JUSTICE, RIGHTS, AND JURAL RELATIONS
A philosophy of Justice and its relationships

By

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Justice, Rights, and Jural Relations

PREFACE
This book is a philosophical investigation into the background of Justice, the Law, and the ever increasing application of so called “rights”. It is my contention that failure to understand the underlying philosophies involved has led to confusion. In order to understand and separate the blurred lines even between law and justice we have to appreciate that the philosophical inputs are quite different. The diagram Fig 1 in chapter 2 sets it out pictorially. Here the reader will see that the type of State we have, which creates our legal system, stems from the relevant political philosophy. However the system of Jurisprudence is governed by the relevant Philosophy of law. Justice again is quite different in that it is based on the Philosophy of Morals and Ethics.

In order properly to understand the concept of RIGHTS, around which modern Western civilization is beginning to revolve, it is necessary to understand fully the concepts both of JUSTICE (Morals & Ethics) and of JURAL RELATIONS (a relationship brought about by the activation of the law). A right, or what most people conceive of as a right, is something which should be enforceable against others or even against the whole of society. It is its enforceability which makes it a right. If we aren’t entitled to try to enforce it by law, it isn’t a right.

Moreover to be a fully blown right there has to be someone against whom it should be enforceable. For example I have a right to the £100 which Jones owes me but regrettably I have no right to nice weather. Now the relationship with the other party or body (for I can have rights against a company or the State) is the Jural Relationship. And these, as we shall see, depend for their creation on the activation of a Law. Rights have to a) have a philosophical justification and then b) be created in law in order to become enforceable. They do not just appear or hang about like the Cheshire cat in Alice in Wonderland irrespective of either their morality or enforceability.

But what then gives rise to the claim that something should be a right? Some philosophers have tried to base the validity of claims to certain rights and the laws establishing them upon the idea that there is a body of ‘natural’ law. This has led to endless disputes with Legal Positivists who in effect maintain, that the only Law is that created by the relevant law making authority. These problems have not until now been resolved. However I have taken an entirely different approach which I believe can lead to a rapprochement (see Chapter 5).
I maintain that the claim that something should be a right is in fact founded on a moral claim for Justice. Thus until the triple relationship, (i.e. the connection between rights, justice, and jural relations) is properly understood it is not possible to form really rational judgements concerning the subject. Unfortunately the growth of the ‘Rights Industry’ has been swept along on a tide of emotionalism rather than logic. Rights have been declared in esoteric generalizations such as a right to Freedom of Speech, a Right to Life, etc. and anyone who breaches these risks being branded as being in breach of Human Rights and possibly even an International Criminal.

In fact it is the generalization of these so called rights, which is extremely popular amongst libertarians, politicians and worst of all lawyers, who at least ought to know better, that leads to terrible confusions and inconsistencies, most of which result from a lack of understanding of the whole philosophical basis and logical arguments upon which claims may legitimately be founded. At the moment the tide of emotionalism sweeps logic into the gutter. What is forgotten is that every right involves a corresponding restraint. Even the most basic right, my right to be sitting where I am, is only available by virtue of denying the same right not only to every other human being but to all other forms of life, both animate (I cannot share this space with a tiger) and inanimate (nor can I share it with a pile of bricks). Thus to the extent that I exercise any right of mine, so I affect others. As to whether the effect is just or unjust is of correlative consequence.

The case against the over simplification of rights is that it results in confusion, over complication, and an exponential increase in litigation. For example, the most generally cited ‘Right’ is of the simply stated ‘Right to Freedom of Speech’. Does this include the right to enter an overcrowded building and shout “Fire”? If not, then we have to say “Yes there is a right to freedom of speech but it doesn’t include the right to shout ‘Fire’...or to make public State secrets in wartime...or to give away your company’s commercial secrets...or to give away secrets you have promised to keep etc., etc.”. - though the last case illustrates the legal maze one gets into when “Freedom of Speech” plus “The public’s right to know” (another generalised right) are used to try to overrule a clearly undertaken and ostensibly binding contract. In this way the rule of law can be, and is being, totally sabotaged leaving us in a morass of uncertainty and litigation. Even the results of this litigation will only stand until the next so called right is brought in to undermine it.

It is absolutely vital, if one wants to talk about ‘rights’ with any authority, to understand just what a “right” is. Of course we say the French and the Germans are lucky, they have two words for ‘right’. What we should be saying is, how fortunate we are, for in
fact in English there are six words covering the concept, but as usual we are too lazy to use them. Now the six fold classification was actually first set out years ago by Professor Wesley Newcomb Hohfeld, a Professor of both Yale and Stanford Universities and a generally acknowledged genius. Unfortunately, as is sometimes the case with geniuses, there was a drawback. Besides being a genius he was reputed to have complete contempt for those who didn’t immediately understand him, plus a short fuse, which no doubt made asking questions hazardous. On top of that, he had a penchant for illustrating his points by reference to exceedingly complicated cases in the field of the law of Trusts (which field of itself along with Tax Law and Patent Law leaves even above average students reaching for a cold towel to wrap round their heads). No wonder then that his work, published under the thrilling title of “Fundamental Legal Conceptions as applied in Judicial reasoning” although deferentially treated, was not altogether avidly followed in the mass market. Nevertheless, we must gird up our loins and take a fresh look at what he told us (albeit minus the trust cases) because what he had to say is of extreme importance to our understanding.

It is also essential that we understand where and how these rights originate. How do they arise? And what are their effects? Well in the first instance they do not arise from the Law - this is just the means of putting them into effect. They arise from Society’s idea of what is just or fair. But this faces us with another problem. That which is the law, is fixed until altered by Parliament, but that which we consider fair changes. In the first place it can differ widely between different societies, and worse still if we look back we can see that it changes within the same society at different times. For example in some States it is considered just that a man may have more than one wife, in our society it is deemed criminal. In Rome, and even in England at one time, slavery was considered quite just, now it is definitely not. It is at this stage that one begins to realize that these all important rights are not quite as simple or necessarily as fundamental as the libertarians would have us believe.

To enforce a right we have to have a law, and this imposes that strange creature the ‘jural relation’ upon us. Again the whole subject of Jural Relations was brilliantly analysed by another genius, Albert Kocourek. Unfortunately in the case of this genius, while his logic was exemplary and he has no record of being difficult, he was an absolute perfectionist. He analysed every conceivable jural relation and in doing so introduced about seventeen pages of new defining terms. These include such delights as ‘Allophylaxis’, ‘Biactive integral conflict’, ‘Endophylactic relations, and ‘Heteromeral relations’ all of which no doubt severely restricted his reading public (if indeed it didn’t paralyse them). Nevertheless to understand our subject we have, at least, to dip our toe into
these waters, though we don’t have to drown in them.

Once we understand the relationship between the law, justice, and rights it is possible to clarify our thinking.

A confusion stems from the fact that emotionally it has been sought generally to treat Freedoms as Rights. The truth is, as a philosophical analysis shows, Freedom is a state. As a state it does not, and cannot per se, involve a jural relationship, whereas a proper right does. In practice this means that we are asking, both legally and philosophically, the wrong questions. Instead of trying to determine whether such and such a freedom is a right, we should be saying “This (action or state) restricts my freedom - Is such a restriction Just?” Then and only then can we get things in their proper perspective. Moreover any proposed new ‘right’ should be examined for its effect on other freedoms and the question answered as to whether any restrictions thereby caused are themselves just.

Unfortunately we cannot just take a light overview of the subject, pointing out inconsistencies and errors - the whole field of Rights, and of Justice is far too important for they are now coming to govern more and more of our lives. They affect our laws and the input is not necessarily coming from our own courts, but often from politicians (which really ought to raise alarm bells). It is imperative therefore that we should have a thorough understanding of the basis on which they might be founded. Moreover it is not sufficient for lawyers to study the subject. It is vital that our law makers, and therefore thinking members of the public should understand the background to this new emphasis being placed on the rules governing the way we live.

This places a considerable burden on anyone tackling the subject because the concepts of Justice and of rights are both products of the fields of ethics, morality and jurisprudence. I decided therefore that I would take a philosophical approach to the basic concepts as this usually gives rise to the clearest understanding.

To start with I have recounted briefly some different ways that philosophers from Plato to Mill have looked at justice, and then, in chapter 2, looked at how the concept of Justice applies to a modern civilized society. Next, in Chapter 3 we tackle the whole question as to what the word ‘Rights’ means. This means that we are going to have to realise that while we often refer to a thing as a “right”, what we may be talking about may in fact be a right or “claim-right” which is the most usual form, or, it may on looking more closely, refer to a “privilege”; or to a “power” to do something; or the “authority” to do it etc etc. Each of these variants in practice have different philosophical bases and legal ramifications. It is my hope that after tackling this chapter, the reader will never again just accept bland
references to ‘rights’ without questioning just what is being referred to. Chapter 3, I readily admit, is not the easiest in the book, but this is simply because we have had to tackle some new and unfamiliar definitions. There is no way round this but the answer I have always found is simple. At first the unfamiliar always seems difficult, but once a thing becomes familiar the difficulties minimize. Therefore I have suggested at the beginning of the chapter that one should only try to grasp the most important concepts, such as the difference between a right and a privilege, at first. One can always come back to the less familiar ones later. After all Stephen Hawking never suggested that A Brief History of Time was going to be simple and this is a lot simpler than that.

In chapter 4, I apply our new thinking to such contentious and difficult practical topics as Civil Disobedience; Objections to by-passes; Hunt saboteurs and Animal Rights; Conscientious Objection; and the question of a duty to obey the law, in order to show how our new understanding may help to resolve some of the issues.

In chapter 5, I discuss problems which have arisen within the law in the application of general principles, such as rights to freedom, and to particular laws which may conflict with these generalised rights. Again we consider justice or equity as opposed to a strict interpretation of the law. I have not adopted a lawyer’s approach to the subject but again tackled it from a philosophical point of view. This surprisingly gave rise to a solution to an age old problem which has bedevilled philosophy and jurisprudence for years, i.e. how to reconcile Legal Positivism* with Natural Law* theories. For philosophers it will, I hope, prove to be most important. At this point I try to show how the new theory relates to such questions as the treatment of animals.

Chapter 6 deals particularly with ‘Intention’. The reason for this is that intention whilst properly the subject of philosophy of Mind also forms a very important part of English law which refers to it frequently and gives us many interesting examples. It affects what a person may be guilty of, whether the courts should treat them in one way or another, it affects concepts such as recklessness etc., and it relates to justice, and thus affects our rights. Although the chapter refers to a number of cases, is not a statement of what the law is. I have deliberately tried to choose interesting or contentious cases and have set out the facts of each case before showing how the Judges tackled the problems (and, as you will see, there were some very difficult problems they had to deal with). I have also tried to show that a philosophical approach to Intention is the best, giving us three types of intention, and

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1 * These terms are explained more fully in the text
that these are paramount and that the law merely provides certain rules as to their application in differing circumstances.

In chapters 7 & 8 I look at the vexed problem of Punishment, as again this relates to both justice and our rights, both as individuals and as members of the public, and finally, in chapter 9 I try to draw a few conclusions.

In following through the analysis of, and establishing the relationship between, Freedom, the State, Law, and Justice it soon became apparent that it was the blurring of the philosophical difference between Law and Justice that has given rise to many of our difficulties. Originally the courts of Justice were entirely separate from the courts of Law. Subsequently the two were merged, and justice lost its priority. Nowadays it is not uncommon to hear a judge say “This is a Court of Law”. Sadly this is what they have become. Gone are the days when great judges founded principles of justice (which later became Rules of Law) such as those in Riggs v Palmer (a murderer shall not inherit under the will of his victim); or Palsgraf v The Long Island Railroad Co. (The case which first established the concept of not being responsible beyond the ambit of foreseeable risk); or the Rule in Rylands v Fletcher (Establishing liability for the escape of dangerous things), a rule which has stood for over one hundred years. Perhaps our best chance for the future lies in re-establishing a separate “Court of Justice”, but such arguments are not the purpose of this book.

In the course of my research and in trying to analyse the fundamental differences between Law and Justice several important by-products came to light. The first of these, namely a possible means of reconciling the dispute which has raged between the concept of Legal Positivism and Natural Law Theories is of fundamental philosophical importance and convinced me that I was pursuing the right line of approach. Moreover the concept introduced there is basic to the question of rights because it provides a logical and consistent justification for their establishment as opposed to that of natural rights theorists.

