong.”

Nineteenth-century metaphysical theories of property carry out these ideas or develop this method. And it is to be noted that they are all open to attack from the standpoint of the theory of *res extra commercium*. Thus Hegel’s theory comes to this: Personality involves exercise of the will with respect to things. When one has exercised his will with respect to a thing and so has acquired a power of control over it, other wills are excluded from this thing and are to be directed toward objects with which other personalities have not been so identified. So long as there are vacant lands to occupy, undeveloped regions awaiting the pioneer, unexploited natural resources awaiting the prospector,—in short, so long as there are enough physical objects in reach, if one may so put it, to go round,—this would be consistent with the nineteenth-century theory of justice. But when, as at the end of the nineteenth century, the world becomes crowded and its natural resources have been appropriated and exploited, so that there is a defect in material nature whereby such exercise of the will by some leaves no objects upon which the wills of others may be exerted, or a deficiency such as to prevent any substantial exertion of the will, it is difficult to see how Hegel’s argument may be reconciled with the argument put behind the conception of *res extra commercium*. Miller, a Scotch Hegelian, seeks to meet this difficulty. He says that beyond what is needed for the natural existence and development of the person, property “can only be held as a trust for the state.” In modern times, however, a periodical redistribution, as in antiquity, is economically inadmissible. Yet if anyone’s holdings were to exceed the bounds of reason, “the legislature would undoubtedly interfere on behalf of society and prevent the wrong which would be done by caricaturing an abstract right.” In view of our bills of rights, an American Hegelian could not invoke the *deus ex machina* of an Act of Parliament so conveniently. Perhaps he would fall back on graduated taxation and inheritance taxes. But does not Miller when hard pressed resort to something very like social-utilitarianism?

Lorimer connects the metaphysical theory with theories resting on human nature. To begin with, he deduces the whole system of property from a fundamental proposition that “the right to be and to continue to be implies a right to the conditions of existence.” Accordingly he says that the idea of property is inseparably connected “not only with the life of man but with organic existence in general”; that “life confers rights to its exercise corresponding in extent to the powers of which it consists.” When, however, this is applied in explaining the basis of the present proprietary system in all its details resort must be had to a type of artificial reasoning similar to that employed by the jurists of the seventeenth and eighteenth centuries. The abstract idea of ownership is not the only thing the legal philosopher has to consider. Moreover the reasoning by which that application is made may not be reconciled with the arguments by which the doctrine of *res extra commercium* is regarded also as a bit of natural law.



Although it purports to be wholly different, the positive theory of the basis of property is essentially the same as the metaphysical. Thus Spencer's theory is a deduction from a fundamental "law of equal freedom" verified by observation of the facts of primitive society. But the "law of equal freedom" supposed to be ascertained by observation, in the same way in which physical or chemical laws are ascertained, is in fact, as has often been pointed out, Kant's formula of justice. And the verification of deductions from this law by observation of the facts of primitive civilization is not essentially different from the verification of the deductions from the metaphysical fundamental law carried on by the historical jurists. The metaphysical jurist reached a principle metaphysically and deduced property therefrom. The historical jurist thereupon verified the deduction by showing the same principle as the idea realizing itself in legal history. In the hands of the positivists the same principle is reached by observation, the same deduction is made therefrom, and the deduction is verified by finding the institution latent in primitive society and unfolding with the development of civilization. The most notable difference is that the metaphysical and historical jurists rely chiefly on primitive occupation of ownerless things, while the positivists have been inclined to lay stress upon creation of new things by labor. In any event, laying aside the verification for the moment, the deduction as made by Spencer involves the same difficulties as those involved in the metaphysical deduction. Moreover, like the metaphysical deduction, it accounts for an abstract idea of private property rather than for the regime that actually exists. Inequalities are assumed to be due to "greater strength, greater ingenuity or greater application" of those who have acquired more than their fellows. Hence, as the end of law is taken to be the bringing about of a maximum of individual free self-assertion, any interference with one's holding the fruits of his greater strength or greater ingenuity or greater application, and his resulting greater activity in creative or acquisitive self-assertion, would contravene the very purpose of the legal order. It will be noted also that this theory, like all that had gone before, assumes a complete *ius disponendi* as implied in the very notion of property. But does not this also require demonstration? Is the *ius disponendi* implied in the idea which they demonstrate or is it only an incident of the institution they are seeking to explain by the demonstration?

Historical jurists have maintained their theory on the basis of two propositions: (1) The conception of private property, like the conception of individual personality, has had slow but steady development from the beginnings of law; (2) individual ownership has grown out of group rights just as individual interests of personality have been disentangled gradually from group interests. Let us look at each of these propositions in some detail.

If we examine the law of property analytically, we may see three grades or stages in the power or capacity which men have of influencing the acts of others with respect to corporeal objects. One is a mere condition of fact, a mere physical holding of or physical control over the thing without any other element whatever. The Roman jurists called this natural possession. We call it custody. Writers on analytical jurisprudence regard it as an element of possession. But this natural possession is something that may exist independently of law or of the state, as in the so-called *pedis possessio* of American mining law, where, before law or state authority had been extended to the public domain in the mining country, the miners recognized the claim of one who was actually digging to dig without molestation at that spot. The mere having of an object in one's actual grasp gives an advantage. But it may be only an

advantage depending on one's strength or on recognition of and respect for his personality by his fellow men. It is not a legal advantage except as the law protects personality. It is the physical person of the one in natural possession which is secured, not his relation to the thing held. Analytically the next grade or stage is what the Romanist calls juristic possession as distinguished from natural possession. This is a legal development of the extra-legal idea of custody. Where custody or the ability to reproduce a condition of custody is coupled with the mental element of intention to hold for one's own purposes, the legal order confers on one who so holds a capacity protected and maintained by law so to hold, and a claim to have the thing restored to his immediate physical control should he be deprived of it. As the Romanist puts it, in the case of natural possession the law secures the relation of the physical person to the object; in juristic possession the law secures the relation of the will to the object. In the highest grade of proprietary relation, ownership, the law goes much further and secures to men the exclusive or ultimate enjoyment or control of objects far beyond their capacity either to hold in custody or to possess—that is, beyond what they could hold by physical force and beyond what they could actually hold even by the help of the state. Natural possession is a conception of pure fact in no degree dependent upon law. The legally significant thing is the interest of the natural possessor in his personality. Possession or juristic possession is a conception of fact and law, existing as a pure relation of fact, independent of legal origin, but protected and maintained by law without regard to interference with personality. Ownership is a purely legal conception having its origin in and depending on the law.

In general the historical development of the law of property follows the line thus indicated by analysis. In the most primitive social control only natural possession is recognized and interference with natural possession is not distinguished from interference with the person or injury to the honor of the one whose physical contact with the physical object is meddled with. In the earlier legal social control the all-important thing is *seisin*, or possession. This is a juristic possession, a conception both of fact and of law. Such institutions as tortious conveyance by the person *seised* in the common law are numerous in an early stage of legal development. They show that primarily the law protected the relation to an object of one who had possession of it. Indeed the idea of dominium, or ownership as we now understand it, was first worked out thoroughly in Roman law, and other systems got their idea of it, as distinguished from *seisin*, from the Roman books.

Recognition of individual interests of substance, or in other words individual property, has developed out of recognition of group interests, just as recognition of individual interests of personality has evolved gradually from what in the first instance was a recognition of group interests. The statement which used to be found in the books that all property originally was owned in common means nothing more than this: When interests of substance are first secured they are interests of groups of kindred because in tribally organized society groups of kindred are the legal units. Social control secures these groups in the occupation of things which they have reduced to their possession. In this sense the first property is group property rather than individual property. Yet it must be noted that wherever we find a securing of group interests, the group in occupation is secured against interference of other groups with that occupation. Two ideas gradually operated to break up these group interests and bring

about recognition of individual interests. One of these is the partition of households. The other is the idea of what in the Hindu law is called self-acquired property.

In primitive or archaic society as households grow unwieldy there is a partition which involves partition of property as well as of the household. Indeed in Hindu law partition is thought of as partition of the household primarily and as partition of property only incidentally. Also in Roman law the old action for partition is called the action for partitioning the household. Thus, at first, partition is a splitting up of an overgrown household into smaller households. Presently, however, it tends to become a division of a household among individuals. Thus in Roman law on the death of the head of a household each of his sons in his power at his death became a *pater familias* and could bring a proceeding to partition the inheritance although he might be the sole member of the household of which he was the head. In this way individual ownership became the normal condition instead of household ownership. In Hindu law household ownership is still regarded as the normal condition. But with changes in society and the rise of commercial and industrial activity, a change has been taking place rapidly which is making individual ownership the normal type in fact, if not in legal theory.

Self-acquired property, the second disintegrating agency, may be seen in Hindu law and also in Roman law. In Hindu law all property is normally and *prima facie* household property. The burden is upon anyone who claims to be the individual owner of anything. But an exceptional class of property is recognized which is called self-acquired property. Such property might be acquired by "valor," that is, by leaving the household and going into military service and thus earning or acquiring by way of booty, or by "learning," that is, by withdrawing from the household and devoting oneself to study and thus acquiring through the gifts of the pious or the exercise of knowledge. A third form was recognized later, namely, property acquired through the use of self-acquired property. In the same way in Roman law the son in the household, even if of full age, normally had no property. Legally all property acquired by any member of the household was the property of the head of the household as the legal symbol and representative thereof. Later the head of the household ceases to be thought of as symbolizing the household and the property was regarded legally as his individual property. But Roman law recognized certain kinds of property which sons in the household might hold as their own. The first of these was property earned or acquired by the son in military service. Later property earned in the service of the state was added. Finally it came to be law that property acquired otherwise than through use of the patrimony of the household might be held by the son individually though he remained legally under the power of the head.

In the two ways just explained, through partition and through the idea of self-acquired property, individual interests in property came to be recognized throughout the law. Except for the institution of community property between husband and wife in civil-law countries, or as it is called the matrimonial property regime, there is practically nothing left of the old system of recognized group interests. And even this remnant of household group ownership is dissolving. All legally recognized interests of substance in developed legal systems are normally individual interests. To the historical jurist of the nineteenth century, this fact,

coupled with the development of ownership out of possession, served to show us the idea which was realizing in human experience of the administration of justice and to confirm the position reached by the metaphysical jurists. Individual private property was a corollary of liberty and hence law was not thinkable without it. Even if we do not adopt the metaphysical part of this argument and if we give over the idealistic-political interpretation of legal history which it involves, there is much which is attractive in the theory of the historical jurists of the last century. Yet as we look at certain movements in the law there are things to give us pause. For one thing, the rise and growth of ideas of "negotiability," the development of the maxim *possession vaut titre* in Continental law, and the cutting down in other ways of the sphere of recognition of the interest of the owner in view of the exigencies of the social interest in the security of transactions, suggests that the tendency involved in the first of the two propositions relied on by the historical school has passed its meridian. The Roman doctrine that no one may transfer a greater title than he has is continually giving way before the demand for securing of business transactions had in good faith. And in Roman law in its maturity the rules that restricted acquisition by adverse possession and enabled the owner in many cases to reclaim after any lapse of time were superseded by a decisive limitation of actions which cut off all claims. The modern law in countries which take their law from Rome has developed this decisive limitation. Likewise in our law the hostility to the statute of limitations, so marked in eighteenth-century decisions, has given way to a policy of upholding it. Moreover the rapid rise in recent times of limitations upon the *ius disponendi*, the imposition of restrictions in order to secure the social interest in the conservation of natural resources, and English projects for cutting off the *ius abutendi* of the landowner, could be interpreted by the nineteenth-century historical jurists only as marking a retrograde development. When we add that with the increase in number and influence of groups in the highly organized society of today a tendency is manifest to recognize practically and in back-handed ways group property in what are not legal entities, it becomes evident that the segment of experience at which the historical jurists were looking was far too short to justify a dogmatic conclusion, even admitting the validity of their method.

It remains to consider some twentieth-century theories. These have not been worked out with the same elaboration and systematic detail as those of the past, and as yet one may do no more than sketch them.

An instinctive claim to control natural objects is an individual interest of which the law must take account. This instinct has been the basis of psychological theories of private property. But thus far these theories have been no more than indicated. They might well be combined with the historical theory, putting a psychological basis in place of the nineteenth-century metaphysical foundation. A social-psychological legal history might achieve much in this connection.

Of sociological theories, some are positivist, some psychological and some social-utilitarian. An excellent example of the first is Duguit's deduction from social interdependence through similarity of interest and through division of labor. He has but sketched this theory, but his discussion contains many valuable suggestions. He shows clearly enough that the law of property is becoming socialized. But, as he points out, this does not

mean that property is becoming collective. It means that we are ceasing to think of it in terms of private right and are thinking of it in terms of social function. If one doubts this he should reflect on recent rent legislation, which in effect treats the renting of houses as a business affected with a public interest in which reasonable rates must be charged as by a public utility. Also it means that cases of legal application of wealth to collective uses are becoming continually more numerous. He then argues that the law of property answers to the economic need of applying certain wealth to definite individual or collective uses and the consequent need that society guarantee and protect that application. Hence, he says, society sanctions acts which conform to those uses of wealth which meet that economic need, and restrains acts of contrary tendency. Thus property is a social institution based upon an economic need in a society organized through division of labor. It will be seen that the results and the attitude toward the law of property involved are much the same as those which are reached from the social-utilitarian standpoint.

Psychological sociological theories have been advanced chiefly in Italy. They seek the foundation of property in an instinct of acquisitiveness, considering it a social development or social institution on that basis.

Social-utilitarian theories explain and justify property as an institution which secures a maximum of interests or satisfies a maximum of wants, conceiving it to be a sound and wise bit of social engineering when viewed with reference to its results. This is the method of Professor Ely's well-known book on Property and Contract. No one has yet done so, but I suspect one might combine this mode of thought with the civilization interpretation of the Neo-Hegelians and argue that the system of individual property, on the whole, conduces to the maintaining and furthering of civilization—to the development of human powers to the most of which they are capable—instead of viewing it as a realization of the idea of civilization as it unfolds in human experience. Perhaps the theories of the immediate future will run along some such lines. For we have had no experience of conducting civilized society on any other basis, and the waste and friction involved in going to any other basis must give us pause. Moreover, whatever we do, we must take account of the instinct of acquisitiveness and of individual claims grounded thereon. We may believe that the law of property is a wise bit of social engineering in the world as we know it, and that we satisfy more human wants, secure more interests, with a sacrifice of less thereby than by anything we are likely to devise—we may believe this without holding that private property is eternally and absolutely necessary and that human society may not expect in some civilization, which we cannot forecast, to achieve something different and something better.

## *Property and Ownership*<sup>1\*</sup>

Property is a general term for rules governing access to and control of land and other material resources. Because these rules are disputed, both in regard to their general shape and in regard to their particular application, there are interesting philosophical issues about the justification of property. Modern philosophical discussions focus mostly on the issue of the justification of *private* property rights (as opposed to common or collective property). ‘Private property’ refers to a kind of system that allocates particular objects like pieces of land to particular individuals to use and manage as they please, to the exclusion of others (even others who have a greater need for the resources) and to the exclusion also of any detailed control by society. Though these exclusions make the idea of private property seem problematic, philosophers have often argued that it is necessary for the ethical development of the individual, or for the creation of a social environment in which people can prosper as free and responsible agents.

### **1. Issues of Analysis and Definition**

More than most policy areas dealt with by political philosophers, the discussion of property is beset with definitional difficulties. The first issue is to distinguish between property and private property.