Once the fundamental importance of Justice is appreciated and given its correct priority, its interaction with all other civilizing concepts can be analysed. This is the second purpose of this book; to determine the relationship of Justice with concepts such as Rights, Freedom, Law, Governance, Punishment and the State. That there is an interaction with each of these is not easily recognized because of the fact that the concepts of State, the Law and Justice are founded on different philosophical approaches.

Despite its fundamental importance an analysis of the principles of Justice, e.g. fairness, reveals that while those principles can remain constant, the various internal
concepts, such as what is currently considered to be fair in a particular society at a particular time, are concepts that may themselves vary. They are based on a moral viewpoint and these views will vary for different Societies at any one time, and for any one society at different times. The changes are often gradual and in the past have been sufficiently gradual as to give the appearance of immutability. This is a false concept - Justice insofar as that which may be considered just, is not an immutable constant. Again I must emphasize that it is the reflection of the moral concept of a particular society at a particular time.

It is a further purpose to show that this very variable nature of the concept of what is ‘just’ is not a weakness but a primary advantage. It is the moral foundation of justice that enables us to tackle the fundamental conflict between Legal Positivism and the Natural Law theories. This is a new approach to the problem and it introduces three new concepts: THE PRIME INHERENT LAW; The fact that POWER IS PRIOR TO RIGHTS; and the POWER - RESPONSIBILITY factor derivable from justice.

Armed with these derived theories it is possible to jettison the basically detrimental approaches we have been forced to adopt. The concept of a Rights based society goes, to be replaced by the realization that freedom is a non jural state and that the correct question to ask is not what RIGHTS to various freedoms do I have? but rather the much more specifically applicable question - Is this restriction on my freedom Just? Similarly the whole emotionally charged and philosophically unstable concept of Rights existing prior to Law may be jettisoned.

Finally I have shown that my theories apply equally to societies such as ours or those with a constitution such as the U.S.A., or those under the code Napoleon. Moreover while at first it appears that there is a direct conflict with Professor Dworkin (Taking Rights Seriously), this conflict can be eliminated and I show that my theory would provide a ground from which similar results might result.

D.O.H-N.
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CHAPTER 1. JUSTICE. - THE CONCEPT

Justice is a neglected and underrated concept. It is more often than not regarded merely as an adjunct of the law. This is, it is true, one of its most important applications, but the concept is far broader and affects vital aspects of our lives without our realizing it. This is because it appears in many guises, the principal one of which is fairness. On hearing the word fairness one does not nowadays automatically think of it in terms of 'justness' but 2500 years ago that would have come to mind at once. We have relegated justice to a secondary role, stripping it of its fundamental role which is that it is very simply the basis of any civilized society. In fact it is inherent in civilization. No society that is not just can call itself civilized. Justice is the civilizing regulator of Government, of Freedom, of Law, and of Punishment.

The consequences of having ignored the fundamental nature of justice are enormous. We concentrate on "democracy" or "rights" trying to form a democratic rights based society with only the vaguest idea of what the word democracy really means, and absolutely no idea of what we mean by "rights" or how to found them. In any society the concept of rights is of great importance and its disentanglement will be dealt with later.

If we return the concept of justice to its true position we will find that the whole approach to our society is changed. On the way we shall discard some hallowed myths which have grown into the dogma of today's troubled civilization. To do so requires an effort. One must stop looking at the trees - our right to this and our right to that, but rather we must look at the forest, the pattern of which is dictated by justice, a justice which determines the relative position of our rights within that forest.

Let us first look at the concept of Justice itself. Justice is a word of many meanings. Philosophers often start by taking it in one sense, that of Political Justice, and maintain that its features are derived from that - Its Impartiality, its Universality, its stringency. Then again they may look at Legal justice or Distributive justice. Some involve it inextricably (and wrongly) with rights or equality. These approaches are unfortunate, they give the impression that there are different types of justice from examples of which we may deduce the essence. In truth they should merely be regarded as attempted applications of justice, in the fields of law, distribution, politics etc.

The most logical approach is to try to analyse the concept of justice per se and a good start is a Hohfeldian one, i.e to look first at it lexicographically and draw parallels of use of its variations.

Lexicographically, and most generally, it is associated with fairness, even-
handedness (impartiality) and doing what is right in the circumstances. Therefore the first thing to note is that it is not an absolute or invariable, it may vary with the circumstances. Basically it would appear to be a moral viewpoint and in each circumstance it is defined by that viewpoint. Looked at in this light we can see that many of the alleged attributes of justice are false.

Firstly, its fundamental nature. Justice is not a fixed concept, it is, like equity (its legal counterpart or application), "as long as the Chancellor's foot". What has been deemed Just and proper by one society, for example slavery, may be condemned and deemed unjust and improper by a subsequent society. For example in ancient Peru there was a certain game in which the killing of the losing side was viewed as natural and acceptable, or even just. To us, today, it would be considered unacceptable, being wrong and unjust to the point of barbarism. Therefore any claims we come upon as to the possible irrevocable tenets of justice (e.g. rights to life, liberty and the pursuit of happiness (whatever that may mean) must be viewed with considerable scepticism.

Next we should look at the claims to Universality. This concept is often cited as a feature of equality, but we know that justice, though impartial, treats only equals equally. This is why an imbecile who cannot appreciate the seriousness of a crime is not treated "equally" to one who knowingly commits the same crime. Moreover what causes people to be regarded within a category of "equals" may itself change with different societies (or at different times within one society) so that we have to be doubly careful. Certainly its ‘universality’ is in grave doubt, at least insofar as to there being universal rules of Justice. There is not one to which exceptions past or present can not be found. However, we shall find that such general rules of justice as we may later deduce, while not being necessarily immutable, may change at a very slow rate so that for many purposes of current application they may be regarded (at least superficially) as unchanging.

Even its Impartiality must be questioned - After all justice is a moral view, but where do we get our moral views? They are usually passed down to us by the leaders of a society (Moral, Religious or Political, and today more and more from our popular icons created by the press and television). Morals are not democratic, they are often thoroughly despotic. However because we are now entered upon the age of rapid mass communication, a particular moral approach may gain swift acceptance giving it the appearance of being led from the people. In practice it will almost invariably have been set by the few and accepted by the many.

In short, justice amounts to a moral judgement of a particular time in a
particular society, and relating to the particular situation e.g. law, distribution etc. This is especially true when we talk of distributive justice. In the first place there can be no single rule because the rule of so called Distributive Justice that may work in a situation of abundance will not apply in cases of shortage. Whatever results is merely a rule deemed appropriate (and thus just) for that society at that time and that situation. To take an example of the sort of problem that can arise in the case of distribution:- To whom is a very rare life saving drug to be given? - To the one who is in most distress and needs it most; To the fittest and therefore most likely to benefit; To the wealthiest whose money permitted the discovery of the drug; To the war leader needed to save the society which is currently under attack; To the undisputed genius who has done more to alleviate sickness, but who may by now be a bit past it; To the youngest who may prove to have no potential whatsoever; To the middle aged one thought to be on the verge of great discoveries; and so on ad infinitum. One's answer to any of these insoluble problems will be swayed by one's moral outlook or prejudice. And we must remember that one man's moral outlook can easily prove to be another man's prejudice.

So, having decided that some of the modern approaches to defining justice are flawed let us take -

**A look to the past.**

**PLATO**

When considering Plato's treatment of ‘Justice’ in *The Republic* we must remember that the subtitle is ‘About Dikaiosune’, which some argue has a far more moral connotation than ‘justice’ i.e. it is closer to ‘doing right’, and indeed this, I think, is a help when we examine the arguments.

In answering the question “Why should we be just (do what is right / be good)?”, Socrates has to face three challenges. First Thrasymachus argues that human behaviour is governed by self interest and that this should be the guiding influence, and the interest of the stronger should prevail. In response to this Socrates argues that the exercise of any skill is actually disinterested, including government (to which he keeps reverting because of course it is the object of *The Republic* to set out his ideal form of government). Frankly these arguments are difficult and not very satisfactory in resolving the nature of justice, except to stress the point that it is disinterested, i.e. impartial.

At this point Glaucon joins in the challenge. His first point is that one who has caused injustice and suffered from it, realizes that it is better to make a compact not to do or suffer wrong. This is the basic or individual contract theory, and from this Glaucon argues men began to make laws and covenants. So he argues justice is a compromise but anyone
who had the power and ability to do wrong and get away with it would be mad not to do so. In support of this contention he cites an example based on the ring of Gyges\textsuperscript{2} So, says Glaucon, imagine two such rings; one is given to a just man and the other to an unjust man. He then goes on to suggest that even the just man would succumb to the temptation to use it, or be thought an idiot if he did not. Then he compares the two lives and points out that the unjust man has to be accomplished in his wickedness not to be found out, in fact he must seem to be good. But the just man must not be seen to be good lest he be deemed to be merely seeking the acclaim of a good name. In short, the unjust man has the better time and is the more popular. To put it another way, the rain rains alike on the just and the unjust but...

"More on the just than the unjust fella',

for the unjust fella' has the just's umbrella."\textsuperscript{3}

Adeimantus then weighs in, adding that people really only do what is right for what they can get out of it, either in this life or the next.\textsuperscript{4} He then points out that what is needed is a demonstration that Justice is inherently superior to injustice.

The response by Socrates to Glaucon's challenge of the ring of Gyges and Adeimantus' point is to look to, and draw parallels with, the justice of the State. However this approach has the drawback that it merely provides us with a view of a particular form of a state i.e. Plato's Republic, which he deems to be the most just. However his point is that just as a 'just' state is more desirable than an unjust one so it is necessary that men be just.

Socrates then proceeds with the idea that a man is just in the same way a state is just. He argues that there is no gain in debasing the god-like part of ourselves to the beast part. Plato also provides us with a strong argument that, in the main, it is better for the individual to be just. He illustrates this with the picture of a man who climbs to the top irrespective of the damage he does to others on the way, but his success, according to Plato, is bought at an awful price for he lives in terror of his enemies' retribution. While this was certainly true of a dictator such as Stalin, one might be tempted to think that his argument is

\textsuperscript{2} This is the story of a shepherd who discovered a hoard of treasure, but took only a ring which had the power, when he twisted the bezel, of making him invisible. He was no slouch in making use of it, and he ended up by seducing the queen of Lydia, murdering the king with her help, and seized the throne.

\textsuperscript{3} Not that, as a philosopher, one should put it quite that way.

\textsuperscript{4} It is interesting to note that this argument applies particularly today to societies with a western theistic religion. In eastern philosophy which is not so concerned with the nature of the next life as the attainment of an end state (be it nirvana, somadhi, moksha, etc.), the question of acting morally is guided by the fact that acting immorally is likely to deflect you from your purpose. It is therefore quite a different approach to the western theistic stick and carrot approach.
open to the suggestion that if one does not go to such extremes there may be a point where ruthlessness pays.

So Plato has given us some ideas but hardly a complete answer.

ARISTOTLE.

It is Aristotle as usual who gives us a much better and more useful interpretation, as we see from both the *Eudemian* and *Nichomachean Ethics*. However we must note that he views justice as a Virtue, an essential virtue of both individuals and Societies. He does not regard it as either a moral principle or as an agreement arrived at between individuals. [He starts from the viewpoint that in ethics man knows what is to be known (N.E. Ross 1925 II ss i-ii 28-30) but he emphasises that good behaviour is in essence due to good training in morally upright habits.] He does not try to show that Justice is better for us than Injustice. He sets out what were considered to be the principle virtues of a good life. These virtues are often a mean between extremes: Courage is the mean between foolhardiness and cowardice; Justice he equates with taking and receiving neither too much nor too little. Of course what is too much or too little depends upon the other merits of the person concerned. It is not a mean of equality or equal division, it is neither more nor less than is one's due, and one's due depends on one's merits.

In Book V of the *Nichomachean Ethics* Aristotle takes as a starting point the various meanings of an unjust man. Both the lawless and the grasping and unfair are thought to be unjust, and the lawful and fair as just. And so, he concludes that lawfulness and fairness form a virtue, a great one in relation to one's neighbours. Justice alone of the virtues is thought to be another's good. He goes on however that there appears to be more than one kind of justice. There appears to be the division of justice into two parts, the unlawful and the unfair. The law tends to look at the virtue (justice) as the whole virtue i.e. responsibility to one's neighbour, but of particular justice there are again two types - Justice of Distribution, and Justice of Rectification. Now it is important to note that Aristotle refers here to the Justice of Rectification, not Retribution. It is not just tit for tat. Aristotle believes that the criminal should be punished in kind, but that there should be some addition to the punishment to ‘expunge’ any gain from the crime. This notion of wiping out the advantage gained by the criminal (the power he has exercised over the victim) is of great significance to Aristotle and it is something which today, rather foolishly, we tend to ignore. This aspect of justice will be dealt with in greater detail later when we look at Punishment.

Also in the case of rectification there are two divisions i.e. with respect to transactions which are a) voluntary - such as agreements, sales, purchases etc., and b)
involuntary - clandestine, theft, violent assault, imprisonment, abuse insult etc.⁵

With regard to Distributive Justice Aristotle’s concept is one of proportionate equality. People ought to receive goods in accordance with their merits. “...The just, therefore involves at least four terms; for the persons for whom it is in fact just are two, and the things in which is manifested, the objects distributed, are two. And the same equality will exist between the persons and between the things concerned; for as the latter - the things concerned - are related, so are the former; if they are not equal, they will not have what is equal, but this is the origin of quarrels and complaints - when either equals have and are awarded unequal shares, or unequals equal shares. Further this is plain from the fact that awards should be ‘according to merit’; for all men agree that what is just in distribution must be according to merit in some sense, though they do not all specify the same sort of merit, but democrats identify it with the status of a freeman, supporters of oligarchy with wealth (or noble birth), and supporters of aristocracy with excellence.”⁶

It is right that the best should do best and the lesser able less well⁷. However, it must at once be noted that this idea is quite different from our modern concept of a free market economy which is distorted by a lack of the individual’s justice in dealing with each other, and additional factors such as advertising. For a man who charges unfairly (as the successful free marketeer, in maximizing his profits may well do) obtains more than his due, and is thus actually inflicting an injustice on his customers. Materialism in this regard is quite prepared to ignore justice in this sense. This is born out by the fact that in our society the richest in the land have often made their money either directly or indirectly out of the marketing of food, and the profit ratio in the U.K. is acknowledged to be twice that on the continent. However materialistic ends have reached the degree of acceptance that not only do these people profit vastly, but they are then given honours and titles - usually for having donated sums of the money unjustly (in the sense we are talking of it) made from the customers to a charity of their choice. Lest the foregoing sound like some argument against free trade it must be emphasized that Aristotle would have been the first to agree that a trader should receive a fair reward (and profit) for his skills and expertise in bringing goods to the people. Where the problem would have come is in relation to what is deemed a fair or just

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⁵ It is interesting to note that Aristotle includes assassination in a, and murder in b. I do not wish to get into a discussion of his individual classifications, which is the province of the Aristotelian specialist and I confess to having been ever so slightly choosy in selecting my examples. Nevertheless this does not, I submit detract from the validity of the two categories, voluntary and involuntary.

⁶ N.E. V.3, [1131a 17-28].

⁷ Although Aristotle does not actually take this approach, his concept is in fact wholly consistent with a ‘Natural’ approach i.e. it is consistent with the need for the best to succeed for the survival of the species.
Despite this we still believe to some extent in ‘goodness’ or merit. We consider that justice is done if the best runner wins the race even if it is due to a natural ability rather than training. To apply the same principle to the "smartest" operator is a denial of Aristotelian justice, but it might be acceptable as a distortion of survival of the fittest. Cicero, as we shall see, has firmer views. Even so it may be argued that we have suffered too much from Utilitarianism and Egalitarianism and Materialism. Claims to equality were dealt with best in the play The Admirable Crighton by J.M.Barrie, and by Gilbert and Sullivan in The Gondoliers. The distortion of Justice as a result of Utilitarianism will be discussed later.

Aristotle's approach was and still is right - consistency among equals is a necessary feature of Justice, but total uniformity does not provide justice.

CICERO (De Officiis)

Cicero rates the four cardinal virtues as Wisdom, Justice, Courage and Temperance. He takes the attitude that there is no such thing as private ownership established by nature but that men are born not for themselves alone, so that we have therefore to provide mutual help. The foundation of Justice therefore is good faith - Truth and fidelity to promises and agreements. There are, according to him, two types of Injustice; 1) Those who inflict wrong, and 2) Those who fail to protect others when they can, i.e. Active and Passive Injustice. Sometimes fear causes us to do wrong but more often it is avarice. Ambition which leads to unjust acquisition is to be avoided. Also, in passing, it is interesting to note that Cicero was one of the first to distinguish between impulsive passion as being less culpable than wilful premeditated wrongdoing.

The motivations for passive injustice are fear, indifference, indolence, and incompetence. All men should contribute their efforts and interest to the social life. He maintains that the rules are that
1) No harm be done to anyone and
2) The common interest shall be conserved.
Moreover there is a justification for changing one's views if for example what you have promised to do will cause harm. So when keeping a promise will do more harm than good, it is proper to follow the greater good. [NB. The greater good to the promisee, not the greater good to all and sundry - Cicero was not a Utilitarian!]

There is, he argues, a limit to retribution and punishment. It is sufficient if the wrongdoer is brought to repent so he may not repeat the offence and also that others are deterred [So it seems there must in practice be more than a true repentance on the road to
Pentonville]. Cicero also takes the view that when discussion fails and we are forced to war we should fight to protect our freedom to live in peace and unharmed. When victory is won we should spare those who have not been bloodthirsty and barbarous in their warfare. [So apparently and correctly we should not spare terrorists.] However he holds the view that morality promotes the good and that therefore it is necessary to try to restore the social relationship that has been violated. Thus revenge for the sake of revenge is not right.

Again Cicero, when considering promises, makes it clear that we should have regard to the spirit and not just the words, and also that we should give justice to the humblest (the slaves) - they must be required to work but must be given their dues. Finally he feels that of the two - injustice by force or fraud - the latter is the most contemptible. Throughout we see how many of Aristotle's principles appear here, albeit in a slightly different guise.

It was not until later that the basic principles above gave way or were displaced by the horrors of such philosophies as utilitarianism.

**HUME.**

Hume took the view that while the virtues of Humanity and Benevolence were intuitive, the social virtues of Justice and Fidelity were not. He takes Justice and Fidelity to be necessary for the well-being of mankind but the benefit arises from the system concurred in by the whole or greater part of the society. He points out that Justice and the rules of law are impersonal and will award riches to a selfish miser whilst taking them from a beneficent man without title.

While many of Hume's views can be linked with the Aristotelian concept of justice he started to veer us off course, in my submission, by linking justice with property. Hume took the view that Justice was part of the moral and political virtues in general. He felt that moral judgements are logically distinctive i.e. that they express a certain kind of sentiment or feeling. Importantly he felt that the same set of facts could arouse different sentiments (even though he felt it was unlikely). I suspect that it is far more likely than Hume would credit, for he lived in a time of a more ordered society in which one could not have access, as we do today, to the disparity of viewpoints between nations, and indeed between the people of any one nation.

The importance is, however, that he realized that moral viewpoints could vary, and thus it must follow that views of what is just could vary. However it is my view that justice has some very deep seated principles which means that such variations as do take place will do so slowly, so that a new viewpoint will usually evolve over time. Examples that immediately spring to mind are that originally no doubt the dipping of witches was
considered by most to be a fair means of determination, or that burning at the stake by the Inquisition for the sake of a person's soul was quite just. Today both would be considered quite unjust and indeed they would have been considered unjust in Greek or Roman times before the evil in the practice of the Christian religion and fear overcame man's previous conception of Justice. Thankfully once the all powerful grip of unsubstantiated dogma began to be destroyed by improved knowledge the natural tendency towards justice came to be realized again. This would appear to favour the argument that a concept of Justice might be inherent though it can be displaced by fear and/or training. However one must remember that Hume assumed that it was the virtues of Humanity and Benevolence which were intuitive. All in all, as I shall argue later, I agree with Hume that Justice is learnt, not intuitive.

After asserting that moral judgements are a certain kind of sentiment Hume went on to the effect that
1. Reason is, and ought to be the slave of passion, and
2. It is not contrary to reason to prefer the destruction of the whole world to the scratching of my finger.

As action requires motive so we must want the state of affairs it produces. Moral assessment considers the character displayed in action. So we may find some actions agreeable others not. But Justice is different, we may approve a hard but just judge but we may not like him. Thus it would seem justice is not merely a matter of the morality of the action but rather the ethics.

Hume linked Justice to property and this is, in my submission, wrong. It came about because he thought that only when society became civilized did it need rules and these give rise to rights, all of which have a proprietorial element in them. For example - even when I promise to take you out I make a promise of my time. I think it is not necessary and possibly even counter productive to take this approach. Furthermore he subjected this concept to the Public Utility, so that Justice, in essence, was reduced to a matter of communal convenience.

J. S. MILL.

Mill maintained that one of the strongest obstacles to the doctrine that ‘Happiness was the criterion of right and wrong’ has been drawn from the idea of justice. He argues that many regard it as an inherent quality - that the just have an existence in nature as an absolute, as distinct from the expedient. His argument is that even if Justice is a peculiar

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8 Treatise of Human Nature Clarendon Press 1978 Bk II pp415-16
instinct it might still require to be controlled by higher reason.

First he asks, is a feeling of Justice *sui generis* with sensation of colours or a derivative feeling. Is it part of the field of general expediency or does it require a separate origin? So he attempts to analyse Justice and Injustice to see if there is always a particular attribute or set of attributes associated with it. He then proceeds to consider what is taken to be Just or Unjust in various situations. He starts by saying that it is considered Unjust to deprive anyone of their personal liberty or property. He then considers whether the law involved is unjust or inexpedient, pointing out, as we shall have to consider later, that there are:

1) Those who maintain that all laws should be obeyed (This attitude he maintains is defended on the grounds of expediency);
2) Those who hold that any law judged to be bad may be disobeyed even though it is not unjust but only inexpedient; and
3) Those who maintain that disobedience should be confined to unjust laws.

But of course there are those who maintain that all laws which are inexpedient are unjust because all laws limit freedom and to that extent are unjust unless they are legitimated by tending to our good. This in my submission shows the sort of calamitous situation one can get oneself in by starting with assumptions such as ‘any restriction of freedom is unjust’, when we know many freedoms can only be exercised by denying the same freedom to others. However it is universally admitted that there are some unjust laws, and that law is not therefore the ultimate criterion of justice. However he goes on that when a law is thought to be unjust it is generally thought so because it infringes someone's moral right. Now this is interesting, because justice is, in my opinion, a set of ethical standards derived ultimately from moral judgements.

Thirdly Mill maintains that it is universally considered that each person should obtain that which he deserves - ‘his just deserts’. What then, asks Mill, constitutes a desert? To deserve good if one does right, to deserve evil if he does wrong, or to deserve good from those to whom he has done good and evil from those to whom he has done evil. [This last is obviously not a Christian Morality which, theoretically, waives such justice].

Fourth It is unjust to break faith. [I would say this is questionable as a feature of justice]. However it can be overridden by a stronger obligation. [It is presumably based on the concept that it is not fair to promise something and then not keep the promise.]

Fifth It is inconsistent with justice to be partial i.e. one must be influenced only by those considerations which ought to influence the decision.
EQUALITY. Many think this to be an essential, but says Mill, the idea of Justice differs with different people. Concepts of equality vary with a person's idea of expediency. [I would argue that it varies with the morality of the time - e.g. slaves should be given their rights, such as they are, with the same seriousness as that of their masters. This is of course an Aristotelian viewpoint]. But questions of justice vary with the idea of expediency e.g. some communists believe in shares of exact equality; others depending on need; and others to those who work the hardest. [These of course are concepts of distributive justice which I maintain are merely an attempt to apply the concepts of justice to a situation where it may be completely inapplicable.]

In ancient times justice came to be associated with the approved manner of doing things - that which should be enforced. Hence the German Recht (originally straightness) now associated with law. So Recht and Droit have become associated with law and it does seem that the original concept of justice stemmed from conformity with the law (at least as to how things ought to be done). This at least was the Hebrew idea for the simple reason that the laws were God given. But for the Greeks and Romans who used man made laws, they were prepared to admit that there could be bad laws [Hence we get the dichotomy between laws based on Morality and laws based on expediency.] So we get to the position where justice applies to such laws as are morally correct. Note for example that our speeding laws could be unjust from a moral standpoint but are suffered for the sake of expediency.