Strictly speaking, ‘property’ is a general term for the rules that govern people's access to and control of things like land, natural resources, the means of production, manufactured goods, and also (on some accounts) texts, ideas, inventions, and other intellectual products. Disagreements about their use are likely to be serious because resource-use matters to people. They are particularly serious where the objects in question are both scarce and necessary. Some have suggested that property relations only make sense under conditions of scarcity (Hume [1739] 1888, pp. 484–98). But other grounds of conflict are possible: there may be disagreements about how a given piece of land should be used, which stem from the history or symbolic significance *of that piece of land*, whether land in general is scarce or not. (Intellectual property provides an example of property rules that do not respond directly to scarcity; moreover unlike material objects, the objects of intellectual property are not corrodible, for their use by any one person does not preclude their use by any number of others.)<sup>[1]</sup>

Any society with an interest in avoiding conflict needs such a system of rules. Their importance can hardly be overestimated, for without them cooperation, production, and exchange are virtually impossible, or possible only in the fearful and truncated forms we see in ‘black markets.’ This necessity is sometimes cited as an argument in favor of *private* property (Benn and Peters 1959, p. 155). In fact, all it establishes is that there ought to be property rules of *some* kind: private property rules are one variety. Some human societies have existed for millennia, satisfying the needs and wants of all their members, without private property or anything like it in land or the other major resources of economic life. So the first step in sound argumentation about property is distinguishing those arguments which support the existence of property in general from arguments which support the existence of a

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<sup>1</sup> \*Jeremy Waldron, “**Property and Ownership**”, *Stanford Encyclopaedia of Philosophy*, 2012.

system of a specific kind (Waldron 1988).

There are three species of property arrangement: common property, collective property, and private property. In a *common property* system, resources are governed by rules whose point is to make them available for use by all or any members of the society. A tract of common land, for example, may be used by everyone in a community for grazing cattle or gathering food. A park may be open to all for picnics, sports or recreation. The aim of any restrictions on use is simply to secure fair access for all and to prevent anyone from using the common resource in a way that would preclude its use by others. *Collective property* is a different idea: here the community as a whole determines how important resources are to be used. These determinations are made on the basis of the social interest through mechanisms of collective decision-making—anything from a leisurely debate among the elders of a tribe to the forming and implementing of a Soviet-style ‘Five-Year Plan’.

*Private property* is an alternative to both collective and common property. In a private property system, property rules are organized around the idea that various contested resources are assigned to the decisional authority of particular individuals (or families or firms). The person to whom a given object is assigned (e.g., the person who found it or made it) has control over the object: it is for her to decide what should be done with it. In exercising this authority, she is not understood to be acting as an agent or official of the society. She may act on her own initiative without giving anyone else an explanation, or she may enter into cooperative arrangements with others, just as she likes. She may even transfer this right of decision to someone else, in which case that person acquires the same rights she had. In general the right of a proprietor to decide as she pleases about the resource that she owns applies whether or not others are affected by her decision. If Jennifer owns a steel factory, it is *for her* to decide (in her own interest) whether to close it or to keep the plant operating, even though a decision to close may have the gravest impact on her employees and on the prosperity of the local community.

Though private property is a system of individual decision-making, it is still a system of social rules. The owner is not required to rely on her own strength to vindicate her right to make self-interested decisions about the object assigned to her: if Jennifer’s employees occupy the steel factory to keep it operating despite her wishes, she can call the police and have them evicted; she does not have to do this herself or even pay for it herself. So private property is continually in need of public justification—first, because it empowers individuals to make decisions about the use of scarce resource in a way that is not necessarily sensitive to others’ needs or the public good; and second, because it does not merely permit that but deploys public force at public expense to uphold it.

It may be thought that the justificatory issue is nowadays moot, with the collapse of socialist systems in Eastern Europe and the former Soviet Union, and the triumph of market economies all over the world. It is tempting to conclude that since economic collectivism has been thoroughly discredited, the problem of justifying *private* property has been solved by default: there is simply no alternative. But the point of discussing the justification of an institution is not only to defend it against its competitors. Often we justify in order to understand and also to operate the institution intelligently. In thinking about property, there are a number of issues that make little sense unless debated with an awareness of what the

point of *private* property might be. Some of these issues are technical. Consider, for example, the rule against perpetuities, the registration of land titles, or the limits on testamentary freedom; all these would be like an arcane and unintelligible code, to be learned at best by rote, unless we connect them with the point of throwing social authority behind individual control (or behind the individual disposition of control) over material resources. (See Ackerman 1977, p. 116.)

The same is true of some grander issues. The Fifth Amendment to the U.S. Constitution requires that private property not be taken for public use without compensation. Clearly this prohibits the simple seizure of someone's land for use, say, as a firing range or an airport. But what if the state places a restriction on the use of a person's land, telling the owner that she may not erect a modern skyscraper because it will compromise the historical aesthetics of the neighborhood? Does this amount to a taking? Certainly the owner has suffered a loss (she may have bought the land with the intention of developing it). On the other hand, we should not pretend that there is a taking whenever any restriction is imposed: I may not drive my car at 100 m.p.h. but I am still the owner of the car. Such questions cannot be answered intelligently without revisiting the reasons (if any) that there are for giving private property this sort of constitutional protection. Is it protected because we distrust the state's ability to make intelligent decisions about resource use? Or is it protected because we want to place limits on the burdens that any individual may be expected to bear for the sake of the public good? Our sense of the ultimate values that private ownership is supposed to serve may make a considerable difference to our interpretation of the takings clause and other doctrines.

Plainly private property and collective control are not all-or-nothing alternatives. In every modern society, some resources are governed by common property rules (e.g., streets and parks), some are governed by collective property rules (e.g., military bases and artillery pieces), and some are governed by private property rules (toothbrushes and bicycles). Also, there are variations in the degree of freedom that a private owner has over the resources assigned to him. Obviously, an owner's freedom is limited by background rules of conduct: I may not use my gun to kill another person. These are not strictly property rules. More to the point are things like zoning restrictions, which amount in effect to the imposition of a collective decision about certain aspects of the use of a given resource. The owner of a building in an historic district may be told, for example, that she can use it as a shop, a home, or a hotel but she may not knock it down and replace it with a skyscraper. In this case, we may still say that the historic building counts as private property; but if too many other areas of decision about its use were also controlled by public agencies, we would be more inclined to say that it was really subject to a collective property rule (with the 'owner' functioning as steward of society's decisions).

It is probably a mistake therefore to insist on any definition of private property that implies a proprietor has absolute control over his resource.[2] Some jurists have even argued that the terms 'property' and 'ownership' should be eliminated from the technical discourse of the law (see Grey 1980). They say that calling someone the 'owner' of a resource conveys no exact information about her rights in relation to that resource: a corporate owner is not the same as an individual owner; the owner of intellectual property has a different array of rights than the owner of an automobile; and even with regard to one and the same resource, the



rights (and duties) of a landlord who owes nothing on his property might be quite different from those of a mortgagor.

The eliminative proposal makes sense to this extent: the position of a private owner is best understood not as a single right to the exclusive use and control of the object in question, but as a bundle of rights, which may vary from case to case (Honore 1961). Even ‘exclusive use’ is a complex idea. It implies, first, that the owner is at liberty to use the object as he pleases (within a range of generally acceptable uses). Secondly, it implies that others have an obligation to refrain from using the object without the owner's permission. The point about permission implies in turn that the owner has the power to license others to use her property. She may lend her automobile, rent her house, or grant a right of way over her land. The effect of this may be to create other property interests in the object, so that the various liberties, rights and powers of ownership are divided among several individuals.

More strikingly, the owner is legally empowered to transfer the whole bundle of rights in the object she owns to somebody else—as a gift or by sale or as a legacy after death. With this power, a private property system becomes self-perpetuating. After an initial assignment of objects to owners, there is no further need for the community or the state to concern itself with distributive questions. Objects will circulate as the whims and decisions of individual owners and their successive transferees dictate. The result may be that wealth is widely distributed or it may be that wealth is concentrated in a very few hands. It is part of the logic of private property that no-one has the responsibility to concern themselves with the big picture, so far as the distribution of resources is concerned. Society simply pledges itself to enforce the rights of exclusion that ownership involves wherever those rights happen to be. Any concern about the balance between rich and poor must be brought in as a separate matter of public policy (as tax and welfare policy or *in extremis* large scale redistribution). As we shall see, philosophers disagree as to whether this is an advantage or an indictment of private property systems.

At the furthest reaches of analysis, the concept of private property becomes quite contestable. Many people believe that ownership implies inheritance. But Mill once observed (Mill 1994 [1848], p. 28) that the private property idea implied only ‘the right of each to his (or her) own faculties, to what he can produce by them, and to whatever he can get for them in a fair market; together with his right to give this to any other person if he chooses.’ He said that passing the property of individuals who made no disposition of it during their lifetime to their children ‘may be a proper arrangement or not, but it is no consequence of the principle of private property’ (*ibid.*). Definitive resolution of such controversies is probably impossible. Some philosophers have suggested that certain concepts should be regarded as ‘essentially contested concepts’ (see Gallie 1956); if there is anything to this suggestion, private property might be one of them (see Waldron 1988, pp. 51–2).

## 2. Historical Overview

There are extensive discussions of property in the writings of Plato, Aristotle, Aquinas, Hegel, Hobbes, Locke, Hume, Kant, Marx, and Mill. The range of justificatory themes they consider is very broad, and I shall begin with a summary.

The ancient authors speculated about the relation between property and virtue, a natural

subject for discussion since justifying private property raises serious questions about the legitimacy of self-interested activity. Plato (*Republic*, 462b-c) argued that collective ownership was necessary to promote common pursuit of the common interest, and to avoid the social divisiveness that would occur 'when some grieve exceedingly and others rejoice at the same happenings.' Aristotle responded by arguing that private ownership promotes virtues like prudence and responsibility: '[W]hen everyone has a distinct interest, men will not complain of one another, and they will make more progress, because every one will be attending to his own business' (Aristotle, *Politics*, 1263a). Even altruism, said Aristotle, might be better promoted by focusing ethical attention on the way a person *exercises* his rights of private property rather than questioning the institution itself (*ibid.*). Aristotle also reflected on the relation between property and freedom, and the contribution that ownership makes to a person's being a free man and thus suitable for citizenship. The Greeks took liberty to be a status defined by contrast with slavery, and for Aristotle, to be free was to belong to oneself, to be one's own man, whereas the slave was by nature the property of another. Self-possession was connected with having sufficient distance from one's desires to enable the practice of virtuous self-control. On this account, the natural slave was unfree because his reason could not prescribe a rule to his bodily appetites. Aristotle had no hesitation in extending this point beyond slavery to the conditions of 'the meaner sort of workman.' Obsessed with need, the poor are 'too degraded' to participate in politics like free men. 'You could no more make a city out of paupers,' wrote Aristotle, 'than out of slaves' (*ibid.*, 1278a). They must be ruled like slaves, for otherwise their pressing and immediate needs will issue in envy and violence. Some of these themes have emerged more recently in civic republican theories, though modern theories of citizenship tend to begin with a sense of who should be citizens (all adult residents) and then proceed to argue that they should all have property, rather than using existing wealth as an independent criterion for the franchise (King and Waldron 1988).

In the medieval period, Thomas Aquinas continued discussion of the Aristotlean idea that virtue might be expressed in the use that one makes of one's property. But Aquinas gave it a sharper edge. Not only do the rich have moral obligations to act generously, but the poor also have rights against the rich. Beginning from the premise that '[a]ccording to the natural order established by Divine Providence, inferior things are ordained for the purpose of succoring man's needs...' (Aquinas *ST*, p. 72), Aquinas argued that no division of resources based on human law can prevail over the necessities associated with destitution. This is a theme which recurs throughout our tradition—most notably in Locke's *First Treatise on Government*, (Locke 1988 [1689], I, para. 42)—as an essential qualification of whatever else is said about the legitimacy of private property (Horne 1990).

In the early modern period, philosophers turned their attention to the way in which property might have been instituted, with Hobbes and Hume arguing that there is no natural 'mine' or 'thine,' and that property must be understood as the creation of the sovereign state (Hobbes 1983 [1647]) or at the very least the artificial product of a convention 'enter'd into by all the members of the society to bestow stability on the possession of...external goods, and leave every one in the peaceable enjoyment of what he may acquire by his fortune and industry' (Hume 1978 [1739], p. 489). John Locke (1988 [1689]), on the other hand, was

adamant that property could have been instituted in a state of nature without any special conventions or political decisions.

Locke's theory is widely regarded as the most interesting of the canonical discussions of property. In part this is a result of how he began his account; because he took as his starting point that God gave the world to men in common, he had to acknowledge from the outset that private entitlements pose a moral problem. How do we move from a common endowment to the 'disproportionate and unequal Possession of the Earth' that seems to go along with private property? Unlike some of his predecessors, Locke did not base his resolution of this difficulty on any theory of universal (even tacit) consent. Instead, in the most famous passage of his chapter on property, he gave a moral defense of the legitimacy of unilateral appropriation.

Though the Earth...be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other Men. (Locke 1988 [1689], II, para. 27)

The interest of Locke's account lies in the way he combines the structure of a theory of first occupancy with an account of the substantive moral significance of labor. In the hands of writers like Samuel Pufendorf (1991 [1673], p. 84), First Occupancy theory proceeded on the basis that the first human user of a natural resource—a piece of land, for example—is distinguished from all others in that he did not have to displace anyone else in order to take possession. It did not particularly matter *how* he took possession of it, or what sort of use he made of it: what mattered was that he began acting as its owner without dispossessing anyone else. Now although Locke used the logic of this account, it *did* matter for him that the land was cultivated or in some other way used productively. (For this reason, he expressed doubts whether indigenous hunters or nomadic peoples could properly be regarded as owners of the land over which they roamed.) This is partly because Locke identified the ownership of labor as something connected substantially to the primal ownership of self. But it was also because he thought the productivity of labor would help answer some of the difficulties which he saw in First Occupancy theory. Though the first occupier does not actually dispossess anyone, still his acquisition may prejudice other's interests of others if there is not, in Locke's words, 'enough and as good left in common' for them to enjoy (Locke 1988 [1689], II, para. 27). Locke's answer to this difficulty was to emphasize that appropriation by *productive* labor actually increased the amount of goods available in society for others (*ibid.*, II, para. 37).

Immanuel Kant's work on property is less well known than Locke's, and is more formal and abstract. Kant began by emphasizing a general connection between property and agency, maintaining that there would be an affront to agency and thus to human personality, if some system were not arrived at which could permit useful objects to be used. He inferred from this that 'it is a duty of right to act towards others so that what is external (usable) could also become someone's' (Kant 1991 [1797], p. 74) Though this legitimated unilateral appropriation, it did so only in a provisional way. Since the appropriation of a resource as private property affects everyone else's position (imposing duties on them that they would

otherwise not have), it cannot acquire full legitimacy by unilateral action: it must be ratified by an arrangement which respects everyone's interests in this matter. So the force of the principle requiring people to act so that external objects can be used as property also requires them to enter into a civil constitution, which will actually settle who is to be the owner of what on a basis that is fair to all.

G.W.F. Hegel's account of property centers on the contribution property makes to the development of the self, 'superseding and replacing the subjective phase of personality' (1967 [1821], para. 41a) and giving some sort of external reality to what would otherwise be the mere idea of individual freedom. These rather obscure formulations were taken up also by the English idealists, most notably by T.H. Green (1941 [1895]), who emphasized the contribution that ownership makes to ethical development, to the growth of the will and a sense of responsibility. But neither of these writers thought of the development of the individual person as the be-all and end-all of property. In both cases it was thought of as a stage in the growth of social responsibility. Both saw the freedom embodied in property as ultimately *positive* freedom—freedom to choose rationally and responsibly for the wider social good. In Karl Marx's philosophy, Hegel's sense of there being several stages in the growth of positive freedom is framed in terms of stages of social development rather than stages of the growth of individuals (Marx 1972 [1862]). And for Marx, as for Plato, social responsibility in the exercise of private property rights is never enough. The whole trajectory of the development of modern society, says Marx, is towards large-scale cooperative labor. This may be masked by forms of property that treat vast corporations as private owners, but eventually this carapace will be abandoned and collectivist economic relations will emerge and be celebrated as such.

The general merits of private property versus socialism thus became a subject of genuine debate in the nineteenth and twentieth centuries. John Stuart Mill, with his characteristic open-mindedness treated communism as a genuine option, and he confronted objections to the collectivist ideal with the suggestion that the inequitable distribution of property in actually existing capitalist societies already partakes of many of these difficulties. He insisted however, that private property be given a fair hearing as well:

If...the choice were to be made between Communism...and the present state of society with all its sufferings and injustices,...all the difficulties, great or small, of Communism would be but as dust in the balance. But to make the comparison applicable, we must compare Communism at its best, with the regime of individual property, not as it is, but as it might be made...The laws of property have never yet conformed to the principles on which the justification of private property rests. (Mill 1994[1848], pp. 14–15)

Mill is surely right, at least so far as the aims of a philosophical discussion of property are concerned. Indeed, one way of looking at the history we have just briefly surveyed is that it is the history of successive attempts to tease out, from the mess of actually-existing maldistribution and exploitation, some sense of the true principles on which the justification of an ideal system of private property would rest, and a sense too of other aspects of moral enterprise which such an institution might serve.

### 3. Is Property a Philosophical Issue?

What is it about property that engages the interest of philosophers? Why should philosophers be interested in property?

Some have suggested that they need not be. John Rawls argued that questions about the system of ownership are secondary or derivative questions, to be dealt with pragmatically rather than as issues in political philosophy (Rawls 1971, p. 274). Although every society has to decide whether the economy will be organized on the basis of markets and private ownership or on the basis of central collective control, there was little that philosophers could contribute to these debates. Philosophers, Rawls said, are better off discussing the abstract principles of justice that should constrain the establishment of *any* social institutions, than trying to settle *a priori* questions of social and economic strategy.

On the other hand, with the growing attention that is being paid in the discipline to public policy generally, it is difficult to deny that questions about property can be posed in terms that are abstract enough for philosophers to address. Though Rawls counsels us to talk about justice rather than property, in fact issues about property are inevitably implicated in some of the issues about justice that have preoccupied political philosophers in recent years. Certain property institutions may be better than others for justice. A system of markets and private property covering all or most of the resources in society will make it very difficult to ensure the steady application of principles like equality, distribution according to need, or even as some have argued—see e.g., Hayek 1976—distribution according to desert. Some have argued that property rights in a market economy ought to be treated as resistant to redistribution and perhaps as insensitive to distributive justice generally except possibly at the moment of their initial allocation (see Nozick, 1974). If we take this view and if we also take distributive issues seriously, we may have to commit ourselves to a compromised or eclectic system rather than a pure market system of private property.

What about the ownership relation itself? Is there any inherent philosophical interest in the nature of a person's relation to material resources? When someone says 'X is mine' and X is an action, we see interesting questions about intentionality, free-will, and responsibility, which philosophers will want to pursue. Or when someone says 'X belongs to person P,' and X is an event, memory, or experience, there are interesting questions about personal identity. But when X is an apple or a piece of land or an automobile, there does not appear to be any question of an *inherent* relation between X and P which might arouse our interest.

This was one of David Hume's conclusions. There is nothing natural about private property, wrote Hume. The 'contrariety' of our passions and the 'looseness and easy transition [of material objects] from one person to another' mean that any situation in which I hold or use a resource is always vulnerable to disruption (Hume 1978 [1739], p. 488). Until possession is stabilized by social rules, there is no secure relation between person and thing. We may think that there ought to be: we may think, for example, that a person has a moral right to something that he has made and that society has an obligation to give legal backing to this moral right. But according to Hume, we have to ask what it is in general for society to set up and enforce rules of this kind, before we can reach any conclusions about the normative significance of the relation between any particular person and any particular thing.

Our property is nothing but those goods, whose constant possession is establish'd by the laws of society; that is, by the laws of justice. Those, therefore, who make use of the words property, or right, or obligation, before they have explain'd the origin of justice, or even make use of them in that explication, are guilty of a very gross fallacy, and can never reason upon any solid foundation. A man's property is some object related to him. This relation is not natural, but moral, and founded on justice. It is very preposterous, therefore, to imagine, that we can have any idea of property, without fully comprehending the nature of justice, and shewing its origin in the artifice and contrivance of man. The origin of justice explains that of property. The same artifice gives rise to both. (ibid., p. 491)

The view that the issue of property begs questions about the general basis of social organization had already been foreshadowed by Thomas Hobbes. Indeed Hobbes regarded property as the key to political philosophy: '[M]y first enquiry was to be from whence it proceeded, that any man should call any thing rather his *Own*, th[a]n another mans' (Hobbes 1983 [1647], pp. 26–7). For Hobbes, property rules were the product of authority—the acknowledged authority of a sovereign, whose commands could guarantee the peace and make it safe for men to embark on social and economic activities that outstripped their ability to protect themselves using their own individual strength. Hume, by contrast, was interested in the possibility that the relevant settlement might emerge as conventions from ordinary human interactions rather than as impositions by an acknowledged figure in authority (Hume 1978 [1739], p. 490).[3]

Still even if we concede that property is the product of social rules, and that normative thinking about the former must be preceded by normative thinking about the latter, there might be facts about the human condition or our agency as embodied beings that provide philosophical premises for an argument that property relations should be established in one way rather than another. Clearly, there is at least one material object with which a person does seem to have an intimate pre-legal relation that would bear some philosophical analysis—namely, that person's body. We are embodied beings and to a certain extent the use and control of our limbs, sensory organs etc. is indispensable for our agency. Were a person to be deprived of this control—were others to have the right to block or manipulate the movements of his physical body—then his agency would be truncated, and he would be incapable of using his powers of intention and action to make something he (and others) could regard as a life for himself. Some modern authors, following John Locke, have tried to think about this in terms of an idea of self-ownership. According to G.A. Cohen (1995) a person owns himself when he has all the control over his own body that a master would have over him were he a slave. Now since a master is entitled to make comprehensive use of his slave for his own profit without owing any account or any contribution to anyone else, it seems to follow from the idea of self-ownership that a person must be allowed to profit equally comprehensively from the control of his own mental and bodily resources. Taking his clue from Nozick (1974) that taxation on earnings is a form of coerced labor (for others or for the state), Cohen concludes that various egalitarian arrangements (like welfare paid for out of taxation) are incompatible with the self-ownership of the rich. We have to choose therefore between principles of equality and principles of self-ownership. Debate on this issue continues: some argue that what we owe to others must be figured out first before there can be any question of

owning either our selves, our bodies, or other material resources; while others say that any attempt to make the argument in that order will lead to counter-intuitive results (Nozick 1974, p. 234).

There is a further question whether self-ownership affords a basis for thinking about property in external objects other than my body? John Locke thought that it did (Locke 1988 [1689], II, para. 27). He suggested that when I work on an object or cultivate a piece of land, I project something of my self-owned self into the thing. That something I have worked on embodies a part of me is a common enough sentiment, but it is difficult to give it a analytically precise sense. That an object is shaped the way it is may be an effect of my actions; but actions don't seem to have the trans-temporal endurance to enable us to say that *they* remain present in the object after the time of their performance. The idea of mixing one's labor seems to be a piece of rhetoric which enhances other arguments for private property rather than an argument in its own right.

Others have speculated about an effect in the opposite direction—not so much the incorporation of the self into the object as the incorporation of the thing into the self (Radin 1982). This was a theme in Hegel's work, where there was a suggestion that owning property helped the individual to 'supersede the mere subjectivity of personality' (Hegel [1821] 1991, 73); in plain English, it gave them the opportunity to make concrete the plans and schemes that would otherwise just buzz around inside their heads, and to take responsibility for their intentions as the material they were working on—a home or an sculptor's block of marble—registered the impact of the decisions they had made (see Waldron 1988, pp. 343–89). Even the utilitarian Jeremy Bentham toyed with a version this idea. Though property, he said, depended on positive law, the law of property had an effect on the self that makes redistribution particularly objectionable. Law provided security for our expectations, and when that security came to be focused on a particular object, that object formed part of the structure of one's agency: 'It is hence that we have the power of forming a general plan of conduct; it is hence that the successive instants which compose the duration of life are not like isolated and independent points, but become continuous parts of a whole' (Bentham 1931 [1802], p. 111).

#### **4. Genealogies of Property**

In our philosophical tradition, arguments about the justification of property have often been presented as genealogies: as stories about the way in which private property might have emerged in a world that was hitherto unacquainted with the institution.

The best known are Lockean stories (Locke 1988 [1689] and Nozick 1974). One begins with a description of a state of nature and an initial premise about land belonging to nobody in particular. And then one tells a story about why it would be sensible for individuals to appropriate land and other resources for their personal use and about the conditions under which such appropriations would be justified. Individuals have needs and they find themselves surrounded with objects capable of satisfying those needs. But each person, X, is vaguely aware that the objects have not been furnished by God or nature for X's use alone; others have a need for them as well. So what is X to do? One thing is clear: if X has to wait for some general meeting of everyone who might be affected by his use of the resources in his vicinity before he is allowed to use them then, as Locke put it, 'man had starved,

notwithstanding the plenty God had given him' (Locke 1988 [1689], II, para. 28). So the individual goes ahead and takes what he needs (*ibid.*, I, para. 86). He 'mixes his labor' with the object he needs, and by doing so he fulfills his fundamental duty of self-preservation, while also increasing the value of the resources he works on for the indirect benefit of others. The first phase of Locke's story involves individuals satisfying their needs out of the common largesse in this virtuous and self-reliant way. The second phase of the story involves their exchanging surplus goods that they have appropriated with one another; rather than saying that such surpluses lapse back into the common heritage, Locke allows individuals to acquire, grow, or make more than they can use so that markets become possible and prosperity general (*ibid.*, II, paras. 46–51). With markets and prosperity, however, comes inequality, avarice and envy, and the third and last stage of Locke's account is the institution of government to protect the property rights that have grown up in this way (*ibid.*, II, paras. 123 ff.) The story assumes that individuals are able to reason through these issues of who is entitled to appropriate and use and exchange goods without the tutelage of government, and that at neither the first stage nor the second stage is any social or political decision-making about property required.

In its most basic aspect, Locke's genealogy has the character of a First Occupancy story. In the first instance, the legitimacy of an individual's appropriation stems largely from the fact that it does not involve the direct expropriation of anyone else: by definition the 'first occupancy' is peaceful. There are, of course, strong elements of utilitarian and virtue theory in Locke's account too—the productivity of labor and the privileging of what Locke calls 'the Industrious and the Rational' over the 'Covetousness of the Quarrelsome and Contentious' (*ibid.*, II, para. 34). But the issue of historical priority is indispensable. Whose use of a given resource came first is crucial, and the order in which goods were subsequently transferred from hand to hand is indispensable for understanding the legitimacy of current entitlements. Robert Nozick (1974) has done more than anyone else to elucidate the form of this kind of 'historical entitlement' theory.

Not all genealogies of property have this shape. David Hume tells a completely different sort of story. On his approach, we begin by assuming that since time immemorial, people have been fighting over resources, so that the distribution of *de facto* possession at any given time is arbitrary, being driven by force, cunning, and luck. Now it is possible that such fighting will continue indefinitely. But it is also possible that it may settle down into a sort of stable equilibrium in which those in possession of significant resources and those tempted to grab resources from others find that the marginal costs of further predatory activity are equal to their marginal gains. Under these conditions, something like a 'peace dividend' may be available. Maybe everyone can gain, in terms of the diminution of conflict, the stabilizing of social relations, and the prospects for market exchange, by an agreement not to fight any more over possessions.

I observe, that it will be for my interest to leave another in the possession of his goods, provided he will act in the same manner with regard to me. He is sensible of a like interest in the regulation of his conduct. When this common sense of interest is mutually express'd, and is known to both, it produces a suitable resolution and behaviour... (Hume 1978 [1739], p. 490).



Such a resolution, if it lasts, may amount over time to a ratification of *de facto* holdings as *de jure* property. As with Locke's account, the state comes into the picture much later to reinforce conventions of property that emerge informally in this way (*ibid.*, pp. 534 ff.). But notice how much more modest Hume's story is than the Lockean account in the moral claims that it makes (see Waldron 1994). The stability of the emergent distribution has nothing to do with its justice, nor with the moral quality of the actions by which goods were appropriated. It may be fair or unfair, equal or unequal, but the parties already know that they cannot hope for a much better distribution by pitching their own strength yet again against that of others. (See also Buchanan 1975 for a modern version of this approach.)

As an account of the genesis of property, Hume's theory has the advantage over its main rivals of acknowledging that the early eras of human history are eras of conflict largely unregulated by principle and opaque to later moral enquiry. It does not require us to delve into history to ascertain who did what to whom, and what would have happened if they had not. Once a settled pattern of possession emerges, we simply draw an arbitrary line and say, 'Property entitlements start from *here*.' The model has important normative consequences for the present as well. Those who are tempted to question or disrupt an existing distribution of property must recognize that far from ushering in a new era of justice, their best efforts are likely to inaugurate an era of conflict in which all bets are off and in which virtually no planning or cooperation is possible. The weakness of the Humean approach is the obverse of its strength. The moral considerations that it marginalizes actually do matter to us. For example, we would not be happy with a Humean convention ratifying slavery or cannibalism, but for all that Hume shows it may well be a feature of the equilibrium emerging from the age of conflict that some people are in possession of others' bodies. The point is that even if Hume is right that the sentiment of justice is built up out of a convention to respect one another's *de facto* possessions, that sentiment once established can take on a life of its own, so that it can subsequently be turned against the very equilibrium that engendered it (Waldron 1994).

A third variety of property-story makes the state and the social contract more fundamental than it is in either Locke's or Hume's approach. We are to imagine a period where people try and rely on their own physical and moral initiative to take possession of the resources which they need or want, but in which it become increasingly apparent that institution of reliable property arrangements is going to have to involve a social decision. Eventually property must be based on consent—the consent of everyone affected by decisions about the use and control of a given set of resources. This theory is associated with the normative political philosophy of Jean-Jacques Rousseau (1968 [1762]) and Immanuel Kant (1991 [1797]). As we have seen, the Lockean critique of this sort of approach was always that urgency of material need left no time for social consent. In fact the Rousseau/Kant approach has little difficulty with this point. There can be provisional appropriations made unilaterally (Ryan 1984, p. 80). But every such appropriation is subject in principle to the consent of all and must be offered up for social ratification. In other words, the urgency of immediate need is not taken as a basis of discrediting the review and redistribution of possession by society as a whole if serious distributive anomalies are emerging.

What all this actually yields in the way of a legitimate assignment of resources to

individuals is a matter of the distributive principles that survive the test of ratification by the general will. Rawlsian, egalitarian and utilitarian approaches are all imaginable under the auspices of this account. The essence of the Rousseau/Kant approach is that society's deployment of principles like these to evaluate existing distributions is never trumped by the history of entitlements and it is never excluded by the Humean conventions that may have emerged as a cosy equilibrium among those who are actually in possession.

What claims are being made about these stories? Are we to assume that one of them is literally true? Or what are we to infer from their falsity (if they are historically inaccurate)? Does it follow that property is illegitimate? A number of philosophers have suggested recently that a genealogy can make an important contribution to our understanding of a phenomenon even when it is not literally true: Bernard Williams (2002) has suggested this about language and the emergence of truth-telling, following Edward Craig (1990)'s genealogical account of our possession of the concept of knowledge. Robert Nozick has also discussed the value of what he calls 'potential explanations'—stories that would explain how something happened if certain things were the case (some of which in fact are not the case): 'To see how in principle, a whole realm could fundamentally be explained greatly increases our understanding of the realm...We learn much by seeing how the state could have arisen, even if it didn't arise that way' (Nozick 1974, pp. 8–9).