Mill then considers punishment which we believe is something which should apply to those who are unjust. We do not necessarily feel this about breaking a law if we deem that law to be unjust. We associate our ideas of wrongdoing with something a person has a duty to do. Duty should be exacted from a person. Mill feels the idea of deserving or not deserving punishment lies at the bottom of the concepts of right and wrong (as to whether because of expediency one is punished is another matter). So if a thing is right in the sense one ought to do it, one should be punished for not doing it. On the other hand there are things which are laudatory to do but one is not compelled to do them. This Mill feels marks off not justice but morality in general from expediency or worthiness.

He then considers moral duties of perfect and imperfect obligation (these latter are obligatory, though the occasion of performance is left to our choice - e.g. acts of charity and beneficence). Some say duties of perfect obligation give rise to a correlative right similar to a legal right. Justice he feels also involves a personal right similar to a legal right. So he feels we have a right to claim justice as opposed to a claim for beneficence or worthiness. This is a most important distinction and one to which we shall revert later, because, having
made this point, Mill does not appear to have appreciated its significance. (see the arguments in chapter 5).

He then proceeds to examine whether the feeling which accompanies the idea is innate, being naturally within man, or whether it grew up from the idea, or whether it is derived from expediency. He feels that the sentiment does not arise from expediency, though the moral content may. He classifies the sentiment as the desire to punish someone who has done harm to others. This he maintains springs from two instincts, self defence and sympathy. Because of his intelligence man can sympathise with his tribe, country or mankind generally. Thus arises a general concept of justice. And he believes that even anti-utilitarians such as Kant maintain the fundamental principle of morals is "So act that thy rule of conduct might be adopted by all rational beings" can be put so that ‘we ought to shape our conduct by a rule which all rational beings might adopt with benefit to their collective interest’. Now I am far from certain that these two necessarily flow from one another but that is not the point here.

It seems to me that in his anxiety to bring in Utilitarian aspects to justice Mill has started to lead himself away from the nub of his discoveries. He takes justice to be two things: A rule of conduct and a sentiment. He then says the rule must be supposed to be for the benefit of all mankind and intended for their good. There seems to be no such requirement to me, it just clouds the issue. The sentiment he says is a desire to punish based on self defence and sympathy for the person affected by the injustice. Again these seem superfluous additions. It is unjust to take more than ones fair share or due, but if this is accomplished by profiting from many people the adverse effect on the individual may be minimal. For example let us return to the example cited before: that some of the wealthiest in the land, who nowadays are mainly associated with food and its production, have unjustly taken more than their fare share. We know that on the continent the profit margin of food chains is half what it is in the U.K. So the argument could run thus: It is unjust that these people should make themselves the wealthiest in the land by overcharging for a necessity (food). It is doubly unjust that they should then donate (our) money to good works and gain themselves knighthoods and baronies for their good works i.e in donating money unjustly obtained from us to a charity of which we may not approve and have no say in. But here the injustice has arisen from small injustices to a vast number of people, so it might be argued, the injustice falls under the de minimis rule. It is only when looked at cumulatively that the injustice becomes apparent.
It is true that there are those who believe that such wicked Capitalists, who it should be noted have done nothing illegal) should be punished, but the majority of people have hardly been affected in the sense Mill uses. And certainly even though their actions are unjust in the Aristotelian sense as they have done nothing illegal, so nothing amounting to a right to a remedy exists. Again it may be thought that it is inexpedient that every injustice however slight must be redressed.

Similarly a speeding law may be unjust when applied to someone who has done no harm in breaking it, but the law here is based on expediency. I feel Mill goes too far in his association of justice with a personal right to a remedy similar to a legal right. And he then makes the claim that I have a right to something which society ought to defend me in the possession of. He justifies the reason why it ought by reference to the general utility, and at this point he has veered us completely off course back into the wilderness. My reason for taking this approach will become clearer when we consider the whole matter of rights. I take a Hohfeldian view that the type of right which Mill is talking of is a Hohfeldian claim-right and these rights are supported by, and exist by virtue of, the law. Thus they become enforceable. Moral obligations are by definition non jural and as such they are not enforceable, however desirable they may be. Once this distinction is blurred we are in all sorts of trouble. Justice represents a moral viewpoint. It is not a legal prescription or it would not be necessary to add it to the law in the form of equity.

Mill attributes the strength of feeling for justice mainly to our universal inherent need for security. - that without security our life would be unbearable. But this utilitarian argument does not really stand the test - it is perfectly possible to provide security without justice. Moreover Mill goes on, rightly, to point out that concepts of justice differ widely, but again he says this is based on what is considered useful to a particular society. He argues his case by citing the very examples that justice per se cannot resolve and says that the ‘just’ solutions result from the viewpoint of utility. My argument would be that it may be that a solution is exacted from a utility basis but that does not make it just or unjust - justice is just not applicable to some of these circumstances. I nearly said ‘hard cases’ but I do not wish to cause confusion with Professor Dworkin's hard (legal) cases. To equate justice, which is based on morality, with distribution based on what is useful, illustrates the point I made previously - that to start to draw conclusions as to the nature of justice by working

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9 For some unknown reason the holders of such views nearly always place the emphasis on the second syllable - an interesting social phenomenon which cannot be pursued here.
backwards from purported applications will land you in the soup.

Mill regards justice as a name for certain moral requirements which regarded collectively stand high in the scale of social utility, but in so doing he castrates justice, and as of course is his intent, subjects everything including justice and morals to the base requirements of utility and expediency. For reasons which I hope will become apparent I cannot accept this. However much of what Mill says is of great use to us, what we have to do is filet out the utilitarianism.

**SUMMARY**

What then of Justice? To me Justice is an equilibrium restored, a balance and a fairness. It is an ethical standard, based on a moral view and as such is based in part upon the beliefs and mores of the society of the time. It is therefore not immutable, though we may find that some of the morals and ethics underlying any moral system are virtually timeless. To justify this statement completely would require a comparison of relative moralities which is beyond our present scope, but I hope to give some examples as we proceed.

It is not appropriate to attempt to analyse the basis of justice by reference to so called applications to situations with which it cannot cope and for which there may be many and varied political solutions, based on expediency, religious dogma, political dogma etc. To be just is to do what appears to be right, but in many situations what appears to be right depends on the criteria of the day and the society involved. One really cannot work backwards from current assumptions of what is just and be sure of arriving at a definitive analysis.

The principles of Justice lie in the rules of its application. It is required not to be partial but at the same time it is required to treat like alike, i.e. it is no supporter of rabid all pervading egalitarianism. It is ‘just’ that the best athlete should win even though his ability may be inbuilt and he is lazy but has beaten all those of lesser talents who trained much harder.

Its applications bring it to bear on many situations some of which are not solvable. Attempts have been made to apply it to problems of distribution, law, retribution and politics, but its principal function is that of restoration. It attempts to restore the equilibrium of a situation, thus it can prove to be more than an arm of retribution. In those situations to which it cannot apply e.g. distribution in a situation of shortage, the solution is arrived at by other means and using other criteria such as expediency, economic market control, etc. That the solution, whatever it is, is accepted by the society tends to cause it to be dubbed ‘just’. In fact it is ‘acceptable’ or ‘considered fair’ but the word ‘just’ is strictly
speaking, inappropriate. It is at best quasi just because the solution is regarded as having one or more of the aspects of ‘justness’ whereas in fact it is merely the best that can be done in the circumstances.

The greatest and possibly the most informative application of justice is in relation to the law. I hope to show that it is of fundamental importance in the reconciliation of Positivism and Natural Law theories. But even so in law justice has sometimes to give way to expediency, for example in many of our traffic laws where the desire is to limit a potential danger but the good driver who has caused no harm may be made to suffer. In one sense it is unjust that a man who intended no harm and caused no harm should be punished. There is no way that such can be regarded as a just punishment. It may be a necessary punishment from society’s viewpoint or it may be regarded as an acceptable punishment, but it is not strictly an equitable punishment.

Similarly Distributive Justice is not a form of justice, it is merely an attempt to apply the principles of justice to a situation of distribution. When one considers for example the various tenets of Communism held by differing groups i.e. Distribution of wealth on the basis of absolute equality; Distribution on the basis of production; and distribution on the basis of needs one really can not claim that justice favours any. Attempts to work backwards to a definition of justice from any of these end positions are therefore doomed to failure.

**Legal Justice**

This is the principal application of justice in the form of equity. Even so customs occur which distort justice but are accepted by society e.g. as I have mentioned, traffic laws. But it is in the field of equity that the application of the great principles of justice are to be found - Such as ‘No man shall be allowed to profit from his wrongdoing’. No-one considers it just to profit in such a manner. Yet it is not a general rule of law even though it was cited as the reason for the decision in *Riggs v Palmer* [115 N.Y.506] where it was decided that a murderer should not receive the inheritance under the will of the person he murdered. If it were a general rule of law that no one should be allowed to benefit from an illegal act then criminals would not be allowed to sell their stories to newspapers for large sums. It would appear therefore to be no more than a principle of justice which is why most of us feel it is not right (i.e. unjust) when such a thing happens. However were it indeed a
rule of law then presumably the sale would be an illegal act. Similarly it is felt that anyone who deliberately creates a dangerous situation should be held responsible for any direct consequences. We shall be discussing some of these innate principles in greater detail later.

**Retributive Justice.**

There is no doubt that there is an innate feeling that a person should get his deserts. He who harms another deserves to be punished. This feeling however relates in my submission to the desire for retribution. That the retribution should be just is a separate matter. The form and nature of that punishment is also the subject of justice - what is right in the circumstances. This also will be the subject of further investigation in chapter 7.

**Rectification Justice.**

Then there is the further, often neglected, but possibly most important feature of justice, the restoration of the status quo. This requires more than mere retribution, it requires compensation to restore the advantage of the wrongdoer. Thus a person who steals would be required in justice to compensate the victim, not just with what has been stolen, but to compensate for the advantage or power gained by the stealing (the metaphysical or physical subjugation of the victim). Similarly the State which effects the retribution on the part of the victim requires additional punishment to effect this rectification or restoration. For example even if the stolen goods had been returned the offence of stealing remains.

**Deterrence.**

Society also requires something further, namely the prevention so far as is possible, of a recurrence of this type of crime. It seeks by making the punishment of a suitable character and by making the punishment known to ‘warn people off’ - to deter them from the act and to persuade any offender not to repeat it. This feature of punishment is termed deterrence. It should be noted that I have referred to ‘making the punishment of a suitable character’ to effect the purpose. As we shall see later we do not currently make much attempt to vary the character of the punishment, but merely rely on varying its severity. From the above it will clearly be seen that deterrence as such is not a part of justice.

**Political Justice.**

This arises in a consideration of the relatively weak position of the citizen to his state, i.e. what is fair for the state to demand from its citizens in each of the various

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10 I would indeed argue that we abandon these principles of justice far too easily, and that such an act should properly be illegal. The fact that we do abandon the principles is not a reflection on the principles but rather of the moral decay of our society.
situations which occur.

Generally justice is the application of principles of fairness and balance (of innate feelings of morality together with those dictums of morality of the times which have been assimilated by society) to various situations of imbalance, as only justice attempts to restore the balance.

It seems that there are certain principles of justice which guide us, but their application may vary with the morals of the society and the time. Justice is the application of what is fair and right. The conception of what is fair and what is right is however something that changes with the state of man's knowledge and the morality of the time. These conceptions tend to resolve themselves into ethical principals which guide justice.

This is what makes justice such an open edged conception. Even so it is a conception that man cannot easily live without, particularly with respect to Law and Punishment. It is here that the principle application occurs - from the manner of these applications (not the end results) we can draw our best idea of current principles and some clues as to the possible existence of any universal principles and then, and only then, we may attempt to apply these to our non-jural relationships.

**Justice in relation to other virtues.**

Some philosophers regard justice as the first virtue with respect to political issues and argue therefore that it is a basic virtue. I agree that it is fundamental as to civilization and that it is of prime importance politically. However that does not necessarily make it universally fundamental, i.e. I do not believe that it is necessarily true that Justice is the virtue from which all other virtues flow. In fact it would appear to be one of a number of virtues such as kindness, charity, honour, etc. which are not always comparable. Of all the virtues it is the most important, and some virtues such as honour may derive from it, or at least be dependant.

Moreover the idea of justice being a mean in the sense of fairness also has to be combined with the concept of rendering to each his due. This concept is particularly important as it is this which distinguishes Justice from equality, and it is most important that we bear this in mind as we pursue our quest. Fairness involves the treatment of equals alike and not the treatment of unequals alike, so that, for example, the mentally handicapped are not treated as if they were totally competent.