The genealogies we have considered may differ in this regard. The Rousseau/Kant approach helps us understand why private property is inherently a matter of social concern and the Humean approach helps us see the value of property in providing people with a fixed and mutually acknowledged basis on which the rest of social life can be built, whether or not it answers to our independent intuitions of justice. But the Lockean genealogy may explain little or nothing about property entitlements unless it is actually true. As Nozick acknowledges (1974, pp. 151–2), a modern state should not feel morally constrained by property holdings which might have had a Lockean pedigree but in fact do not. In this regard it is interesting that one of the main uses of Lockean theory these days is in defending the property rights of indigenous people—where a literal claim is being made about who had first possession of a set of resources and about the need to rectify the injustices that accompanied their subsequent expropriation (see Waldron 1992).

Finally, we should not forget that not all genealogies set out to flatter the practices or institutions they purport to explain. Karl Marx (1976 [1867])'s account of primitive accumulation and Jean-Jacques Rousseau's non-normative description of the invention of property in the *Discourse on the Origins of Inequality* (Rousseau 1994 [1755]) are genealogies written more in a Nietzschean spirit of pathology than as part of any quest for justification. Such negative genealogies reminds us of the importance of Mill's observation that in approaching the justification of private property we must remember that, 'we must leave out of consideration its actual origin in any of the existing nations of Europe' (Mill 1994 [1848], p. 7).

### **5. Justification: Liberty and Consequences**

The justificatory issue might therefore be confronted directly, without invoking any sort of history or genealogical narrative.

In dealing with the pros and cons of private property as an institution, it has sometimes been suggested that the general justification of private property and the distribution of particular property rights can be treated as separate issues, rather in the way that some philosophers suggested that the general justification of punishment can be separated from the principles governing its distribution (Hart 1968, p. 4; see also Ryan 1984, p. 82 and Waldron 1988, p. 330). In neither case, though, is the separation complete: it holds for some general justifications and not for others. In the theory of punishment, a retributivist will believe that the principles governing punishment in general necessarily also regulate its particular distribution. And there are analogues in the theory of property. Robert Nozick (1974) argued that a theory of historical entitlement, along Lockean lines, provides both a complete justification of the institution and a set of strict criteria that govern its legitimate distribution. Property rights, according to Nozick, constrain the extent to which we are entitled to act on our intuitions and theories about distributive justice. Consequentialist theories, however, may be able to separate the institutional and distributive issues in this way, and some theories of liberty may be able to do this also (though the distribution of liberty is itself something about which most libertarians have firm—and egalitarian!—views). As we assess various distributive arguments, then, it is a good idea to keep in mind the question of whether or not they have direct or indirect distributive implications.

The most common form of justificatory argument is consequentialist: people in general are better off when a given class of resources is governed by a private property regime than by any alternative system. Under private property, it is said, the resources will be more wisely used, or used to satisfy a wider (and perhaps more varied) set of wants than under any alternative system, so that the overall enjoyment that humans derive from a given stock of resources will be increased. The most persuasive argument of this kind is sometimes referred to as ‘the tragedy of the commons’ (Hardin 1968). If everyone is entitled to use a given piece of land, then no one has an incentive to see that crops are planted or that the land is not over-used. Or if anyone does take on this responsibility, they themselves are likely to bear all the costs of doing so (the costs of planting or the costs of their own self-restraint), while any benefits of their prudence will accrue to all subsequent users. And in many cases there will be no benefits, since one individual's planning or restraint will be futile unless others cooperate. So, under a system of common property, each commoner has an incentive to get as much as possible from the land as quickly as possible, since the benefits of doing this are in the short-term concentrated and assured, while the long-term benefits of self-restraint are uncertain and diffused. However, if a piece of hitherto common land is divided into parcels and each parcel is assigned to a particular individual who can control what happens there, then planning and self-restraint will have an opportunity to assert themselves. For now the person who bears the cost of restraint is in a position to reap all the benefits; so that if people are rational and if restraint (or some other form of forward-looking activity) is in fact cost-effective, there will be an overall increase in the amount of utility derived.

Arguments of this sort are familiar and important, but like all consequentialist arguments, they need to be treated with caution. In most private property systems, there are some individuals who own little or nothing, and who are entirely at the mercy of others. So when it is said that ‘people in general’ are better off under private property arrangements, we have to

ask ‘Which people? Everyone? The majority? Or just a small class of owners whose prosperity is so great as to offset the consequent immiseration of the others in an aggregative utilitarian calculus?’ John Locke hazarded the suggestion that everyone would be better off. Comparing England, whose commons were swiftly being enclosed by private owners, to pre-colonial America, where the natives continued to enjoy universal common access to land, Locke speculated that ‘a King of a large and fruitful Territory there [i.e. in America] feeds, lodges, and is clad worse than a day Labourer in England.’ (Locke 1988 [1689], II, para. 41) The laborer may not own anything, but his standard of living is higher on account of the employment prospects that are offered in a prosperous privatized economy. Alternatively, the more optimistic of the consequentialists cast their justifications in the language of what we would now call ‘Pareto-improvement’. Maybe the privatization of previously common land does not benefit everybody: but it benefits some and it leaves others no worse off than they were before. The homelessness and immiseration of the poor, on this account, is not a result of private property; it is simply the natural predicament of mankind from which a few energetic appropriators have managed to extricate themselves.

So far we have considered the consequentialist case for private property over common property. The consequentialist case for private property over collective property has more to do with markets than with the need for responsibility and self-restraint in resource use. The argument for markets is that in a complex society there are innumerable decisions to be made about the allocation of particular resources to particular production processes. Is a given ton of coal better used to generate electricity which will in turn be used to refine aluminum for manufacturing cooking pots or aircraft, or to produce steel which can be used to build railway trucks, which may in turn be used to transport either cattle feed or bauxite from one place to another? In most economies there are hundreds of thousands of distinct factors of production, and it has proved impossible for efficient decisions about their allocation to be made by central agencies acting in the name of the community and charged with overseeing the economy as a whole. In actually existing socialist societies, central planning turned out to be a way of ensuring economic paralysis, inefficiency and waste (Mises 1951). In market economies, decisions like these are made on a decentralized basis by thousands of individuals and firms responding to price signals, each seeking to maximize profits from the use of the productive resources under its control, and such a system often works efficiently. Some have speculated that there could be markets without private property (Rawls, 1971, p. 273), but this seems hopeless. Unless individual managers in a market economy are motivated directly or indirectly by considerations of personal profit in their investment and allocation decisions, they cannot be expected to respond efficiently to prices. Such motivation will occur only if the resources are privately owned, so that the loss is theirs (or their employer's) when a market signal is missed and the gain is theirs (or their employer's) when a profitable allocation is secured.

I said earlier that a consequentialist defense is in trouble unless it can show that everyone is better off under a private property system, or at least that no-one is worse off. Now, a society in which all citizens derive significant advantages from the privatization of the economy is perhaps not an impossible ideal. But in every existing private property system there is a class of people who own little or nothing and who are arguably much worse off

under that system than they would be under a socialist alternative. A justificatory theory cannot ignore their predicament, if only because it is their predicament that poses the justificatory issue in the first place (Waldron 1993). A hard-line consequentialist may insist that the advantages to those who profit from private ownership outweigh the costs to the underclass. Philosophically, however, this sort of hard line is quite disreputable (Rawls 1971, pp. 22–33; Nozick 1974, pp. 32–3). If we take the individual rather than a notional entity like ‘the social good’ as the focal point of moral justification, then there ought to be something we can say to *each* individual why the institution we are defending is worthy of her support. Otherwise it is not at all clear why *she* should be expected to observe its rules (except when we have the power and the numbers to compel her to do so).

Maybe the consequentialist argument can be supplemented with an argument about desert in order to show that there is justice in some people's enjoying the fruits of private property while others languish in poverty. If private property involves the wiser and more efficient use of resources, it is because someone has exercised virtues of prudence, industry, and self-restraint. People who languish in poverty, on this account, do so largely because of their idleness, profligacy or want of initiative. Now, theories like this are easily discredited if they purport to justify the actual distribution of wealth under an existing private property economy (Nozick 1974, pp. 158–9; Hayek 1976). But there is a more modest position which desert theorists can adopt: namely, that private property alone offers a system in which idleness is not rewarded at the expense of industry, a system in which those who take on the burdens of prudence and productivity can expect to reap some reward for their virtue which distinguishes them from those who did not make any such effort (Munzer 1990, pp. 285 ff.).

Many of the alleged market-advantages accrue only if private property is distributed in certain ways. Monopolistic control of the main factors of production by a few individuals or corporations can play havoc with market efficiency; and it can also lead to such great concentrations of private power as to offset any argument for property based on freedom, dissent or democracy. Distributive equity may be crucial also for non-consequentialist arguments. The idea that property-owning promotes virtue is, as we have seen, as old as Aristotle; and even today it is used by civic republicans as an argument against economic collectivism. According to this argument, if most economic resources are owned in common or controlled collectively for everyone's benefit, there is no guarantee that citizen's conditions of life will be such as to promote republican virtue. In a communist or collectivist society, citizens may behave either as passive beneficiaries of the state or irresponsible participants in a tragedy of the commons. If a generation or two grow up with that character then the integrity of the whole society is in danger. These arguments are interesting, but it is worth noting how sensitive they are to the distribution of property (Waldron 1986, pp. 323–42). As T.H. Green observed, a person who owns nothing in a capitalist society ‘might as well, in respect of the ethical purposes which the possession of property should serve, be denied rights of property altogether’ (Green 1941 [1895], p. 219).

Lastly I want to consider justificatory arguments that connect property with liberty. Societies with private property are often described as free societies. Part of what this means is surely that owners are free to use their property as they please; they are not bound by social or political decisions. (And correlatively, the role of government in economic decision-making

is minimized.) But that cannot be all that is meant, for it would be equally apposite to describe private property as a system of *unfreedom*, since it necessarily involves the social exclusion of people from resources that others own. All property systems distribute freedoms and unfreedoms; no system of property can be described without qualification as a system of liberty. Someone may respond that the liberty to use what belongs to another is license not liberty, and so its exclusion should not really count against a private property system in the libertarian calculus. But the price of this maneuver is very high: not only does it commit the libertarian to a moralized conception of freedom of the sort that he usually shies away from (as in case of positive liberty), but it also means that liberty, so defined, can no longer be invoked to support property except in a question-begging way (Cohen 1982).

Two other things might be implied by the libertarian characterization. The first is a point about independence: a person who owns a significant amount of private property—a home, say, and a source of income—has less to fear from the opinion and coercion of others than the citizen of a society in which some other form of property predominates. The former inhabits, in a fairly literal sense, the ‘private sphere’ that liberals have always treasured for individuals—a realm of action in which he need answer to no-one but himself. But like the virtue argument, this version of the libertarian case is also sensitive to distribution: for those who own nothing in a private property economy would seem to be as unfree—by this argument—as anyone would be in a socialist society.

That last point may be too quick, however, for there are other indirect ways in which private property contributes to freedom. Milton Friedman (1962) argues that political liberty is enhanced in a society where the means of intellectual and political production (printing presses, photocopying machines, computers) are controlled by a number of private individuals, firms, and corporations—even if that number is not very large. In a capitalist society, a dissident has the choice of dealing with several people (other than state officials) if he wants to get his message across, and many of them are prepared to make their media available simply on the basis of money, without regard to the message. In a socialist society, by contrast, those who are politically active either have to persuade state agencies to disseminate their views, or risk underground publication. More generally, Friedman argues, a private property society offers those who own nothing a greater variety of ways in which they earn a living—a larger menu of masters, if you like—than they would be offered in a socialist society. In these ways, private property for some may make a positive contribution to freedom—or at least an enhancement of choice—for everyone.

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## *Possession*<sup>1</sup>

### **The idea of possession**

Few relationships are as vital to man as that of possession, and we may expect any system of law, however primitive, to provide rules for its protection. Human life and human society, as we know them, would be impossible without the use and consumption of material things. We need food to eat, clothes to wear and tools to use in order to win a living from our environment. But to eat food, we must first get hold of it; to wear clothes, we must have them; and to use tools, we must possess them. Possession of material things then is essential to life; it is the most basic relationship between men and things.

Nor is it just the acquisition of possession that is essential. A society lacking all respect for individual possession would quite clearly be unviable. If a man could never be sure that the food before him, the coat on his back and the tool in his hand will not be snatched from him by his neighbour, then obviously life in society would be completely impracticable. Simple economics dictates that, as a minimum, some measure of uninterrupted enjoyment is a prerequisite to man's deriving any benefit or value from material objects and that such temporary possession must be respected by, and protected from, his neighbours.

For this reason, law must provide for the safeguarding of possession. Human nature being what it is, men are tempted to prefer their own selfish and immediate interests to the wide and long-term interests of society in general. But since an attack on a man's possession is an attack on something which may be essential to him, it becomes almost tantamount to an assault on the man himself; and the possessor may well be stirred to defend himself with force. The result is violence, chaos and disorder. In so far therefore as a legal system aims to replace self-help and private defence by institutionalised protection of rights and maintenance of order, it must incorporate rules relating to possession.

But the concept of possession is as difficult to define as it is essential to protect. In the first place, possession is an abstract notion and involves the same sort of difficulties, which we have seen to arise with other abstract terms such as "law" and "rule". There is nothing which we can point at and identify as possession in the same way as we can do with concrete things such as tables and chairs. Moreover, it is an abstract term to which the traditional type of definition is as inappropriate as we saw it to be for the term "rule". Just as we could not locate the notion of a rule within some wider class of concepts, so too with possession we cannot define it by placing it in a wider class and then distinguishing it from other members of the class; for possession is, it would seem, in a class of its own.

A second cause of difficulty is the fact that possession is not purely a legal concept. Our discussion of ownership showed that possession differs from ownership in that the former is of temporary duration whereas the latter is of a more permanent, ultimate and residuary nature. But possession differs from ownership in another quite different respect. Ownership, as we saw, consists of a combination of legal rights, some or all of which may be present in

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<sup>1</sup> P.J. Fitzgerald, *Salmond on Jurisprudence* 265-294 (1966).

any particular instance; and such rights imply the existence of legal rules and a system of law. With possession this is not so. A possessor is not so much one who has certain rights as one who actually *has* possession. Whether a person has ownership depends on rules of law; whether he has possession is a question that could be answered as a matter of fact and without reference to law at all. The notion of possession has application in a pre-legal society, and even perhaps outside society altogether. Of course in so far as statements about possession are statements of law, then they imply the existence of that law, but the existence of possession is independent of, and prior to, that of law. Whereas ownership is strictly a legal concept, possession is both a legal and a non-legal concept.

Now with possession, as with all concepts that are used both inside and outside the law, we must remember that the legal and the ordinary meanings can diverge. There is indeed no logical compulsion for lay and legal usage to coincide. For it is always open to a system of law to adopt a word from ordinary language and to use it in some special restricted or extended sense for its own particular purposes. Some cases of actual possession the law may prefer to regard as something less than possession, since it may wish to refuse to these the protection which it normally affords. The borrower of a thing would usually be considered to be in possession of it. Yet Roman law looked on him as having something less, as having mere custody or *detentio* : he had possession in fact but not in law. Again, a person in possession of an envelope or bureau would ordinarily be taken to have possession of its contents. Yet English law has decided the contrary in certain larceny cases, where such persons have been held not to take possession of contents of which they were unaware until they discovered them and realised what they were. Equally a system of law may wish to afford the protection usually given to possessors to persons who in fact have sometimes less than possession; such persons are sometimes said by lawyers to have constructive possession.

This divergence between law and legal usage is not only possible; it is to be expected. Like many words in common use, "possession" is a word of open texture. Though there are cases where we can say "If this is not possession, then nothing is", and others where we can assert that here is nothing remotely like possession, nevertheless there may always arise the marginal situation that leaves us doubtful whether to describe it as a case of possession or not. If X unknown to me leaves a wallet on the floor of my shop, is it now in my possession? To this sort of question common sense and ordinary language provides no clear or unqualified answer. Law, however, may have to provide just this, because upon the answer given may depend a determination as to whether the right to the wallet should inhere in me or in the customer who finds it.

To such problems each system of law is free to provide its own solution. No two systems are obliged to arrive at the same conclusion, but the answers given will depend on the policy which each legal system adopts and will affect the meaning of the legal concept of possession in each system. As policies and solutions may differ from system to system, so will the concept of possession. Moreover, even within the same system of law different policies may be seen at work in different areas of law. The English law of larceny, where the courts have been concerned to see that dishonesty should not escape conviction, has frequently found occasion to narrow the meaning of possession, as in the examples given above. By contrast, the law relating to landlord and tenant, where the courts have been anxious to give protection

to tenancies, has at times extended the connotation to cover situations that would hardly qualify in ordinary speech as cases of possession.

To look for a definition then that will summarise the meanings of the term “possession” in ordinary language, in all areas of law and in all legal systems, is to ask for the impossible. We may be tempted, therefore, to inquire instead into the sorts of factual criteria according to which each area of a system of law ascribes possessory rights to people and to investigate the nature of these rights. In other words we may prefer to ask “what are the facts on which legal possession is based, and what are the legal consequences?” In short we might feel that the term “possession” itself could just as well be omitted: there are facts and there are rights, but possession itself is merely a useful but unnecessary stepping-stone from one to the other.

However attractive it may seem, this is a misleading approach. In the first place, it is true that the rules in different systems, and in different parts of the same system of law, may not necessarily produce consistency: the concept of possession in larceny may be different from the concept of possession in the law of landlord and tenant. For in any case the normal order of things is that practical rules precede theoretical analysis. Nevertheless, a multitude of unrelated regulations becomes in due course not only intellectually unsatisfying but for practical purposes unmanageable. Practice itself then stands in need of theory and rationalisation. We must not expect to achieve a definition to which every use of the term “possession” will conform. That could be bought only at the price of distorting the rules of law themselves or lengthening the definition to a point beyond utility. What we can aim at is a definition of the normal or standard legal case of possession and an analysis of the factual notion underlying this concept.

Secondly, to seek only the criteria for the ascription of possessory rights together with a description of such rights, overlooks the importance to the legal concept of the notion of actual possession. Not only is actual possession the prime case where possessory rights are afforded; it is also true that one of these rights may well consist in the right to be restored to actual possession. Consequently we cannot avoid inquiring into the nature of actual possession itself. Further, to concentrate solely on the criteria and the rights, without regard to the underlying factual notion underlying the standard legal case is to miss the unifying force of existence of the term “possession”. If facts  $F_1, F_2, \dots, F_n$  are such that the existence of any one of them enables us to say in law that here is a case of possession; and if a possessor is entitled in law to any or all of the possessory rights  $R_1, R_2, \dots, R_n$  nonetheless to restrict the description of the concept of possession to a description of the facts and the rights would be to distort the picture. Some of the facts may be more central than other; equally so may some of the rights. A mere catalogue of both will miss the pattern running through the whole.

The most fruitful approach is first to examine the ordinary or extra-legal meaning of possession, and then to discuss the ways in which a legal concept of possession may diverge from this on account of the factors which the law may want to take into consideration, remembering that while the factual concept underlies the legal concept, the latter may in turn affect our use of the former. The way that lawyers use “possession” may well have repercussions on its extra-legal use.

### **Possession in fact**

Possession, in fact, is a relationship between a person and a thing. I possess, roughly speaking, those things which I have: the things which I hold in my hand, the clothes which I wear, and the objects which I have by me. To possess them is to have them under my physical control. If I capture a wild animal, I get possession of it; if it escapes from my control, then I lose possession.

Things not in any way amenable to human control cannot form the subject-matter of possession. A man cannot be said to possess for example the sun, the moon or the stars. Indeed the expression "to possess the sun" is without application: if a man claimed to possess the sun, we should be at a loss to understand what he meant. In time, however, it is conceivable that means might be discovered of controlling such distant objects as the sun and in this event it might make sense to talk of possessing it; but this would be a very different world from the one we know and the one our language describes. Yet the fact that our ordinary language has no use for such expressions by no means rules out their employment in a legal system. We have seen that the legal concept of ownership could quite feasibly be applied to such objects as the sun and the same holds true of the legal concept of possession. We could, if we wanted, have laws specifying criteria according to which a man might be said to possess the sun. For legal concepts and ordinary concepts need not coincide.

Now to say that something is under my control is not to assert that I am continuously exercising control over it. I can have a thing in my control without actually holding or using it at every given moment of time. In the ordinary sense of the word, I retain possession of my coat even if I take it off and put it down beside me; and I continue in possession of it even though I fall asleep. All that is necessary is that I should be in such a position as to be able, in the normal course of events, to resume actual control if I want. At this point we may observe the influence of law and of the legal concept of possession on the idea of possession in fact. In a wholly primitive society utterly devoid of law and of legal protection for possession, there might well be little hope of resuming actual control over a thing once you had momentarily relinquished. In such a society men could only be said to possess those objects over which they were actually exercising control. By contrast, in a society in which possession is respected generally and is protected by law, we may expect that temporary relinquishment of actual control will not result in complete loss of the ability to resume it at will. So, by providing remedies against dispossession the law enlarges the number of situations in which a person may count on retaining his power of control; in other words it increases the number of cases where a man may be said to have possession.

Now whether in any given case I can be said to have sufficient control (whether actual or potential) to be in possession of an object will depend on a variety of factors. First there is the extent of my power entails complete lack of possession, but having possession does not involve having absolute power over the subject-matter; the amount of power that is necessary varies according to the nature of the object. The more amenable it is to control, the less likely am I to qualify as possessing it without being able to exercise a high degree of control. Possession of small objects may involve holding them or else having them near to hand; a fairly ungovernable object such as a wild animal is capable of being possessed by being confined in a cage, without the possessor's being able to lay hold of it himself; a large or

immovable object, such as a ship or a house, could be said to remain in my possession even though I am miles away and able to exercise very little control, if any.

Another factor relevant to the assessment of control is the power of excluding other people. Once actual control is abandoned, the possibility of resumption may well depend on the lack of outside interference. This may be due to the possessor's own physical power and influence; to his having kept secret the object's existence or whereabouts; to his neighbour's customary respect for possession, i.e. their unwillingness to interfere if the exercise of control has been interrupted; and finally to the law itself which may penalise any such interruption. Indeed, so important is the exclusion of others to the notion of possession that it is sometimes regarded as an essential part of the very concept: to possess anything, it is said, entails being able or intending to exclude others from it. That this is not so, however, can be seen from the fact that "possession" is a term apt to describe even situations involving only one person. If the sole inhabitant of a desert island catches a fish, he can quite correctly be described as getting possession of it if it escapes. Here actual possession differs from ownership, which consists of rights and which therefore automatically involves the existence of persons against whom the owner can have those rights. But words are not used idly and "possession" is not just a term used to catalogue everything which a man happens to have at any one time. We should hardly attribute to the man on the island possession of his clothes, for example: there would be no point in our doing so; whereas the point in describing his relationship with the fish in terms of possession was to contrast his position with regard to this particular fish with this position with regard to those which he had not caught. Now the contrast we usually want to make is between those cases where we have exclusive control and those where we do not. The factor of exclusion, therefore, though not logically essential to possession, is, because of its effect on the ability to control and because of the kind of distinctions we wish to draw, a highly important feature; it is central in the sense that cases of possession without such exclusion are odd exceptions: the example of the man on the island is an unusual and marginal situation.

So far no distinction has been made between the mental and physical aspects of possession. Many jurists have distinguished two such elements (i) Salmond considered that possession consisted of a *corpus possessionis* and an *animus possidendi*. The former, he thought, comprised both the power to use the thing possessed and the existence of grounds for the expectation that the possessor's use will not be interfered with. The latter consisted of an intent to appropriate to oneself the exclusive use of the thing possessed.

It is certainly true that in assessing whether possession has been acquired, lost or abandoned intention may be highly relevant. Moreover, it is doubtful whether in ordinary usage possession could be ascribed to a person utterly unable to form any intentions whatsoever: it would be odd to describe a day-old baby or a man in a protracted coma as actually (as opposed to legally) possessing anything at all. As against this, however, we may find counter-examples of possession unaccompanied by intention. I should normally be said to possess the coins in my pocket, even if unaware of their existence and so unable to form any intention in respect of them. Can we say then that what the possessor needs is at least a minimum intention, an intent to exclude others from whatever may be in his pocket? To this there are two replies. First, in its widest and loosest sense, the sense in which "possesses"

simply means “has”, I can be said to possess such things as a fine head of hair, a stout heart or a good sense of humour - without any question of intent arising. Secondly, in the narrower sense, where the subject-matter of possession consists of material objects other than parts of the possessor’s own body, it is misleading to assert that the possessor must actually be intending anything at all. If I possess something, then it is true that if my possession is challenged or attacked. I shall probably display an intention of excluding such interference. But unless my possession is under attack-and in the normal course of events it is not; furthermore it would be highly unusual to find a man’s possession under constant attack-no question of, or need for, intent is involved.

The test then for determining whether a man is in possession of anything is whether he is in general control of it. Unless he is actually holding or using it - in which event he clearly has possession - we have to ask whether the facts are such that we can expect him to be able to enjoy the use of it without interference on the part of others. There will always, of course, be border-line cases. Suppose I become paralysed: am I still in possession of the coat by my side? Such questions need not detain us, for the ordinary concept of possession is not designed to cope with such marginal cases, while the existence of legal rules relating to legal possession will answer such questions and obviate the need for any decision in terms of possession in fact.

We have seen that the word “possess” is sometimes used in a very wide sense to mean “have”. Thus I can be said to possess a sense of humour. I can also be said to possess certain rights, and here the term can be used to draw a distinction between the ownership and the possession of a proprietary right, as discussed earlier. It may, on the other hand, mean nothing more than to say that I have the rights in question, and this is not restricted to legal rights; I can be said to possess a moral, or natural, right to privacy, whether or not this is accompanied by a legal right. In general, however, the extra-legal notion of possession is concerned with things of a material or physical character.

### **Possession in law**

We have seen that in any society some protection of possession is essential. This being so, the law must needs provide such protection, and this it can do in two different ways. First, the possessor can be given certain legal rights, such as a right to continue in possession free from interference by others. This primary right *in rem* can then be supported by various sanctioning right *in personam* against those who violate the possessor’s primary right: he can be given a right to recover compensation for interference and for dispossession, and a right to have his possession restored to him. Secondly, the law, can protect possession by prescribing criminal penalties for wrongful interference and for wrongful dispossession. By such civil and criminal remedies the law can safeguard a man’s *de facto* possession.

Now obviously whenever such remedies are invoked, it will be important to ascertain whether a person invoking them actually has any possession to be protected. It will be relevant to inquire whether a plaintiff complaining of interference actually possesses the object interfered with, or whether a plaintiff alleging wrongful dispossession was himself formerly in possession in fact. Consequently there will be a need for legal criteria to determine whether a person is in possession.

A legal system could of course content itself with providing that in law the existence of possession should depend solely on the criteria of common sense. In this case possession in law would be identical with possession in fact; a man would in law possess only those things which in ordinary language he would be said to possess. Such a system of law, then, would concern itself only with actual possession. Even so, the concept of possession would not be free of difficulty. For possession in fact, as we saw, is not a wholly simple notion; the question whether I am in fact in possession of an article depends on such factors as the nature of the article itself and the attitudes and activities of other people. But the general outline of the concept of possession in fact, as given in the preceding section, would suffice for the purposes of a legal system that adopted this approach.

Even with such a legal system, however, there would no doubt arise borderline questions to which lay usage gave no answer but which the law would have to resolve : if A loses his golf-ball on B's golf-links and the ball is found by C, we cannot proceed with the matter of safeguarding possession until we know who in such a case actually has possession. Yet, at the moment when C has found the ball but has not yet picked it up, it is by no means clear which of these three parties would ordinarily, and outside the law, be held to be in possession. A legal system's solutions to such marginal problems would inevitably refine the notion of possession and produce divergences between the factual and the legal concepts.

Apart from this type of development however, the two concepts could quite easily coincide. Nor need such coincidence restrict legal protection to cases of actual possession. If A wrongfully takes possession of B's watch, the law can still afford all its possessory remedies to B, on the ground that B *did* originally have, and therefore *ought* to have, possession. The fact that the law regards as possessors only those who are not in possession but who in the general view of society ought to be. Indeed the protection of possession would be of little point if legal protection ceased the moment possession was lost: the protection of possession entails supporting the dispossessed against the dispossessor.

But when a system of law allows possessory rights and remedies to persons not in actual possession, it may do so, not by considering them simply as entitled to possession and its attendant rights, but by regarding them as being for legal purposes *in possession*. Thus we may find that one who is not actually a possessor is nevertheless considered as such in the eyes of the law; and conversely one who actually has possession may be looked on by law as a non-possessor. Accordingly the concept of legal possession parts company still further from the ordinary notion of possession, as law tends to invent instances of constructive possession, *i.e.*, cases where something less than possession in one person is deemed possession in law, and where conversely the actual possession of some other party is reduced to something less than legal possession.

The common law relating to the crime of larceny provides numerous examples of this tendency. This offence penalises the wrongful taking of possession, and in order to qualify as wrongful such taking must be without the possessor's consent and accompanied by an intent to deprive him permanently of the object stolen. But there are many cases where an unsuspecting owner allows the wrongdoer to get possession with his consent and where accordingly dishonesty would go scot-free but for the special provisions regarding possession in such cases. Where a man asks his companion to hold his luggage, or a shopkeeper allows a

customer to examine his goods, or a master instructs his servants to use his tools, or a host lets his guests use his table-ware-in all these cases actual possession might well be said to have been given by the first party to the second. Consequently if the companion, the customer, the servant or the guest absconded with the goods, they would not in ordinary language take possession against the rightful possessor's consent, since they would have already obtained it earlier with consent. The law, however, provides that in such cases possession remains in the first party, while the second is said to obtain mere custody of the article. Accordingly he does not acquire legal possession until he makes off with the article, but at this point he is acting without the rightful possessor's consent and so is guilty of a wrongful taking of possession.

It should be noted that there was nothing logically inevitable in this sort of development: in order to catch dishonesty which is outside the strict meaning of the definition of larceny, the law has extended the meaning of certain terms in the definition; it could equally well have extended the definition itself.

This indeed has been done to cope with the case of the dishonest bailee. In common law a bailee is one who is given possession of goods on the understanding that he is to deliver them *in specie* to the bailor or at the bailor's directions. Such a person acquires possession of the goods in law as well as in fact. Suppose then that he misappropriates them? Having already got possession, he cannot, it would seem, be guilty of larceny. First, the courts created a peculiar rule that the bailee only got possession of the container and not of its contents; if he subsequently "broke bulk" by opening the container and misappropriating the contents, he was now deemed to take possession of the contents for the first time, and because such taking was against the original possessor's consent, he became guilty of larceny. Later, however, legislation provided that if a bailee fraudulently misappropriated the goods bailed to him he would be guilty of stealing, thus providing that a bailee who has lawful possession can nevertheless commit larceny of the goods he possesses. Here then the definition of larceny was extended by extending the terms in the definition.