**A digressionary word of warning (for those politically inclined)**

There seems to be a failure of logic amongst some political thinkers, in that having established Justice as a principal virtue of a society they proceed from this to the
assumption that only a just society is valid. This is about as logical as saying that as beauty is a principal virtue of art anything that is not beautiful is not valid as art (and even further should therefore be destroyed).

Following this further we find that there is a tendency today to take the view that only democratic societies are just and that anything else is fair game to be brought down. In fact because of this flaw in our thinking democracy is in danger of becoming as despotic as the Inquisition. Democracy, particularly our current brand, is very far from solving our problems. So beware linking justice (however desirable it may appear) with validity.

**The great Justice Myth** is that it is Immutable and Universally uniform. It is neither. The concept of Justice varies from civilization to civilization, and even within one civilization it will vary with time. That variation is slow, so slow that it can give the impression that what is considered just does not vary, but that impression is false, as history has shown.
CHAPTER 2 JUSTICE IN RELATION TO A CIVILIZED SOCIETY.

It is vital to understand how the concept of justice bears upon the various aspects of any civilized society. These include concepts such as Freedom; Law; The State; Punishment etc. Moreover it is important to understand the theoretical and practical relationships and interactions of these concepts. Therefore we are going to have to face a few basic questions such as just what do we mean when we talk about Freedom? What should constitute Punishment etc.? These are matters of great importance and sometimes of great confusion because philosophers, governments, economists and everyday people often have quite different ideas about these very basic points. Moreover as they usually forget to let us know what their view is, a great deal of bickering and dispute takes place. Lawyers (to which I plead guilty) tend to like definitions because definitions have the great advantage that, even if one does not agree with them, at least you know what is, and what is not being talked about, so that one should not end up arguing at cross purposes. Therefore, to that end I shall set out, wherever possible, the viewpoint from which I shall be starting. Sometimes it will be necessary for me to try to justify to you the starting point I have chosen, particularly where there are viable alternatives. At others I shall just say ‘this is what I mean when I am talking about so and so’. As an example let us start with:-

**Freedom:** Now Freedom is a state. It has nothing to do with the Law and is not linked to it in any jural relation\(^{11}\). This will come as a shock to many people who are used to thinking of it as a right. However Freedom is rather like inter stellar space - it is everywhere that the law is not! Kocourek puts it very well:—

”Freedom is not a legal relation because it is one sided. A relation always involves two elements or two sides. Freedom is protected by the law by various claims and powers, but in itself it is not within the law. It is rather the end of law. Where Freedom ends the law begins, and where the laws end Freedom begins.”\(^{12}\)

The law on the other hand involves a relationship. It involves a situation in which the activities of two or more parties affect their relationship, thus making it a jural relation.

It is arguable that there are only two fundamental types of jural relationships -

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\(^{11}\) For those unfamiliar with the term jural relations it is discussed in detail in chapter 3 post.

Claims and Power\textsuperscript{13}. This is extremely important because of the confusions that arise through failure to recognize this, with the resultant tendency to include other things. We shall be going into this in chapter 3 in order to separate and distinguish some of the terms which are currently used in a confusing manner.

For the present however we are concerned primarily with the concept of Freedom. Freedom can of course be curtailed, rather as space can be occupied by stars. It is also interesting to note that in a sense it can never be absolute. My freedom to remain seated where I am is maintainable only at the cost of denying that same privilege not only to all other human beings, but to all animals, living things such as a tree, and also ultimately to all inanimate objects - one just cannot share the same space with a pile of bricks. It is important to note that I have thereby categorized Freedom initially as a Privilege not a Right. Later we shall be distinguishing between rights (which I define as Claims), Powers, and Privileges etc. and we shall see how, why and when a Freedom might become a right.

The law's relationship with Freedom

The law has a double sided relationship with Freedom. Primarily, it is in fact the law which constrains freedoms in the ultimate nature of their being. Therefore, the more law there is the less freedom we actually have. This must not be confused with the second side of the relationship - the fact that the law can be used to protect a freedom. It does this by creating a claim right under which a citizen may claim and enforce his right to that defined freedom. The distinction between the limiting nature (upon freedom) of the existence of laws generally, and the individual protecting function of a specific law must kept firmly in mind. Certain laws may protect a freedom (within limits) but the nature of law generally is to limit freedom.

The Growth of Society - The Purpose of Law

The next great definitional problem we come to relates to the law, its purpose, and its parameters. People will talk of law in many senses - from the strict command approach of the Legal Positivist Austin, to the theories of the Natural law school that law has its basis in morality. Here, the great schism lies in determining what might properly be called a valid law. Is its validity derived from its source (positivism), or its content (natural law theory)? - But these questions, which we will be going into later, relate to the system of law or jurisprudence, and the justification of various laws. For the moment I am primarily concerned with its purpose to determine how it fits into the picture.

\textsuperscript{13} Ibid p.10.
In this, Law's purpose, I take the pragmatic view in that I would go along (but only this far) with A. V. Lundstedt, one of the more extreme members of the Scandinavian realists. His view is that law is indispensable for the maintenance of human society and that it needs no other basis or justification. It is that term which is used to describe an existing phenomena.

If we return to our concept of freedom, the hermit is the only truly free man. Even then he is constrained by his very isolation which renders many tasks or desires impossible - i.e our completely free hermit is not "free" to cross an ocean, because alone he could not do it. Mankind does not appear to have been designed to be isolated, we have always been gregarious, but not always in large societies. Originally (it is presumed) we were in family units which were ruled by the head of the family. As they became small tribes different means of controlling them developed. Some no doubt continued to be controlled by the head, senior, or most powerful family. Others would have developed a rule by elders, councils or heads of families, some even by powerful religious or quasi religious leaders. Some would have been dictatorial, others more democratic. This variety of itself was a good thing, a facet of survival of the fittest in which different forms of society arose and competed.

Whatever their constitution, it was still necessary, in order to preserve the cohesiveness of the group, to provide rules governing the inter-action of its members. It was this that Lundstedt saw so sharply. Whether they grew up as customs or were imposed, once they became enforceable they were laws. Of course it is possible to effect other objectives by means of the law but these are additional, tacked on objectives. As such they can not be substituted for the basic purpose of the law without abandoning that purpose. No doubt it was this that made Lundstedt intolerant of those who lost sight of the basic facts in trying to ascribe new basic purposes to the law.

Therefore let us take as the starting point - the basic purpose of the law is to govern the actions and interactions of people within a society. This is the raison d'etre of the law - no more, no less. As we shall see many other objectives have been grafted on (differing from society to society) but the one fundamental paramount purpose is the thing common to all, the governing of actions and interactions within a society. With our advances and the increased contact between societies we find the more sophisticated international law growing up, but this is actually no more than an attempt to govern the interactions of different societies having different basic laws.

This brings us to A slight digression (But not without purpose):

Society or The State.
While we are looking at the early developments of societies and their laws we should perhaps consider why those societies or groups were formed in the first place. Basically it was for protection against predators (including other tribes), for strength, and for ease of living. It was no doubt easier to forage, kill one's prey, and obtain food when aided by another. It was also easier to protect oneself. In short it was an aid to survival of the fittest. Survival of the fittest is an important factor to bear in mind. It is not a man made concept. Like the wind and tides it is an external immutable regulator, and, I submit, it is ignored at one's peril.

Man's ability to co-operate gave him a great advantage, and he found that it was worth the sacrifice of some autonomy to obtain that. I appreciate that Aristotle took the view that man was innately political and while this may be true, I submit that my somewhat more pragmatic approach does not require the same major assumption, though it leads I suspect, to the same result.

Thus there was a sacrifice in autonomy and a gain in protection and quality of life. The surrender of autonomy can only be effected by upward delegation to a ruler or rulers (i.e whoever it is, once they have the power of decision, in practice they become, at least for that purpose, a decision maker or ruler).

The rulers themselves generally had two interconnected objectives: -
1) to make their society as strong and powerful as possible, and
2) to stay in power.
[It might be noted in passing that good rulers put them in this order, bad rulers have a nasty habit of reversing the priorities.]

In order to effect these ends, the ruler(s) had to control their people and get them to do as the leaders wished. In fact the objectives were interconnected in that unless they were successful in providing a strong and powerful society, capable of resisting others and providing for itself, they would be less likely to remain in power. They would eventually be overthrown from within or without.

Originally presumably anyone who fundamentally disapproved of the ruler or laws of his tribe had the options of:-
1) Packing his belongings and leaving. If enough were of the same persuasion they could leave and form a separate tribe, or
2) Staying and overthrowing the rulers. The new leader(s) would then take over and impose his(their) rule upon the tribe.
3) The Gorbachov Solution. This is difficult and rare. It is to join the system, work one's way up and then, when in power, to alter it. It requires someone of very special qualities and capabilities, but it is a far better solution than 2. Although I have said this is rare, it is not as rare as at first appears. Julius Caesar was an early example, and F. W. de Klerk another recent one. Doubtless a little research would produce other examples.

4) Persuading the ruler(s) to his view.

5) Simply knuckling under and obeying.

Even in the most primitive societies the rulers had to maintain a certain acceptance by those governed for the only alternative was imposing themselves through fear, ritual or precedent. Even in the case of suppression there would come a point sooner or later when the people would revolt, and by the sheer weight of numbers of those wishing for a change, eventually effect it. However, a powerful leader capable of standing up to those outside could, no doubt, get away with more internal repression than others, and for a considerably longer period.

The most recent example of this must be Hitler and National Socialism. What is generally forgotten is that when he came to power the people had been through a terrible time with unimaginable inflation and appalling unemployment. Hitler set about solving the terrible unemployment, which relieved a humiliating burden on the people and must have, at best, earned a great deal of gratitude, and, at worst, stifled criticism. Having thus secured a strong position he could subsequently get away with repression of a kind which would have been opposed earlier had he been less successful in alleviating the economic ills of the country.¹⁴

The parallels are still with us today. It is, as before, still the objective of rulers, whether elected or not,

1) to provide a robust society capable of standing up to outside opposition and 2) to remain in power.

A word must be said about the use of the expression "robust society". I have coined this expression for want of a better because while man was originally governed by the survival of the fittest a subtle change took place with the formation of larger groups. At this stage it was not necessarily the "physically fittest" who contributed to survival. The bow may

¹⁴ Also he was extremely lucky at first. All his enterprises seemed to go well, and he used his successes to appeal to national pride. Even when revolt was starting he appeared to lead a charmed life. Bombs intended to kill him failed, and to those wavering on the edge of revolt it must have seemed that he was destined to survive.
well have been invented by the original 97 lb. weakling who could not throw his spear as far as the others! Thus societies began to find uses for different talents amongst their members, but in the end it was the most ‘robust’ group, using its bows as well as spears that succeeded against its neighbours.

Success after all was the hallmark, and it still is today. The primary object of any government in any society should be success in providing its members with a strong, stable, and prosperous ambience. Again the parallel with the purpose of laws recurs. One may add other objectives but one cannot substitute them for the basics. For example, those who maintain that the primary object of a society is to give the people what they want are doomed to failure. To give the masses what they want - even if they could ever decide what that is - would almost certainly not be good for them. Equally certainly it would not be good for the rest of society. The reason one can say this without being in the slightest paternalistic is that, that great bastion (allegedly) of freedom and equality, the U.S.A. has reached the point where advertising has so distorted people’s perspective that we have cases of youths actually killing each other to possess a pair of trainers with the right name on the outside. The fact that they probably would not fit and that their main attribute is to make the feet smell, appears not to matter. Yet to kill for something - surely one must desire it a great deal. This would presumably place it high in the utilitarian scale, but that is another matter.

Of course the standard answer is to give the people the autonomy to choose what they want. Even so, there must be some overall regulator and, to the extent that this is imposed, it must be perfectionist\(^\text{15}\) which is theoretically anti-libertarian.

In practice the resolution of this dilemma would appear to lie in an examination of the State’s objectives - the provision of a robust society, one that ‘flourishes’ in the sense used by Aristotle (i.e. one capable of standing up to and alongside its neighbouring or competing societies). At the same time one must not forget the government’s secondary aim - that of remaining in power. The best way to secure this latter object, without resorting to oppressive means, is to allow as much freedom to the ordinary citizen as is possible within the scope of the first objective. That is to say, it would appear that the optimal form of government should ensure the overall robustness of a society while permitting the maximum internal freedom consistent therewith.