Similar to the problem of the bailee is that posed by the delivery by one person to another of an object which, unknown to either of them, contains inside it certain valuable items of property. A sells B a bureau, which, unknown to both, contains jewels in a secret drawer. Who has possession, A or B? Ordinarily perhaps we should consider that a person with possession of a container gets possession also of the contents, and that the buyer in the above example would simultaneously take possession of the bureau and the valuables. Common law, however, holds that in such a case, unless the deliverer intends the deliverer to obtain possession of the contents, the latter does not acquire legal possession of them until he discovers them and that if at this stage he decides dishonestly to misappropriate them, he accordingly becomes guilty of larceny [*Merry v. Green* (1847) M. & W. 623. We may contrast with this the case of *Maynes v. Cooper* (1956) 1 Q.B. 439, where the deliveror intended the deliverer to take possession of the money in the wage packet, so that the deliverer acquired possession with consent and could not, therefore, commit larceny of the money later on].

In the above cases the physical possession of the accused is regarded as less than legal possession, because the accused is unaware that he has the object. Yet in common law possession does not always involve knowledge of the presence or existence of the subject-



matter. If A unknowingly takes something which is in B's possession, he nevertheless takes possession and commits a trespass against B. So in the famous case of *R. v. Riley* [(1853) Dears. C.C. 149] the accused was held to have taken possession of a sheep which belonged to the prosecutor and which he unknowingly drove with his own flock to market.

An occupier of land is held to be in possession of objects under or attached to the land whether he knows of them or not [*Elwes v. Brigg Gas Co.* (1886) 33 Ch. D. 562; *South Staffordshire Water Co. v. Sharman* (1896) 2 Q.B. 44]. So if X takes valuable rings embedded in the soil of Y's pool, he commits a trespass to goods which in law are in the possession of Y, despite Y's ignorance. For the purpose of larceny an occupier of land has been held to be in possession also of articles lying on the land though not attached to it. In *Hibbert v. McKiernan* (1948) 2 K.B. 142 balls lost on a golf-links and abandoned by the owner were held to have fallen into the possession of the secretary and members of the club. Whether things lying on but not attached to land are for civil purposes in the possession of the occupier is not settled (The uncertainty is largely due to the case of *Bridges v. Hawkesworth*).

Normally, lost articles are deemed in law to remain in possession of the loser. So, if I lose my wallet, in law I retain possession of it. Even though in fact I might well be said to have lost possession. To lose not only the object but also legal possession of it, the law requires that I should terminate my intention to retain my rights over it, *e.g.*, by throwing it away deliberately. In most cases it is question of interference from the circumstances whether the loser has abandoned his legal possession, and this is a conclusion which the law is slow to draw [It is not unusual for the law to consider that a person has not relinquished all right to possess an object, although outside the law he might well be thought to have abandoned all right to possess. A person who had buried a diseased pig: *R. v. Edwards* (1877) 13 Cox C.C. 384; a householder who puts refuse in his dustbin has been held to retain possession of it until it is collected: *Williams v. Phillips* (1957) 41 Cr. App. R. 5. In these cases, however, the objects were on land in occupation of these persons, whose possession could, therefore, be also based on their right as occupiers].

We can see that sometimes possession is possible without knowledge of the subject-matter and that sometimes such knowledge is necessary requirement. We can also see, however, that in common law possession is a relative matter. The common law is not normally concerned with the question who has the *best* right to possess; it is concerned with the question which of the parties before the court has the *better* right to possess. If A momentarily hands his wallet to B, from whom it is stolen by C, who then loses it on D's property, where it is then found by E, the question who has the right to possess-which is often considered the same as the question who *has* legal possession-will depend on who brings action against whom.

Against all subsequent parties E's title would prevail, for finding confers a good title. In an action between D and E, however, it would seem that D would have the better right if he could show that the article was found on property from which he had a general intention to exclude other. *Bridges v. Hawkesworth* [(1851) 21 L.J.Q.B. 75] decided that notes found on the floor of a shop passed into the possession of the finder rather than of the shopkeeper. This case, which has been much criticised, was distinguished in *South Staffordshire Water Co. v.*

*Sharman* [(1896) 2 Q.B. 44] on the ground that the notes were found in the public part of the shop, but would seem to have been followed in *Hannah v. Peel* [(1945) K.B. 609] where a soldier, who found a brooch in a requisitioned house, was held entitled to the brooch as against the owner of the house. Here, however, the owner had never been in possession of the house.

In the recent case of *London Corporation v. Appleyard* [(1963) 1 W.L.R. 982, *Cf. Bird v. Fort Francis* (1949) 2 D.L.R. 791, where the finder of money lost in a building was held to have obtained a good title to it, there being no claim on the part of the owner of the money or the occupier of the premises. *Cf. also Grafstein v. Holme & Freeman* (1958) 12 D.L.R. (2d) 727] money found on land was held to be in the possession of the occupier and not of the finder.

The occupier of land has possession in common law of articles under and attached to his land and also, perhaps of articles lying on his land, unless they are on a part of this land to which the public is admitted. Where the public is admitted, the rule in *Bridges v. Hawkesworth* may still hold good, *i.e.*, that the finder's right prevails. It is arguable that the occupier's right should always prevail, since the true owner will have more hope of recovering the article from the occupier of the place where it was lost than from a finder whose whereabouts may be unknown. Certain American jurisdictions draw a distinction between articles that are mislaid and articles that are lost. Where they are mislaid, *i.e.*, deliberately left somewhere but the owner has forgotten where, possession passes to the occupier. On the other hand, if there is no likelihood of the true owner's appearance to claim the property, perhaps the fairest course would be to treat the object as a windfall and to divide the proceeds of sale between finder and occupier equally.

To return to our example, neither D nor E would be said by law to have possession as against C. The latter, since he had possession, has a right good against all the world except the true owner. In an action by C against D and E, the latter would not be able to plead *ius tertii*, *i.e.*, to argue that the object belongs to someone other than C and that therefore C should not succeed against D or E. To allow anyone who could prove a defect in a possessor's title to dispossess him of the goods. This, however, is a right which common law allows only to the true owner and his agents.

As against A or B, however, C would have no defence. B could recover the wallet because he had actual possession of it. A could recover it from C because, although it was in B's hands, he had an immediate right to possess. So either A or B, whichever brought action against C, would be deemed to have possession as against C.

As between A and B, however, there is no doubt that in law A, the true owner, would succeed. In a civil action for conversion or detinue the question which party actually has possession need not arise, because A, having an immediate right to possession, is entitled to bring these actions; but if B were to be prosecuted for larceny there is no doubt that he would be said to have had, not possession, but only custody of the wallet. This is notwithstanding that he has possession as against C, who is guilty of stealing the wallet from B's possession. In *R. v. Harding (b)*, for example, the accused was convicted of stealing a raincoat from a

servant, who, as against the master, had mere custody of the coat herself have been convicted of larceny had she dishonestly made off with it.

Of all the divergencies between legal and actual possession this is the most notable, *viz.*, that outside the law possession is used in an absolute sense whereas within the law possession is used in an absolute sense whereas within the law it is employed in a relative sense. Outside the law we do not speak of a person having possession as against someone else; we say that he either has or has not got possession. In law we talk rather of possession as something which one person has against another. If we overlook this, then decisions like *R. v. Harding and London Corporation v. Appleyard* are unnecessarily difficult. How could the servant in first case have possession of the coat and yet at the same time not have possession of it? If the law used possession in an absolute sense, then of course she could not. As it is, she had possession as against the thief but not as against her employer. Likewise the occupier of the land in the second case had possession of the notes as against the workmen who found them; he would not of course have had possession as against the true owner, had the latter advanced his claim.

It is said that English law has never worked out a consistent theory of possession. But although there are many other parts of English law which give rise to difficult problems concerning possession and which cannot be further discussed here, it would seem that underlying the concept of possession in English law is to be found the ordinary notion of factual possession; that this has been refined by extensions and restrictions in order to base the right to possess on actual possession; and that the equating of the right with the possession has resulted in an unnecessary and yet useful concept of relative possession. To provide a terse definition to apply to all instances of legal possession would, therefore, be impossible, but the basic strands in the concept are reasonably discernible.

### **Immediate and mediate possession**

In law one person may possess a thing for and on account of some one else. In such a case the latter is in possession by the agency of him who so holds the thing on his behalf. The possession thus held by one man through another may be termed *mediate*, while that which is acquired or retained directly or personally may be distinguished as *immediate* or *direct*. If I go myself to purchase a book, I acquire direct possession of it; but if I send my servant to buy it for me, I acquire mediate possession of it through him, until he has brought it to me, when my possession becomes immediate.

Of mediate possession there are three kinds. The first is that which I acquire through an agent or servant; that is to say, through someone who holds solely on my account and claims no interest of his own. In such a case I undoubtedly acquire or retain possession; as, for example, when I allow my servant to use my tools in his work, or when I send him to buy or borrow a chattel for me, or when I deposit goods with a warehouseman who holds them on my account, or when I send my boots to a shoemaker to be repaired. In all such cases, though the immediate possession is in the servant, warehouseman, or artisan, the mediate possession is in me; for the immediate possession is held on my account.

The second kind of mediate possession is that in which the direct possession is in one who holds both on my account and on his own, but who recognises my superior right to

obtain from him the direct possession whenever I choose to demand it. That is to say, it is the case of a borrower or tenant at will. I do not lose possession of a thing because I have lent it to someone who acknowledges my title to it and is prepared to return it to me on demand, and who in the meantime holds it and looks after it on my behalf. There is no difference in this respect between entrusting a thing to a servant or agent and entrusting it to a borrower. Through the one, as well as through the other, I retain as regards all other persons a due security for the use and enjoyment of my property. I myself possess whatever is possessed for me on those terms by another.

There is yet a third form of mediate possession, respecting which more doubt may exist, but which must be recognised by sound theory as true possession. It is the case in which the immediate possession is in a person who claims it for himself until some time has elapsed or some condition has been fulfilled, but who acknowledges the title of another for whom he holds the thing, and to whom he is prepared to deliver it when his own temporary claim has come to an end: as for example when I lend a chattel to another for a fixed time, or deliver it as a pledge to be returned on the payment of a debt. Even in such a case I retain possession of the thing, so far as third persons are concerned.

The extent to which the above ideas are recognised in English law may be briefly noticed. An instance of mediate legal possession is to be found in the law of prescription. Title by prescription is based on long and continuous possession. But he who desires to acquire ownership in this way need not retain the *immediate* possession of the thing. He may let his land to a tenant for a term of years, and his possession will remain unaffected, and prescription will continue to run in his favour. If he desires to acquire a right of way by prescription, his tenant's use of it is equivalent to his own. For all the purposes of the law of prescription mediate possession in all its forms is as good as immediate. In *Haig v. West* it is said by Lindley, L.J.: "The vestry by their tenants occupied and enjoyed the lanes as land belonging to the parish...The parish have in our opinion gained a title to those parish lanes by the Statute of Limitations. The vestry have by their tenants occupied and enjoyed the lanes for more than a century."

In the case of chattels a further test of the legal recognition of mediate possession in all its forms is to be found in the law as to delivery by attornment. In *Elmore v. Stone*. A bought a horse from B, a livery stable keeper, and at the same time agreed that it should remain at livery with B. It was held that by this agreement the horse had been effectually delivered by B to A though it had remained continuously in the physical custody of B. That is to say, A had acquired mediate possession, through the direct possession which B held on his behalf. The case of *Marvin v. Wallace* goes still further. A bought a horse from B, and, without any change in the immediate possession, lent it to the seller to keep and use as a bailee for a month. It was held that the horse had been effectually delivered by B to A. This was mediate possession of the third kind, being acquired and retained through a bailee for a fixed term. Crompton, J., referring to *Elmore v. Stone*, says: "In the one case we have a bailment of a description different from the original possession; here we have a loan; but in each case the possession of the bailee is the possession of the bailor; it would be dangerous to distinguish between such cases."

In larceny, where a chattel is stolen from a bailee, the “property”, *i.e.*, the possession that has been violated, may be laid either in the bailor or in the bailee, at any rate where the bailment is revocable by the bailor at his pleasure either unconditionally or upon a condition that he may satisfy at will. A bailor at will can also bring a civil action of trespass where a chattel is taken from his bailee; but a bailor for a term cannot do so. Thus the third form of mediate possession is not recognised for the purpose of the action of trespass. Also, where land is let, whether for a term of years or at will, the landlord cannot bring trespass so long as he is out of immediate possession; but after re-entry he can recover damages in respect of acts done even while he was out of possession.

In all cases of mediate possession two persons are in possession of the same thing at the same time. Every mediate possessor stands in relation to a direct possessor through whom he holds. If I deposit goods with an agent, he is in possession of them as well as I. He possesses for me, and I possess through him. A similar duplicate possession exists in the case of master and servant, landlord and tenant, bailor and bailee, pledgor and pledgee. There is, however, an important distinction to be noticed. For some purposes mediate possession exists as against third persons only, and not as against the immediate possessor. Immediate possession, on the other hand, is valid as against all the world, including the mediate possessor himself. Thus if I deposit goods with a warehouseman, I retain possession as against all other persons; because as against them I have the benefit of the warehouseman’s custody. But as between the warehouseman and myself, he is in possession and not I. So in the case of a pledge, the debtor continues to possess *quoad* the world at large; but as between debtor and creditor, possession is in the latter. The debtor’s possession is mediate and relative; the creditor’s is immediate and absolute. So also with landlord and tenant, bailor and bailee, master and servant, principal and agent, and all other cases of mediate possession.

Here also we may find a test in the operation of prescription. As between landlord and tenant, prescription, if it runs at all, will run in favour of the tenant; but at the same time it may run in favour of the landlord as against the true owner of the property. Let us suppose, for example, that possession for twelve years will in all cases give a good title to land, and that A takes wrongful possession of land from X, holds it for six years, and then allows B to have the gratuitous use of it as tenant at will. In six years more A will have a good title as against X, for, as against him, A has been continuously in possession. But in yet another six years B, the tenant, will have a good title as against his landlord, A, for a between these two the possession has been for twelve years in B.

To put the matter in a general form, prescription runs in favour of the immediate against the mediate possessor, but in favour of the mediate possessor as against third persons.

On the other hand, the transfer of the mediate possession of goods is regarded as a “delivery” of the goods even as between the two parties to the transfer.

### **Concurrent possession**

It was a maxim of the civil law that two persons could not be in possession of the same thing at the same time. *Plures eandem rem in solidum possidere non possunt*. As a general proposition this is true; for exclusiveness is of the essence of possession. Two adverse claims of exclusive use cannot both be effectually realised at the same time. Claims however, which

are not adverse, admit of concurrent realisation. Hence there are several possible cases of duplicate possession.

1. Mediate and immediate possession coexist in respect of the same thing as already explained.

2. Two or more persons may possess the same thing in common, just as they may it in common. This is called *compossessio* by the civilians.

### **The acquisition of possession**

The modes of acquisition are two in number, namely Taking and Delivery. Taking is the acquisition of possession without the consent of the previous possessor. The thing taken may or may not have been already in the possession of some one else, and in either case the taking of it may be either rightful or wrongful. Delivery, on the other hand, is the acquisition of possession with the consent and co-operation of the previous possessor. It is of two kinds, distinguished by English lawyers as actual and constructive. Actual delivery is the transfer of *immediate* possession; it is such a physical dealing with the thing as transfers it from the hands of one person to those of another. It is of two kinds, according as the *mediate* possession is or is not retained by the transferor. The delivery of a chattel by way of sale is an example of delivery without any reservation of mediate possession; the delivery of a chattel by way of loan or deposit is an instance of the reservation of mediate possession on the transfer of immediate. Actual delivery may be either to the deliverer himself or to a servant or agent for him, and the delivery of the key of a warehouse is regarded in law as an actual delivery of the goods in the warehouse, because it gives access to the goods.

Constructive delivery, on the other hand, is all which is not actual, and it is of three kinds. The first is that which the Roman lawyers termed *traditio brevi manu*, but which has no recognised name in the language of English law. It consists in the surrender of the mediate possession of a thing to him who is already in immediate possession of it. If, for example, I lend a book to someone, and afterwards, while he still retains it, I agree with him to sell it to him in fulfilment of this sale or gift, by telling him that he may keep it. It is not necessary for him to go through the form of handing it back to me and receiving it a second time from my hands. For he has already the immediate possession of it, and all that is needed for delivery under the sale or gift is the destruction of the *animus* through which mediate possession is still retained by me.