\(^{15}\) Perfectionism: A term here used to imply the imposition of the governing body’s view of “the good” on the general citizens. Anti-perfectionism is to permit people to have, and put into practice, their own conception of “the good”.

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Since the earliest times there have been disputes about the nature and purpose of the State. Aristotle's *Politics* provides us with a great many interesting insights which are still applicable today, even though his concern was with the *polis* or city state. Even though he thought that the true theoretical politician should be of the highest virtue (possibly more akin to a statesman in today's terminology), he recognized that most took up political life for the position and money [EE I 5. 1216a 23-27].

However, one of the things which I find so intriguing about Aristotle is his view of Justice and the importance he attaches to it. He takes it (in the Politics III 13. 1283a 38-40) to be a communal virtue from which all others follow, and he took the position that political justice involved the rule of law. He also took the view that humans are by nature political animals so that the *polis* exists by nature, and that human nature requires political life for its fulfilment. This is a view which is often disputed today, most preferring Hobbes's arguments put forward in the *Leviathon*, that the political state is a purely man made construction and that man is prior to the state and governed by natural law and possesses natural rights.

However I am not sure that humans are necessarily inherently political. Even so I believe it is possible to retain much of what is left of Aristotle’s views. Secondly I can not accept Hobbes's baggage of man being prior to the state and governed by natural laws and natural rights. These latter concepts have always seemed to me to be epistemologically and philosophically totally unfounded. In most cases they just seem to appear, rather like the Cheshire cat in *Alice in Wonderland* [and on top of that they are proving to be inherently destructive]. However I do propose to establish a basis for one, and only one, Inherent Law, which some might try to construe as a natural law. I do not claim it to be a natural law as such but rather one which we shall see is inherent in the very concept of civilization.

I believe, and hope to show, that my view is correct and actually draws some substance from Aristotle who regarded politics as being similar to a living organism which he viewed as being affected not only by its inner cause but by its surroundings. Thus it would be quite natural for societies to develop in different forms and no-one can say that any one

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16 As we shall see the conflict may not turn out to be quite as marked as it appears at this stage, because I am prepared to countenance "natural justice"- albeit of the living organism variety - though I do not accept either "natural law" or "natural rights". These always prove to be Yeti like creatures that fade away into the mountains and no one has yet succeeded in catching one alive, dead or even fossilized.
form is of such excellence that it must needs suit every circumstance. Aristotle certainly conceived that although there might be a theoretically best form, others could suit the needs of different societies.

Now I appreciate that there are still many arguments as to what form such a state should take. These may range, even amongst democracies for example, from a welfare state providing services and security, to a rigid free enterprise state. These arguments are however all resolvable within the overall parameters of robustness and internal freedom and do not substitute for them. It is not the purpose here to discuss the relative merits of different societies - that is primarily a matter for political philosophy. We are merely concerned that within a robust state (viewed from outside) there should be the maximum freedom within. This would suggest that the body of law governing the citizens should be optimized by its simplicity. Again it is true that the larger and more complex a society is, the greater will its governing body of laws be, but we should always keep in mind that law for the sake of regulation adversely affects the citizen's freedom. The more a state nannies and over regulates its citizens the less robust it will prove to be until it ceases to flourish against its competitors, becomes weak and is over-run, or, as in the case of the USSR, it implodes under the weight of its own bureaucracy. Moreover the greater the regulation, with its concomitant bureaucracy, the greater is the likelihood is that corruption will become endemic. This will destroy the society more effectively than any external force.

So, while the purpose of law is to provide a means of regulating the activities of a group or society, it should not be regarded solely as a means of control, for the manner and style of the law itself will have an effect on the society. The degree of control applied by the law will have a direct bearing on the quality of that society. Additionally, the quality or ‘justness’ of the laws themselves will have a direct effect on the lives of the people. Thus the law may serve other purposes than the single one of control. While its fundamental purpose is control, the quality and quantity of its content are of enormous importance.

**Law as a created body.**

The law of any society is a created thing restricting freedom even in its most

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17 Though it seems that we are in danger of trying to do just this with our so called Democracy today.

18 There is an argument against this statement, because, when Great Britain ruled a quarter of the world Halsbury's Statutes occupied about four feet of shelf space. Today when we cannot even govern ourselves properly the wretched things occupy best part of a wall and we are badgered about by laws and regulations to the point of virtual 'castration of independence'.
purely regulatory form, e.g even the rules for making out one's will restrict one from doing it any way you want. There are those who will argue that the validity of any law lies in the manner of its creation or recognition (Legal positivism\textsuperscript{19}) or alternatively by virtue of its content (natural law theories). However, before considering a possible means of reconciliation of these views (see chapter 5) we shall look to the manner in which law is created and then to its content.

A preliminary caveat: One must be careful to distinguish rules of behaviour from the law. Professor Dworkin's example of the rule that men should remove their hats in church, followed by a discussion as to whether baby boys should remove their bonnets [See Dworkin Taking Rights Seriously p.50.] is a marvellous example. The law primarily is that which the state recognizes as applicable to its subjects. Much has already been written on this subject and we shall be discussing various distinguishing features as we progress.

For example, the law of our Society is created in two ways:-

1) The directly created enacted statute &
2) The Common law created by judges and accepted by the Courts. This latter may include some laws accepted by the courts as being derived originally from long standing custom. But it should be noted that, until accepted by the courts or incorporated into a statute, they are and remain customs, not the law. This is why I have not classified Custom as a third way of creation of law. It is, if you like, a third source, but that is subtly different.

THE POSITIVIST VIEW OF LAW.

Positivists vary and do not all subscribe to exactly the same views. One of the most succinct analyses of these was by Professor Dworkin in Taking Rights Seriously. Dworkin says:- “These key tenets [of Positivism] may be stated as follows:

"(a) The law of a community is a set of special rules used by the community directly or indirectly for the purpose of determining which behaviour will be punished or coerced by the public power. These special rules can be identified and distinguished by specific criteria, by tests having to do not with their content but with their pedigree or the manner in which they were adopted or developed. These tests of pedigree can be used to distinguish valid legal rules from spurious legal rules (rules which lawyers and litigants wrongly argue are rules of law) and also from other sorts of social rules (generally lumped together as ‘moral rules’) that the community follows but does not

\textsuperscript{19} Throughout when I refer to Positivism I am referring to Legal Positivism which should not be confused with the school of logical or epistemological positivism. The latter though much in favour at Oxford in the 1940's and 50's is now largely discounted.
enforce through public power.

(b) The set of these valid legal rules is exhaustive of ‘the law’, so that if someone's case is not clearly covered by such a rule (because there is none that seems appropriate, or those that seem appropriate are vague, or for some other reason) then that case cannot be decided by ‘applying the law’. It must be decided by some official, like a judge, ‘exercising his discretion’, which means reaching beyond the law for some other sort of standard to guide him in manufacturing a fresh legal rule or supplementing an old one.

(c) To say that someone has a ‘legal obligation’ is to say that his case falls under a valid legal rule that requires him to do or to forbear from doing something. (To say he has a legal right, or has a legal power of some sort, or a legal privilege or immunity, is to assert, in a shorthand way, that others have actual or hypothetical legal obligations to act or not to act in certain ways touching him) In the absence of such a valid legal rule there is no legal obligation; it follows that when the Judge decides an issue by exercising his discretion, he is not enforcing a legal right to that issue

This is only the skeleton of positivism. The flesh is arranged differently by different positivists, and some even tinker with the bones. Different versions differ chiefly in their description of the fundamental test of pedigree a rule must meet to count as a rule of law.”

I have set out Dworkin's definition because he is one of the principal critics of certain aspects of Legal Positivism and I find many of his comments exceptionally persuasive. However my theories appear to differ in certain respects from Dworkin's and it will be necessary later to see how far this produces disagreement, or whether the theories can co-exist.

Dworkin then shows how Hart solved the problems of Austin's command approach. Hart distinguished rules as being of two kinds: Primary rules such as those of the Criminal Law i.e. rules of direct application, and secondary rules which themselves comprised two groups. The first of these related to the administration of the system of law, the basis for formulating, varying and repealing laws and administering them through the system of courts and judges. The second related to procedural laws such as how to form a contract, make a valid will etc.

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21 Briefly Austin's theory was that all law emanated from the command of a Sovereign.
Hart also made it clear that not all rules were necessarily commands. It is possible for a rule to be binding because it is accepted as a standard of conduct, i.e. it is recognized as binding. It is also possible for a rule to be a ‘valid’ rule i.e. that it is enacted by virtue of an identifiable rule that provides for its enactment. In short it is recognized by virtue of the ‘rule of recognition’. The rule of recognition of a community is that which governs the acceptance by that community and particularly its officials of a rule as valid.

Dworkin then sets out to establish two points of distinct variation from positivism. Both are extremely important. The first relates to the making of new law by the courts in which the judge exercises ‘his discretion’. The establishment of new law in this manner is one which Dworkin disputes. It is his view that the judge considers Principles, which unlike rules of law, are not fixed. He weighs them and comes to a decision, which itself may be right or wrong. The fundamental distinction is that these legal principles are there, and that the judge is required to decide upon them. Therefore the judge is not making new law by an act of discretion. He feels that most lawyers, if they think about it at all (though he was not quite that pointed), accept judges rulings in hard cases as an act of discretion and that this is wrong. Here I totally agree with Dworkin and I believe that with some variations it provides a major forward step in our understanding which I shall be pursuing later.

The second and quite fundamental point is that Dworkin feels that the ruling theory of positivism, as he has described it, does not accept the idea that individuals can have rights against the state prior to any rights that are created by specific legislation. "Legal positivism rejects the idea that legal rights can pre-exist any form of legislation". I totally accept that. Dworkin rejects it. Stated like this it looks as if an irreconcilable stand off is inevitable but part of my task is going to be to question whether such views are necessarily irreconcilable. Positivism has long been at odds with theories of natural justice but Professor Raz took the view that a reconciliation might be possible and although he admitted that he had not succeeded he has taken the first and most important step, namely that of actually pursuing the idea that a reconciliation might be possible. In a world of opposed views the importance of that first step cannot be underestimated. It is my object to pursue this line, inspired by Raz, though not in the same manner. It is my rash belief that I might have taken steps along the path to success. No doubt in my attempt I shall bring down on myself hell-fire and brimstone from both sides.

Justice

I believe that a great mistake was made in allowing the concept of Justice to
fall from the position of pre-eminence that it had in Aristotle's time. As a result there was a failure to appreciate the influence it actually has on the basis of other concepts with the result that when questions arose other explanations and solutions were sought. Justice was thought of mainly in the context of its legal application. I believe that a study of the vital role justice plays in our thinking can help to provide answers to problems which have been eluding solutions.

As we have seen Justice is a concept far greater than its mere application to the law. The great confusion came about in the failure caused by the habit of not separating the concepts of Justice from the concepts of law. Justice is a subject which can be considered completely in isolation from the law. As we have seen it involves concepts such as fairness, impartiality, even-handedness etc.

While it would seem, at first glance, that the principles of justice should override the law this is not always the case. In a complex society the needs of expediency and administration have sometimes been seen to outweigh the requirements of justice. To emphasize the separateness of the two it would be possible, theoretically, to have a legal system in which the concept of justice played no part. One can envisage a society in which offences would be defined and no extenuating circumstances allowed. Such law would be rigorous and unbending. However it could be argued to provide the merit of certainty. We would not like such a system but there is no doubt that it could be made to work. In some instances it could prove to be just, as we define the term, in other instances it almost certainly would not. However the point remains - Law can exclude justice.

It is important to realize therefore, that, because it could theoretically be excluded, justice is not a necessary constituent of either law or punishment. In practice in Western philosophy it plays a considerable part and thus while it is vital for us to consider it, it is separable. A great part of our idea of justice involves intentionality, and this plays a far more important part in criminal law than it does in civil law. In civil law the damages are often definable, and whether, for example, the breach of a contract giving rise to damages was deliberate or accidental does not necessarily affect the amount of the damages. In the case of punishment much may hinge on the intention involved. Thus it will be necessary for us later to look further into this.

**The relationship of Society, Law, Punishment, Justice, and their various philosophical inputs.**

The time has now come, I believe, to examine the overall picture into which the pieces of the jigsaw have to fit. Most philosophers, with a bravado and ability which
leaves me breathless tend to plunge straight into the maze and fight their way through to their objective (or not as the case may be). Possibly because I am a hands on philosopher, or one who has come back to philosophy after a life of actually having to deal with engineering and law, I like to try to produce a visual image of the puzzle I am working on. I therefore tried to sort out in my own mind a picture of how the pieces related.

This is necessary or at least I hope, helpful because, as should have become apparent if I have been making my point correctly, we are at the cusp of several distinct areas of philosophy. I have therefore set out in Fig.1. my view of the best differentiation of the subjects, showing their primary philosophical inputs. I say primary philosophical inputs because obviously they are not rigidly confined. For example Moral thinking can have a considerable influence on the type of State and the normative law. Nevertheless it is my contention that it is necessary, for example to emphasize that the primary input to Justice is governed by moral and ethical concepts, whereas the normative law is governed primarily by jurisprudential considerations (legal philosophy) and the manner in which the State wishes to control the society (political philosophy).

In Fig.1 I have made the following assumptions:-

Law:-

Law is merely that which is enacted or recognized by the courts. It has no substantive per se existence. It is also Law insofar only as it can be enforced. I am not referring here to degrees of failure to enforce a law which could be enforced, but rather the basic inability to enforce as for example in the case of Rhodesian U.D.I. where we claimed our law to be that of Rhodesia. The Rhodesians merely took no notice and went about their business.

Punishment:-

Punishment is regarded primarily from the pragmatic point of view. It is basically the sanction for the non performance of the normative laws. Its raison d'être is to ensure obedience to those laws. The degree to which it does so is related to its effectiveness. Secondary objects may be to indicate the offence's severity in the scale of things; to provide retribution; to act as a deterrent, and even possibly to effect reform or provide a cure.

Justice:-

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22 I appreciate that there is a grey area in relations to customs, particularly commercial customs. However in accordance with my theory of Principles of Justice (see chapter 5.) these may well be accepted by the courts as if they were enacted rules.
The concept of Justice involves Equity, the question as to whether the law is fair / the punishment is fair. It involves the Moral and Ethical perceptions of the State and the people of the particular time. These things are in fact mutable and change with time.

Fig. 1

The State I have used as an illustration is one such as the U. K. Without bearing the above relationships in mind it is very easy to misconstrue or place the wrong philosophical interpretation on any situation - see the example in footnote 23. Unfortunately most writings on the subject appear to contain no such analysis, relying on their readers to carry it or a similar one in their heads, or worse still not even to formulate one. This certainly adds to difficulties of interpretation. In order to understand any part it is necessary to locate it

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23 This portion shows one of the peculiarities of our system. It is not strictly necessary for the purposes of our analyses but it illustrates clearly why we need to establish the relationship and the sources. For example in the U.K. The Lord Chancellor's Office [L.C.O.] which is primarily an arm of the state (political) has been known to write to magistrates concerning the length of sentences they may have handed down. The Lord Chancellor's Office may, for example, encourage less custodial sentences, as indeed it has done, not on moral or philosophical grounds but on the purely pragmatic grounds that the prisons are too full. The effect of this on the public conception of justice may be one of moral outrage (feeling prisoners are getting off too lightly) but it is absolutely essential in assessing the results, to realize the actual cause. - ie. here a perception of justice is distorted by a political and not a moral act.
in the system.

Having given ourselves a pictorial view of the overall set up we can return to amplify one or two definitions further, because as I have pointed out, many people use the same word in different senses and this leads to immense difficulties if the reader is unaware of the sense used by the writer. Dworkin also emphasises this, pointing out, for example, that the English only have one word for law, covering that which in both French and German requires two words. Generally I shall use the term "Law" in the sense of the body of Normative Law i.e. that which is enacted by statute; the common law which is accepted by practice or recognition (per Hart); and the law derived from custom and accepted as above. This includes Hart’s primary and secondary laws.

The next area of vagueness relates to the term "Rights". This will be the subject of considerable discussion in later chapters. Generally however it is sufficient to say at this stage that I am a confirmed Hohfeldian, believing as he did that enormous confusion was caused by the use of the one word “rights” when referring not just to legal claims but also to privileges, freedoms and even Power. The fact that we have a number of words that can be used to impart precision therefore leaves us a clear path to avoid some of these confusions. In most senses when I refer to legal rights I therefore mean a Hohfeldian claim-right.24

Such rights involve a jural relation which itself is a creature of the law. Thus by my definitions there cannot exist claim-rights that are prior to the law. Hence my apparent conflict with Dworkin. However this conflict is in part brought about by my definitions of law and of rights. Yet we have seen that Dworkin considers there is something beyond the strict legal rules to which I have confined my definition. The difference appears to be that he considers these principles to be part of "the law" though different from a rule of law. I on the other hand would tend to say they are a part of the concept of justice, not law, for the very flexibility he applies to them fits more naturally here. Therefore it is possible that the apparent Mexican stand-off envisaged before may yet be resolved.

What I have done is to revert to the old distinction between law and equity. It

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24 For those completely unfamiliar with the term ‘Hohfeldian Claim-right’ the derivation of this and other related terms is discussed in detail in chapter 3, post.
is true that since 1873 the court of Chancery was merged with the High Court. But in the old
days the Court of Chancery dealt with Equity under the Lord Chancellor and his Vice-
Chancellors and was originally a means of rectifying injustices under “the law”. It was also
variable, equity being described at one time as ‘being as long as the Chancellor's foot’. Nowadays we have become used to thinking of the two as one but there are useful
philosophical distinctions.

**Man as a Group Animal.**

While I have outlined a purely pragmatic background to the necessity of man living as a group animal, the idea has considerable philosophical backing. Aristotle's *Politics*
are based on the same idea and it is useful to examine the background of the concept.

Aristotle's approach was based on the premise that humans are, by nature, political, i.e. disposed to live together and co-operate. He also believed that the *polis* or city state existed by nature and served natural ends. Moreover he felt that the polis was prior to the individual members and that it arose from practical wisdom co-operating with nature. Now the modern state has changed completely from the polis that existed in those times but some of the underlying ideas persist to this day. It is interesting to note that Aristotle's idea of the polis as prior to its members gave rise to the fact that when Aristotle refers to the good of the state he is referring to the good of the whole as a unit and not the most good of the individual members making up the state. Thus he is able to contemplate things which may not be to the individual's advantage. This is important because today the view is often taken that what is important and should be the object of government is the happiness of the most citizens. I take Aristotle's view that what is most important is the ‘robustness’ of the society (as a unit).

Within the limits defined by the above one may well look for the happiness, autonomy, and well-being of the individual citizens. That this is in some measure accepted by all states is illustrated by the fact that the state expects its citizens to help defend it when it is attacked from without. That this is a restriction on the citizen's freedom or autonomy should also be noted.

**Law Making.**
The state represents the law making body. Within the political philosophy the system of jurisprudence is contained, and the state sets out the laws and sanctions which it deems appropriate. The State may or may not have a constitution. It is my argument, though it would not necessarily be accepted by philosophers such as Raz, and certainly not by others, that this is irrelevant. Any constitution is, in my submission, no more than a series of normative laws which are enshrined with a special status which makes them more difficult to amend. But in all cases any constitution can ultimately be changed, suspended, or even swept away, however difficult that may prove to be. This is because Power is prior to Rights (a point of view which I agree does not appear to be universally shared, but for my justification see chapter 3), and constitutions merely set out certain desirable Hohfeldian privileges or freedoms which, by virtue of their incorporation into normative law, establish jural relations giving rise to claim-rights which are sometimes falsely alleged to be inalienable. Inalienability, it could be argued, like equality, is a myth.

This question can be important because if one takes a “rights” based approach, i.e. that rights are fundamental pillars of the fabric of the state, then in that case certain of the so called "rights" could be held to affect punishment, and thus also the philosophy of punishment. For example, Raz, while a positivist, is greatly concerned with rights, which he devolves from interests in a person, such interests being sufficient to create a duty in others. This is a definition which, as will be seen later, is one which I totally reject on the grounds that it is void for incoherence.

**The system of Jurisprudence.**

Philosophers often seek to find a means of answering basic questions in a deterministic way - The ultimate society; the best constitution; the definitive system of law. Each is to be backed by a theory, and, its proponents will argue, proves its worth as the best. Yet the truth is that flux and variation are the background to everything. Nothing in the universe stands still and it often seems that there may be no ultimate answers to some of these questions. Philosophers such as Roscoe Pound recognized this and he set it out for all of us.

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25 In short that an attempt has been made to make them proof against politicians, officious bureaucrats, and other minimalist characters of that ilk.
to appreciate even though we seldom do. The truth of the matter especially with respect to Law was set out by him in his *Introduction to the Philosophy of Law*. In chapter 2 he sets out the position and distinguishes twelve separate conceptions of what the law is, starting with the Divinely ordained such as the Mosaic law or Hammurapi’s code, through the tradition of old customs, recorded wisdom, to a philosophically discovered system of principles relating to the nature of things to which man ought to conform (the Roman Jurisconsult), to the more strict concept of a body of ascertainments from an eternal and immutable moral code (pure natural law theory). Next he cites the concept of law as a body of agreements of men in a politically organized society as to their relations with each other. Seventh he says law has been thought of as a reflection of the Divine reason governing the universe (Thomas Aquinas’ view which governed and affected English law until comparatively recently). Eighth there is law as a body of commands of sovereign authority (Basic positivism). A ninth idea he cites as a system of precepts discovered by experience enabling individuals to enjoy the most freedom possible consistent with the freedom of others. (This is in part consistent with my contention that over regulation is primarily freedom destructive). The eleventh is particularly interesting in that it regards the law as a system of rules imposed by a dominant class for the time being in furtherance of its own interests. Finally he gives the example of law as the dictates of social or economic laws with respect to the conduct of men in society discovered by observation and expressed in precepts worked out through experience of what would and would not work.

The most important point however is that, as he went on to point out

“each of the foregoing theories of law was in the first instance an attempt at a rational explanation of the law of the time and place or of some striking element therein.”

At the time Pound first wrote this (1922), law was the law related very much to an enterprise society and it reflected the enterprise philosophy. Since then there has evolved a very different concept of society, a society based on looking at people's wants. This has been developed by some into a Welfare society which is very much the law of our current

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26 p. 30. For a complete exposition of the above summary see An *Introduction to the Philosophy of Law* second edition 1954 ch.3.
society. Today the enterprise society, although still encouraged in some quarters, is beginning to take second place to a welfare philosophy, certainly at least as far as the UK and the EU are concerned. The effect of this shows in many ways in what may be considered to be Just, i.e it will reflect itself in concepts of justice and what we currently consider to be ‘naturally just’. As such this will feed back in systems such as our own (though not necessarily in other systems such as a dictatorship) as I have shown in Fig. 1 to affect the political input to the legal system.

Pound did not provide us with the same analysis with respect to justice but it is my contention that justice also must be based on the concept of the morality of the time and of the particular society at that time.

Thus it is my belief, that in considering any philosophy of law, Punishment or Justice, it is imperative to keep two things firmly in mind:-

1) The relationship that I have set out in Fig.1. and
2) The primary philosophical inputs governing the individual parts.

It is by this means that I believe we actually can go further than Raz, by reconciling concepts of ‘natural justice’ (involving equity and discretion) as opposed to ‘natural law’ with the concept of positivist normative laws. Unfortunately a detailed consideration and deduction of all the principles (rules) of ‘natural justice’ is beyond the scope of this book but it must be emphasised that in my submission the concept of ‘justice’ in general may vary in accordance with the morals and ethics of the day and of the society.

To give an example, it is no longer considered morally justifiable to set ‘man traps’ to catch poachers. A concept of moral injustice will filter through the public reaction to a law or judgement, and be fed back, in a society such as ours, to the State, who may do something about it - as in the case of man traps, or not - as in the case where it is often suggested that the majority might want to reintroduce capital or corporal punishment. In the U. S. on the other hand, some states have actually re-introduced capital punishment in response to such reactions. Thus the various parts inter-act or to use Raz's words, though in a different context, there is an internal relationship.

In the case of punishment we have both the Judge's discretion and the reaction of the public to sentences. This is an increasing factor in today's society due largely to the far
greater ease of communication. Unfortunately the very means of communication may also be a means of influencing those informed, which is why it may be argued that it is necessary for governments to be free to use their own ultimate discretion. It will be necessary for us to consider how this relates to a philosophy of punishment.

At this point a brief review of some of the arguments relating to punishment is called for.