The second form of constructive delivery is that which the commentators on the civil law have termed *constitutum possessorium* (that is to say, an agreement touching possession). This is the converse of *traditio breve manu*. It is the transfer of mediate possession, while the immediate possession remains in the transferor. Any thing may be effectually delivered by means of an agreement that the possessor of it shall for the future hold it no longer on his own account but on account of some one else. No physical dealing with the thing is requisite, because by the mere agreement mediate possession is acquired by the transferee, through the immediate possession retained by the transferor and held on the other's behalf. Therefore, if I buy goods from a ware-houseman, they are delivered to me so soon as he has agreed with me that he will hold them as ware houseman on my account. The position is then exactly the

same as if I had first taken actual delivery of them, and then brought them back to the warehouse, and deposited them there for safe custody.

The third form of constructive delivery is that which is known to English lawyers as attornment. This is the transfer of mediate possession, while the immediate possession remains outstanding in some third person. The mediate possessor of a thing may deliver it by procuring the immediate possessor to agree with the transferee to hold it for the future on his account, instead of on account of the transferor. Thus if I have goods in the warehouse of A and sell them to B, I have effectually delivered them to B so soon as A has agreed with B to hold them for him, and no longer for me. Neither in this nor in any other case of constructive delivery is any physical dealing with the thing required, the change in the *animus* of the persons concerned being adequate in itself.

### **The continuance of possession**

We have seen that the acquisition of legal possession normally involves the occurrence of some event whereby the subject-matter falls under the control of the possessor. This can consist in the possessor's taking the thing or having it delivered to him; or it may consist in the object's coming on to the possessor's land. Such acquisition will also normally involve some intention so the part of the possessor to exercise control over the subject-matter and to exclude others from it.

The continuance of legal possession, however, does not necessitate the continuance of either of these factors. For example the furniture in my house remains in my legal possession even during my absence from the house, even though such absence may prevent me from exercising control over the furniture. Or again, if I lose my wallet in the street, I have now lost control over it together with any actual likelihood that others will not interfere with the wallet. Nevertheless, unless I have actually abandoned possession, the legal possession of the wallet remains in me. On the other hand if the subject-matter is particularly difficult to control, such as a wild animal, then escape from my control may well terminate my legal possession.

Nor does continuance of legal possession depend on continuance of intention on the part of the possessor. For even if I forget that I have the object, and so have no specific intention of still possessing it, I may still retain possession of it. I may have forgotten that I ever had the wallet, which I lost in the street, but in law this need not prevent me from still being in possession. But if I lose control of the subject-matter and give up all intention of resuming control, then I shall lose possession of it in law. If I go away from my house with no intention of ever returning or exercising any rights over it, I may be taken to have abandoned possession to anyone wishing to take it.

### **Incorporeal possession**

Hitherto we have limited our attention, in the main, to the case of corporeal possession. We have now to consider incorporeal possession and to seek the generic conception which includes both these forms. For I may possess not the land itself, but a way over it, or the access of light from it, So also I may possess powers, privileges, immunities, liberties, offices, dignities, services, monopolies. All these things may be possessed as well as owned. They

may be possessed by one man, and owned by another. They may be owned and not possessed, or possessed and not owned.

Corporeal possession involves, as we have seen, the continuing exercise of exclusive control over a material object. Incorporeal possession is the continuing exercise of a claim to anything else. The thing so claimed may be either the non-exclusive use of a material object (for example, a way or other servitude over a piece of land) or some interest or advantage unconnected with the use of material objects (for example, a trade-mark, a patent, or an office of profit).

Corporeal possession, as we have seen, consists less in the actual exercise of exclusive control than in the existence of a legal right to exercise such control. If I lose my watch, I retain possession, not because I have control over it or because I exercise a claim to exclusive control, but because in law I retain a right to exclusive control. Actual use of the subject-matter, therefore, is not essential. In the case of incorporeal possession, on the contrary, it may be thought that I must actually enjoy and exercise the right in order to possess it. Yet if I have an easement of way over another man's land, mere non-use will not extinguish it; at most this will only constitute evidence of abandonment, which consists of non-use together with an intention to give up the right. Moreover, my possession of various rights *in rem* such as the right to my reputation, my liberty to leave the country and so on is quite consistent with my never actually exercising them or seeking to enforce them.

Incorporeal possession is commonly called the possession of a *right*, and corporeal possession is distinguished from it as the possession of a *thing*. The Roman lawyers distinguish between *possessio juris* and *possessio corporis*, and the Germans between *Rechtsbesitz* and *Sachenbesitz*. But there is a sense in which possession of a right necessarily involves the exercise of the right in question. In this sense I can be said to possess a right where I exercise a claim as *if it were a right*. There may be no right in reality; and when there is a right, it may be vested in some other person, and not in the possessor. If I possess a way over another's land, it may or may not be a *right* of way; and even if it is a right of way, it may be owned by someone else, though possessed by me. Similarly a trade-mark or a patent which is possessed and exercised by me may or may not be legally valid; it may exist *de facto* and not also *de jure*; and even if legally valid, it may be legally vested not in me, but in another.

The distinction between corporeal and incorporeal possession is clearly analogous to that between corporeal and incorporeal ownership. Corporeal possession, like corporeal ownership, is that of a thing; while incorporeal possession, like incorporeal ownership, is that of a right.

### **Possession and ownership**

We have already adverted to the chief differences between possession and ownership. Possession consists basically in a relationship between a person and an object within the context of the society in which he lives. It is therefore primarily a matter of fact; and the differences between legal and non-legal or actual possession result from the need to advance the policy of the law by regarding this relationship as existing where in fact it does not obtain; and this in turn may lead to the development of the notion that in law I may have possession



of an object as against one person while not having possession of it as against another. Ownership, on the other hand, consists not of a factual relationship but of certain legal rights, and is a matter not of fact but of law. These two concepts of ownership and possession, therefore, may be used to distinguish between the *de facto* possessor of an object and its *de jure* owner, between the man who actually has it and the man who ought to have it. They serve also to contrast the position of one whose rights are ultimate, permanent and residual with that of one whose rights are only of a temporary nature.

Speaking generally, ownership and possession have the same subject-matter. Whatever may be owned may be possessed, and whatever may be possessed may be owned. This statement, however, is subject to important qualifications. There are claims which may be realised and exercised in fact without receiving any recognition or protection from the law, there being no right vested either in the claimant or in anyone else. In such cases there is possession without ownership. For example, men might possess copyrights, trade-marks, and other forms of monopoly, even though the law refused to defend those interests as legal rights. Claims to them might be realised *de facto*, and attain some measure of security and value from the facts, without any possibility of support from the law.

Conversely there are many rights which can be owned, but which are not capable of being possessed. They are those which may be termed *transitory*. Rights which do not admit of continuing exercise do not admit of possession either. They cannot be exercised without being thereby wholly fulfilled and destroyed; therefore they cannot be possessed. A creditor, for example, does not possess the debt that is due to him; for this is a transitory right which in its very nature cannot survive its exercise. But a man may possess an easement over land, because its exercise and its continued existence are consistent with each other. It is for this reason that obligations generally (that is to say, rights *in personam* as opposed to rights *in rem*) do not admit of possession.

It is to be remembered, however, that *repeated* exercise is equivalent in this respect to *continuing* exercise. I may possess a right of way through repeated acts of use, just as I may possess a right of light or support through continuous enjoyment. Therefore even obligations admit of possession, provided that they are of such a nature as to involve a series of repeated acts of performance. We may say that a landlord is in possession of his rents, an annuitant of his annuity, a bondholder of his interest, or a master of the services of his servant.

We may note finally that, although incorporeal possession is possible in fact of all continuing rights, it by no means follows that the recognition of such possession or the attribution of legal consequences to it, is necessary or profitable in law. To what extent incorporeal possession exists in law, and what consequences flow from it, are questions which are not here relevant, but touch merely the details of the legal system.

### **Possessory remedies**

In English law possession is a good title of right against anyone who cannot show a better. A wrongful possessor has the rights of an owner with respect to all persons except earlier possessors and except the true owner himself. Many other legal systems, however, go much further than this, and treat possession as a provisional or temporary title even against the true owner himself. Even a wrongdoer, who is deprived of his possession, can recover it

from any person whatever, simply on the ground of his possession. Even the true owner, who takes his own, may be forced in this way to restore it to the wrongdoer, and will not be permitted to set up his own superior title to it. He must first give up possession, and then proceed in due course of law for the recovery of the thing on the ground of his ownership. The intention of the law is that every possessor shall be entitled to retain and recover his possession, until deprived of it by a judgment according to law.

Legal remedies thus appointed for the protection of possession even against ownership are called *possessory*, while those available for the protection of ownership itself may be distinguished as *proprietary*. In the modern and medieval civil law the distinction is expressed by the contrasted terms *petitorium* (a proprietary suit) and *possessorium* (a possessory suit).

This duplication of remedies, with the resulting provisional protection of possession, has its beginnings in Roman law. It was taken up into the canon law, where it received considerable extensions, and through the canon law it became a prominent feature of medieval jurisprudence. It is still received in modern Continental systems; but although well known to the earlier law of England, it has been long since rejected by us as cumbrous and unnecessary.

There has been much discussion as to the reasons on which this provisional protection of possession is based. It would seem probable that the considerations of greatest weight are the three following:

1. The evils of violent self-help are deemed so serious that it must be discouraged by taking away all advantages which any one derives from it. He who helps himself by force even to that which is his own must restore it even to a thief. The law gives him a remedy, and with it he must be content. This reason, however, can be allowed as valid only in a condition of society in which the evils and dangers of forcible self-redress are much more formidable than they are at the present day. It has been found abundantly sufficient to punish violence in the ordinary way as a criminal offence, without compelling a rightful owner to deliver up to a trespasser property to which he has no manner of right, and which can be forthwith recovered from him by due course of law. In the case of chattels, indeed, our law has not found it needful to protect possession even to this extent. It seems that an owner who retakes a chattel by force acts within his legal rights. Forcible entry upon land, however, is a criminal offence.

2. A second reason for the institution of possessory remedies is to be found in the serious imperfections of the early proprietary remedies. The procedure by which an owner recovered his property was cumbrous, dilatory, and inefficient. The path of the claimant was strewn with pitfalls, and he was lucky if he reached his destination without disaster. The part of plaintiff in such an action was one of grave disadvantage and possession was nine points of the law. No man, therefore, could be suffered to procure for himself by violence the advantageous position of defendant, and to force his adversary by such means to assume the dangerous and difficult post of plaintiff. The original position of affairs must first be restored; possession must first be given to him who had it first; then, and not till then would the law consent to discuss the titles of the disputants to the property in question. Yet however cogent such considerations may have been in

earlier law, they are now of little weight. With a rational system of procedure the task of the plaintiff is as easy as that the defendant. The law shows no favour to one rather than to the other.

3. A third reason for possessory remedies, closely connected with the second, is the difficulty of the proof of ownership. It is easy to prove that one has been in possession of a thing, but difficult (in the absence of any system of registration of title) to prove that one is the owner of it. Therefore it was considered unjust that a man should be allowed by violence to transfer the heavy burden of proof from his own shoulders to those of his opponent. Every man should bear his own burden. He who takes a thing by force must restore it to him from whom he has taken it; let him then prove, if he can, that he is the owner of it; and the law will then give to him what it will not suffer him to take for himself. But English law has long since discovered that it is possible to attain this end in a much more satisfactory and reasonable way. It adjusts the burden of proof of ownership with perfect equity, without recourse to any such anomaly as the protection of the possessor against the owner. This it does by the operation of the three following rules:

1. Prior possession is *prima facie* proof of title. Even in the ordinary proprietary action a claimant need do nothing more than prove that he had an older possession than that of the defendant; for the law will presume from this prior possession a better title. *Qui prior est tempore potior est jure*.

2. A defendant is always at liberty to rebut this presumption by proving that the better title is in himself.

3. A defendant who has violated the possession of the plaintiff is not allowed to set up the defence of *jus tertii*, as it is called, that is to say, he will not be heard to allege, as against the plaintiff's claim, that neither the plaintiff nor he himself, but some third person, is the true owner. Let every man come and defend his own title. As between A and B the right of C is irrelevant. The only exceptions are (i) when the defendant defends the action on behalf and by the authority of the true owner; (ii) when he committed the act complained of by the authority of the true owner; and (iii) when he has already made satisfaction to the true owner by returning the property to him [Salmond, *Torts* (14<sup>th</sup> ed.), 161].

By the joint operation of these three rules the same purpose is effected as was sought in more cumbrous fashion by the early duplication of proprietary and possessory remedies.

\* \* \* \* \*

## *Ownership*

*A. M. Honore*

Ownership is one of the characteristic institutions of human society. A people to whom ownership was unknown, or who accorded it a minor place in their arrangements, who meant by *meum* and *tuum* no more than 'what I (or you) presently hold' would live in a world that is not our world. Yet to see why their world would be different, and to assess the plausibility of vaguely conceived schemes to replace 'ownership' by 'public administration', or of vaguely stated claims that the importance of ownership has declined or its character changed in the twentieth century, we need first to have a clear idea of what ownership is.

I propose, therefore, to begin by giving an account of the standard incidents of ownership: *i.e.* those legal rights, duties and other incidents which apply, in the ordinary case, to the person who has the greatest interest in a thing admitted by a mature legal system. To do so will be to analyse the concept of ownership, by which I mean the 'liberal' concept of 'full' individual ownership, rather than any more restricted notion to which the same label may be attached in certain contexts....

If ownership is provisionally defined as the *greatest possible interest in a thing which a mature system of law recognizes*, then it follows that, since all mature systems admit the existence of 'interests' in 'things', all mature systems have, in a sense, a concept of ownership. Indeed, even primitive systems, like that of the Trobriand islanders, have rules by which certain persons, such as the 'owners' of canoes, have greater interests in certain things than anyone else.

For mature legal systems it is possible to make a larger claim. In them certain important legal incidents are found, which are common to different systems. If it were not so, 'He owns that umbrella', said in a purely English context, would mean something different from 'He owns that umbrella'. proffered as a translation of 'Ce parapluie est a lui'. Yet, as we know, they mean the same. There is indeed, a substantial similarity in the position of one who 'owns' an umbrella in England, France, Russia, China, and any other modern country one may care to mention. Everywhere the 'owner' can, in the simple uncomplicated case, in which no other person has an interest in the thing, use it, stop others using it, lend it, sell it or leave it by will. Nowhere may he use it to poke his neighbour in the ribs or to knock over his vase. Ownership, *dominium*, *propriété*, *Eigentum* and similar words stand not merely for the greatest interest in things in particular systems but for a type of interest with common features transcending particular systems. It must surely be important to know what these common features are?

I now list what appear to be the standard incidents of ownership. They may be regarded as necessary ingredients in the notion of ownership, in the sense that, if a system did not admit them, and did not provide for them to be united in a single person, we would conclude that it did not know the liberal concept of ownership, though it might still have a modified version of ownership, either of a primitive or sophisticated sort. But the listed incidents are not individually

necessary, though they may be together sufficient, conditions for the person of inheritance to be designated 'owner' of a particular thing in a given system. As we have seen, the use of 'owner' will extend to cases in which not all the listed incidents are present.

Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary: this makes eleven leading incidents. Obviously, there are alternative ways of classifying the incidents; moreover, it is fashionable to speak of ownership as if it were just a bundle of rights, in which case at least two items in the list would have to be omitted.

No doubt the concentration in the same person of the right (liberty) of using as one wishes, the right to exclude others, the power of alienating and an immunity from expropriation is a cardinal feature of the institution. Yet it would be a distortion — and one of which the eighteenth century, with its over-emphasis on subjective rights, was patently guilty — to speak as if this concentration of patiently garnered rights was the only legally or socially important characteristic of the owner's position. The present analysis, by emphasizing that the owner is subject to characteristic prohibitions and limitations, and that ownership comprises at least one important incident independent of the owner's choice, is an attempt to redress the balance.

### **(1) The Right to Possess**

The right to possess, *viz*, to have exclusive physical control of a thing, or to have such control as the nature of the thing admits, is the foundation on which the whole superstructure of ownership rests. It may be divided into two aspects, the right (claim) to be put in exclusive control of a thing and the right to remain in control, *viz*, the claim that others should not without permission, interfere. Unless a legal system provides some rules and procedures for attaining these ends it cannot be said to protect ownership.

It is of the essence of the right to possess that it is *in rem* in the sense of availing against persons generally. This does not, of course, mean that an owner is necessarily entitled to exclude everyone from his property. We happily speak of the ownership of land, yet a largish number of Officials have the right of entering on private land without the owner's consent, for some limited period and purpose. On the other hand, a general licence so to enter on the 'property' of others would put an end to the institution of landowning as we now know it.

The protection of the right to possess (still Using 'possess' in the convenient, though over-simple, sense of 'have exclusive physical control') should be sharply marked off from the protection of mere present possession. To exclude Others from what one presently holds is an instinct found in babies and even, as Holmes Points out, in animals, of which the seal gives a striking example. To sustain this instinct by legal rules is to protect possession but not, as such, to protect the right to possess and so not to protect ownership. If dispossession without the possessor's consent is, in general, forbidden, the possessor is given a right *in rem* valid against persons generally, to remain undisturbed, but he has no *right to possess in rem* unless he is

entitled to recover from persons generally what he has lost or had taken from him, and to obtain from them what is due to him but not yet handed over.

To have worked out the notion of 'having a right to' as distinct from merely 'having', or, if that is too subjective a way of putting it, of rules allocating things to people as opposed to rules merely forbidding forcible taking, was a major intellectual achievement. Without it society would have been impossible. Yet the distinction is apt to be overlooked by English lawyers, who are accustomed to the rule that every adverse possession is a root of title, *Le.* gives rise to a right to possess, or at least that '*de facto* possession is *prima facie* evidence of session in fee and right to possession'.

The owner, then, has characteristically a battery of remedies in order to obtain, keep and, if necessary, get back the thing owned. Remedies such as the actions for ejectment and wrongful detention and the *vindictio* are designed to enable the plaintiff either to obtain or to get back a thing, or at least to put some pressure on the defendant to hand it over. Others, such as the actions for trespass to land and goods, the Roman possessory interdicts and their modern counterparts are primarily directed towards enabling a present possessor to keep possession. Few of the remedies mentioned are confined to the owner; most of them are available also to persons with a right to possess falling short of ownership, and some to mere possessors. Conversely, there will be cases in which they are not available to the owner, for instance because he has voluntarily parted with possession for a temporary purpose, as by hiring the thing out. The availability of such remedies is clearly not a necessary and sufficient condition of owning a thing; what is necessary, in order that there may be ownership of things at all, is that such remedies shall be available to the owner in the usual case in which no other person has a right to exclude him from the thing.

## **(2) The Right to Use**

The present incident and the next two overlap. On a wide interpretation of 'use', management and income fall within use. On a narrow interpretation, 'use' refers to the owner's personal use and enjoyment of the thing owned. On this interpretation it excludes management and income.

The right (liberty) to use at one's discretion has rightly been recognized as a cardinal feature of ownership, and the fact that, as we shall see, certain limitations on use also fall within the standard incidents of ownership does not detract from its importance, since the standard limitations are, in general, rather precisely defined, while the permissible types of use constitute an open list.

## **(3) The Right to Manage**

The right to manage is the right to decide how and by whom the thing owned shall be used. This right depends, legally, on a cluster of powers, chiefly powers of licensing acts which would otherwise be unlawful and powers of contracting: the power to admit others to one's land, to permit others to use one's things, to define the limits of such permission, and to contract effectively in regard to the use (in the literal sense) and exploitation of the thing owned. An

owner may not merely sit in his own deck chair but may validly license others to sit in it, lend **it**, impose conditions on the borrower, direct how it is to be painted or cleaned, contract for it to be mended in a particular way. This is the sphere of management in relation to a simple object like a deck chair. When we consider more complex cases, like the ownership of a business, the complex of powers which make up the right to manage seems still more prominent. The power to direct how resources are to be used and exploited is one of the cardinal types of economic and political power; the owner's legal powers of management are one, but only one possible basis for it. Many observers have drawn attention to the growth of managerial power divorced from legal ownership; in such cases it may be that we should speak of split ownership or redefine our notion of the thing owned. This does not affect the fact that the right to manage is an important element in the notion of ownership; indeed, the fact that we feel doubts in these cases whether the 'legal owner' *really* owns is a testimony to its importance.

#### **(4) The Right to the Income**

To use or occupy a thing may be regarded as the simplest way of deriving an income from it, of enjoying it. It is, for instance, expressly contemplated by the English income tax legislation that the rent-free use or occupation of a house is a form of income, and only the inconvenience of assessing and collecting the tax presumably prevents the extension of this principle to movables.

Income in the more ordinary sense (fruits, rents, profits) may be thought of as a surrogate of use, a benefit derived from forgoing personal use of a thing and allowing others to use **it** for reward; as a reward for work done in exploiting the thing; or as the brute product of a thing, made by nature or by other persons. Obviously the line to be drawn between the earned and unearned income from a thing cannot be firmly drawn.

#### **(5) The Right to the Capital**

The right to the capital consists in the power to alienate the thing and the liberty to consume, waste or destroy the whole or part of **it**: clearly **it** has an important economic aspect. The latter liberty need not be regarded as unrestricted; but a general provision requiring things to be conserved in the public interest, so far as not consumed by use in the ordinary way, would perhaps be inconsistent with the liberal idea of ownership....

An owner normally has both the power of disposition and the power of transferring title. Disposition on death is not permitted in many primitive societies but seems to form an essential element in the mature notion of ownership. The tenacity of the right of testation once it has been recognized is shown by the Soviet experience. The earliest writers were hostile to inheritance, but gradually Soviet law has come to admit that citizens may dispose freely of their 'personal property' on death, subject to limits not unlike those known elsewhere.

#### **(6) The Right to Security**

An important aspect of the owner's position is that he should be able to look forward to remaining owner indefinitely if he so chooses and he remains solvent. His right to do so may be

called the right to security. Legally, this is in effect an immunity from expropriation, based on rules which provide that, apart from bankruptcy and execution for debt, the transmission of ownership is consensual.

However, a general right to security, availing against others, is consistent with the existence of a power to expropriate or divest in the state or public authorities. From the point of view of security of property, it is important that when expropriation takes place, adequate compensation should be paid; but a general power to expropriate subject to paying compensation would be fatal to the institution of ownership as we know it. Holmes' paradox, that where specific restitution of goods is not a normal remedy, expropriation and wrongful conversion are equivalent, obscures the vital distinction between acts which a legal system permits as rightful and those which it reprobates as wrongful: but if wrongful conversion were general and went unchecked, ownership as we know it would disappear, though damages were regularly paid.

In some systems, as (*semble*) English law, a private individual may destroy another's property without compensation when this is necessary in order to protect his own person or property from a greater danger. Such a rule is consistent with security of property only because of its exceptional character. Again, the state's (or local authority's) power of expropriation is usually limited to certain classes of thing and certain limited purposes. A general power to expropriate any property for any purpose would be inconsistent with the institution of ownership. If, under such a system, compensation were regularly paid, we might say either that ownership was not recognized in that system, or that money alone could be owned, 'money' here meaning a strictly fungible claim on the resources of the community. As we shall see, 'ownership' of such claims LS not identical with the ownership of material objects and simple claims.

### **(7) The Incident of Transmissibility**

It is often said that one of the main characteristics of the owner's interest is its 'duration'. In England, at least, the doctrine of estates made lawyers familiar with the notion of the 'duration' of an interest and Maitland, in a luminous metaphor, spoke of estates as 'projected upon the plane of time'.

Yet this notion is by no means as simple as it seems. What is called 'unlimited' duration (*perpetuitl*) comprises at least two elements (i) that the interest can be transmitted to the holder's successors and so on *ad infinitum* (The fact that in medieval *láh*d law all interests were considered 'temporary' is one reason why the terminology of ownership failed to take root, with consequences which have endured long after the cause has disappeared); (ii) that it is not certain to determine at a future date. These two elements ay be called 'transmissibility' and 'absence of term' respectively. We are here concerned with the former.

No one, as Austin points out, can enjoy a thing after he is dead (except vicariously) so that, in a sense, no interest can outlast death. But an interest which is transmissible to the holder's successors (persons designated by or closely related to the holder who obtain the property after him) is more valuable than one which stops with his death. This is so both because on alienation



the alienee or, if transmissibility is generally recognized, the alienee's successors, are thereby enabled to enjoy the thing after the alienor's death so that a better price can be obtained for the thing, and because, even if alienation were not recognized, the present holder would by the very fact of transmissibility be dispensed *pro tanto* from making provision for his intestate heirs. Hence, for example, the moment when the tenant in fee acquired a heritable (though not yet fully alienable) right was a crucial moment in the evolution of the fee simple. Heritability by the state would not, of course, amount to transmissibility in the present sense: it is assumed that the transmission is in some sense *advantageous* to the transmitter.

Transmissibility can, of course, be admitted, yet stop short at the first, second or third generation of transmitters. The owner's interest is characterized by *indefinite* transmissibility, no limit being placed on the possible number of transmissions, though the nature of the thing may well limit the actual number.

In deference to the conventional view that the exercise of a right must depend on the choice of the holder, I have refrained from calling transmissibility a right. It is, however, clearly something in which the holder has an economic interest, and it may be that the notion of a right requires revision in order to take account of incidents not depending on the holder's choice which are nevertheless of value to him.

#### **(8) The Incident of Absence of Term**

This is the second part of what is vaguely called 'duration'. The rules of a legal system usually seem to provide for determinate, indeterminate and determinable interests. The first are certain to determine at a future date or on the occurrence of a future event which is certain to occur. In this class come leases for however long a term, copyrights, etc. Indeterminate interests are those, such as ownership and easements, to which no term is set. Should the holder live forever, he would, in the ordinary way, be able to continue in the enjoyment of them forever. Since human beings are mortal, he will in practice only be able to enjoy them for a limited period, after which the fate of his interest depends on its transmissibility. Again, since human beings are mortal, interests for life, whether of the holder or another, must be regarded as determinate. The notion of an indeterminate interest, in the full sense, therefore requires the notion of transmissibility, but if the latter were not recognized, there would still be value to the holder in the fact that his interest was not due to determine on a fixed date or on the occurrence of some contingency, like a general election, which is certain to occur sooner or later.

#### **(9) The Prohibition of Harmful Use**

An owner's liberty to use and manage the thing owned as he chooses is in mature systems of law, as in primitive systems, subject to the condition that uses harmful to other members of society are forbidden. There may, indeed, be much dispute over what is to count as 'harm' and to what extent give and take demands that minor inconvenience between neighbours shall be tolerated. Nevertheless, at least for material objects, one can always point to abuses which a legal system will not allow. I may use my car freely but not in order to run my neighbour down, or to

demolish his gate, or even to go on his land if he protests; nor may I drive uninsured. I may build on my land as I choose, but not in such a way that my building collapses on my neighbour's land. I may let off fireworks on Guy Fawkes night, but not in such a way as to set fire to my neighbour's house. These and similar limitations on the use of things are so familiar and so obviously essential to the existence of an orderly community that they are not often thought of as incidents of ownership; yet, without them 'ownership' would be a destructive force.

#### **(10) Liability to Execution**

Of a somewhat similar character is the liability of the owner's interest to be taken away from him for debt, either by execution of a judgment debt or on insolvency. Without such a general liability the growth of credit would be impeded and ownership would, again, be an instrument by which the owner could defraud his creditors. This incident, therefore, which may be called *executability*, seems to constitute one of the standard ingredients of the liberal idea of ownership.

#### **(11) Residuary Character**

A legal system might recognize interests in things less than ownership and might have a rule that, on the determination of such interests, the rights in question lapsed and could be exercised by no one, or by the first person to exercise them after their lapse. There might be leases and easements; yet, on their extinction, no one would be entitled to exercise rights similar to those of the former lessee or of the holder of the easement. This would be unlike any system known to us and I think we should be driven to say that in such a system the institution of ownership did not extend to any thing in which limited interests existed. In such things there would, paradoxically, be interests less than ownership but no ownership.

This *fantasy* is intended to bring out the point that it is characteristic of ownership that an owner has a residuary right in the thing owned. In practice, legal systems have rules providing that on the lapse of an interest rights, including liberties, analogous to the rights formerly vested in the holder of the interest, vest in or are exercisable by someone else, who may be said to acquire the 'corresponding rights'. Of course, the 'corresponding rights' are not the same rights as were formerly vested in the holder of the interest. The easement holder had a right to exclude the owner; now the owner has a right to exclude the easement holder. The latter right is not identical with, but corresponds to, the former.

It is true that corresponding rights do not always arise when an interest is determined. Sometimes, when ownership is abandoned, no corresponding right vests in another; the thing is simply *res derelicta*. Sometimes, on the other hand, when ownership is abandoned, a new ownership vests in the state, as is the case in South Africa when land has been abandoned.

It seems, however, a safe generalization that, whenever an interest less than ownership terminates, legal systems always provide for corresponding rights to vest in another. When easements terminate, the 'owner' can exercise the corresponding rights, and when bailments terminate, the same is true. It looks as if we have found a simple explanation of the usage we are

investigating, but this turns out to be but another deceptive short cut. For it is not a sufficient condition of A's being the owner of a thing that, on the determination of B's interests in it, corresponding rights vest in or are exercisable by A. On the determination of a sub-lease, the rights in question become exercisable by the lessee, not by the 'owner' of the property.

Can we then say that the 'owner' is the ultimate residuary? When the sub-lessee's interest determines the lessee acquires the corresponding rights; but when the lessee's right determines the 'owner' acquires these rights. Hence the 'owner' appears to be identified as the ultimate residuary. The difficulty is that the series may be continued, for on the determination of the 'owner's' interest the state may acquire the corresponding rights; is the state's interest ownership or a mere expectancy?

A warning is here necessary. We are approaching the troubled waters of split ownership. Puzzles about the location of ownership are often generated by the fact that an ultimate residuary right is not coupled with present alienability or with the other standard incidents we have listed....

We are of course here concerned not with the puzzles of split ownership but with simple cases in which the existence of B's lesser interest in a thing is clearly consistent with A's owning it. To explain the usage in such cases it is helpful to point out that it is a necessary but not sufficient condition of A's being owner that, either immediately or ultimately, the extinction of other interests would enure for his benefit. In the end, it turns out that residuary is merely one of the standard incidents of ownership, important no doubt, but not entitled to any special status.

### Notes and Questions

#### JOHN LOCKE, from *Second Treatise of Civil Government*

1. John Locke's basic project here is to show how private property can be justified, even if we start with the basic assumption that all people intrinsically are, or at least originally were, equally entitled to the land and fruits of the earth. Or as Locke might have put it, we are all the children of God. Locke uses religious-sounding language, but all religious references can easily be translated into the language of objective morality. Do not be fooled by the style: That is the way people talked in seventeenth-century England. Nothing in Locke's argument depends on a religious claim. It relies only on reason. Three conditions have to be true for Locke to be right: (1) Morality is objective— that is, there is such a thing as right and wrong; (2) we can figure out what is moral, or right and wrong, by the use of reason; and (3) Locke's analysis is the one supported or compelled by reason.