**The Justification of Punishment.**

Because of its apparent necessity, its presence in all legal systems, Punishment per se is rarely the subject of philosophical justification. Moreover it is always easy to fall into the trap of justifying the particular punishment in terms of its deterrent, retributive, value etc. In addition it is easy to confuse the justification with the legal relationship. For example to confuse the justification of punishment with say the existence of a breached duty on the part of the perpetrator of the crime. It is a subject where the edges seem more blurred than most. Nevertheless a philosopher's attitude to this question will help determine the type of punishment which is considered necessary, or indeed, in some cases, whether punishment is required at all.

J. S. Mill believed in securing the just rights of others as an aim of punishment. F. H. Bradley who opposed this thought that Mill took the view that punishment was justifiable only as a means of benefiting the offender and protecting others, and while Bradley thought these aims desirable side effects he took the main characteristic to be the destruction of guilt, which created a criminal desert in the offender. i.e. a substantially retributive approach. Later he took the view that punishment was a reaction of the whole community against an action that weakened it. Moreover punishments need not be ‘genuinely moral’, being overridden by the good of the social organism.

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27 Examination of Sir William Hamilton's Philosophy 1872 p.597.
28 *Ethical Studies* (first essay) 1876.
29 International Journal of Ethics 1894.
It is interesting to note the early appearance of references to “rights”. T. H. Green took the view that punishment was justifiable by virtue of the offender’s violation of someone’s rights. As this was Punishment by the state for breach of publicly supported rights this separated it from private vengeance. Bosanquet also saw punishment as the State’s maintenance of rights by use of force. It was an annulment of the wrong act, which was necessary to prevent the setting of a precedent. It thus maintained moral standards and acted as a cancellation of the wrong act, negating the bad will of the criminal. One could perhaps describe this as the atonement justification and there are a great many arguments in its favour. It is not strictly bound to morals even though ‘it maintains the moral standard of the general mind and will’, nor necessarily to ‘curing’ the wrongdoer. Nevertheless deterrence and reform are treated as part of the whole of Punishment.

Those who argue against the retributive theory often do so on three grounds:

1. Pain and sin cannot be equated
2. An addition to the pain for reform would be unjust and
3. Retribution makes forgiveness always wrong.

I would argue against these on the grounds that in case 1. Punishment is not related purely to sin and morality. In 2. it is not possible to assess these relative to each other (throwing the arguments used in their first proposition back at them), and in 3. Forgiveness is for the victim; Retribution is for the state, and in any event the punishment of the criminal is an aid towards forgiveness by both the victim and society.

There is also the utilitarian approach that punishment is justified in defence of the public good, but those who do not accept the utilitarian approach feel that deterrence is a result of publicity and Mabbot quotes a criminal as saying "To punish a man is to treat him as an equal. To be punished for an offence against the rules is a sane man's right". A similar argument to 2) above was used against the lex talionis by Blackstone who argued that

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30 It would appear that these rights were almost universally considered to be a type of Hohfeldian claim-right with its concomitant Duty. It is the breach of this which causes the punishment to be applied in ‘compensation’.


32 Bernard Bosanquet. The Philosophical Theory of the State 1899.

33 J. D. Mabbott ‘Punishment’, Mind Apr. 1939
one could not equate for fraud or forgery etc.34

In many respects the views of J. D. Mabbott35 are particularly helpful, whether one is persuaded by them, as indeed I am, or not. This is because he takes a strong line in which he separates retribution from both deterrence and cure. In accordance with his theory punishment relates solely to retribution.

“The truth is that while punishing a man and punishing him justly, it is possible to deter others, and also to attempt to reform him, and if these additional goods are achieved the total state of affairs is better than it would be with just the punishment alone. But reform and deterrence are not modifications of the punishment, still less reasons for it.”

In fact he goes on to make his point for separation with extremely good examples, and equates the claim of ‘right’ to punish with reparation and places the question of forgiveness solely with the victim, and not the court or society. Like Hohfeld his ability for separating disparate issues is acute.

But what is the relevance of these different approaches to Punishment? The answer is that the approach or underlying philosophy may colour the whole subject. For example, Raz takes an entirely different approach to Mabbott in that he argues that there could be a case for disobedience on moral grounds with respect to a law and this would have a powerful influence on his approach to punishment

Hart's views are discussed later. However it must be noted here that Hart introduces us to a useful division of the subject into definition, general justifying aim, and distribution. Distribution covers liability to be punished and degree of punishment. He also, like Mabbott, introduces considerations of Justice, for example that the insane should not be punished.

SUMMARY - A brief look back and a glimpse forward

In the course of the above I have attempted to illustrate the differing views held with respect to some of the subjects with which we are involved. At the same time I

34 Though a great admirer of Blackstone I submit that this is one of his sillier arguments. Because a spanner does not fit every nut on my outboard motor, I do not therefore heedlessly throw it overboard. I use it where it is appropriate.

35 J. D. Mabbott ‘Punishment’ Mind Apr 1939.
have tried to indicate the approach which I favour and the guiding philosophical inputs. As we progress I shall attempt to justify my preferences and argue their benefits.

The correct solution is to start from basics and discard a few myths. It is however absolutely essential to distinguish just what it is one is talking about therefore all terms should be Hohfeldian, or otherwise clearly defined.

Freedom is a state and does not exist by itself. It has a necessary and irrevocable corollary. You will recall that I illustrated this by reference to the simplest freedom - My freedom to stay in one particular spot, is maintainable only by denying the very same freedom not only to every other human being, but all animals, plant forms (I can hardly share the space with an oak tree) or inanimate objects such as a pile of bricks. Once this very basic fact is appreciated the whole scheme of things comes into focus. General freedom of action obtains to a person on their own. However as soon as there are a number of people their interests conflict and restrictions of a general nature (plus operation facilitating procedures - e.g how to make a valid will etc.) are defined by law. Thus Freedoms do not exist as rights, save only insofar as they are created by virtue of law (e.g. constitutional ‘liberties’). In this regard it must be remembered that a Constitution is actually only a form of law which has been enshrined with rules making it difficult to change. Nevertheless all constitutions can be suspended or overthrown by force. This is merely a practical application of the philosophical point which I maintain is true - namely that Power is prior to rights. This will be developed in the next chapter.

Thus by definition one is free to take whatever action is not restricted by normative law.

Law is intended to be obeyed. (Here I am taking the strict positivist view but I shall show later that this is not necessarily irreconcilable with some aspects of the natural law theory). It therefore creates claim-rights and correlative duties. These duties must not be confused with non obligatory moral duties which for the sake of clarity I refer to as moral obligations. (I must point out here that it may have been more logical if duties had actually been termed obligations because of the meaning of obligo to tie or bind and the use of obligatory as synonymous with mandatory, but the die is now cast by usage and any attempt to change would further muddy the waters.)
Basic, fundamental, or natural rights to freedom, are concepts which I believe to be in fundamental error because one can never define a freedom in terms which will not give rise to conflicts of interest. These necessarily give rise to some qualifier which immediately renders the definition void for uncertainty - e.g. Does freedom of speech entitle one to enter a crowded theatre and shout fire? If not, then a qualifier has to be added and so on ad infinitum. Exactly the same criticism applies to Raz's attempt to define Rights. He keeps receding a step, to duties, then to interests, all with their potential conflicts etc.

The correct solution, which I would propound, in the case of the Freedom believers is startlingly simple. It is simply that people are looking at the wrong question. The question is quite straightforward. It is: Given that there is a Restriction on any given activity, Is that restriction Just? The reason why I favour this question is that we can apply very simple logic to its resolution, as follows:-

1. The restriction is ascertainable.
2. The concept of justice, based on the moral precepts of the day is ascertainable. And
3. The answer is therefore ascertainable.\(^{36}\)

At this point the whole vacillating, vague, emotionally charged and politically tainted ‘Rights to Freedom’ industry may be relegated to the dustbin of confused philosophical thinking from which it ought never have been allowed to escape in the first place.

The solution in the case of ‘rights’ in general is not so simple but it requires a proper analysis of the jural relations involved and a clearly adopted set of definitions. If one does not adopt these then frequently one is forced as it were to re-invent the wheel - as for example where Raz says ‘I shall call this a ‘liberty right’ having come up with what Hohfeld described as a liberty in 1923. If one adds, as he does, the word right, it merely makes one think he is referring to a claim-right. Now claim-rights are jural and a liberty or freedom is non jural, and one can't mix the two without landing oneself in the philosophical soup. Of course if the ‘liberty’ has been incorporated into the law by some formal means (involving an exercise of power) it then becomes a ‘right’ properly so called, but at that stage it is no longer a ‘liberty’, because its status has been transformed.

\(^{36}\) Even so, having ascertained a possible injustice there still remains the question of what to do about it, and when, and if action is justified, and if so what action. These problems will be faced in chapter 4.
However in order to understand fully the importance of these distinctions it is of the utmost importance to define our terms. The necessity for this was set out by Hohfeld who was worried by the confusions that were being caused primarily by the misuse of the word "Rights", and I shall be following his reasoning in the next chapter. In addition I shall be extrapolating from the position he established.

If one takes these simple initial definitional steps, clarity, brevity and intelligibility are far more likely to be accomplished.

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For the non specialist: I appreciate that this chapter is not easy. This is because we are going to deal with both legal and philosophical terms in difficult and controversial areas. However it is logical. What we are going to do is in essence to take the word ‘Rights’ and show that through sloppy usage we use it to cover several meanings. In fact it turns out that there are six legal and three philosophical ways in which the term ‘rights’ may be used. People often point out that the Germans and the French have two words covering this term. However, not to be outdone, we actually have five quite common words which define the legal uses (Hohfeld introduced a sixth). So each of these meanings except one already has a perfectly adequate word which covers the precise use, and after reading this chapter I hope the reader will, whenever they see the word ‘rights’, say to themselves ‘Oh yes, and what precisely does he mean by that?’ In order to understand the analysis we have to master a concept which may not be immediately familiar. We shall be talking of opposites, which of course is familiar, e.g. the opposite of good is bad, but then we will consider correlatives. Now the best way to understand a correlative is to consider the situation where there is some agreement (or relationship usually referred to as a ‘jural relationship’) between two parties. The correlation is seen when looking at the situation from each party’s point of view; for example if A owes B £100, then B has a Claim against A for £100, and A has a correlative Duty to pay B. Therefore we say the Duty is the correlative of the claim. Note that: For there to be a correlative there must be two parties involved in some form of relationship (a jural relationship) with each other. Once you are happy about this you are 80% home and dry. It is because there are a number of new definitions that the whole thing looks so complicated but one really cannot deal with just a part of the analysis. So, I would suggest that one should not attempt to remember them all at once. The most important concepts to concentrate on are: that of a right as a claim; the concept of its relationship (correlation) with the attached Duty; the difference between a right and a privilege; and the concepts of Power and liability. One can always come back as and when needed to clarify other points later.

HOHFELD

Many eminent lawyers and philosophers have caused a great confusion to exist in considering various jural relations. In particular they use the term "RIGHTS" to cover a multitude of things such as claim- rights, lack of rights (Hohfeld's ‘no-right’, Kocourek's ‘inability’), powers, privileges, duties, disabilities, liabilities, and immunities. It
may be all very well for the public to use one word for all these things but for us to do so leads only to confusion and wrong conclusions. These terms and their distinctions are vital to any discussion in jurisprudence and the philosophy of law and justice. They are too often misused and confused in current usage. The problems involved were first analysed by Professor Wesley Newcomb Hohfeld of Stanford and Yale. I have used Hohfeld's terminology in trying to separate some of the issues because it seems to be the best and most logical. The definitions have also been used, with minor variations, by Kocourek in his minutely detailed analysis of jural relations.

Unfortunately his analysis of the terms is at first not easy to follow. Also many of his examples often related to complicated trust laws, that have since been changed so that it is easy to overlook the quite vital contribution he made simply to clarity. Moreover because his work was legally orientated and he often used difficult cases to illustrate his point, I believe it fails to receive more than scant and often dismissive attention.

He had the idea of exploring terms by first seeking out their jural opposites, followed by their jural correlatives. In exploring the meaning of a word he would first seek out its similar applications or words *ejusdem generis* until he was able to separate the meanings into logically definable segments.

He began by emphasizing the necessity of distinguishing between legal relations and the facts that cause those relations to exist. One of the examples he gives is the term "property" which is used to denote the physical object to which various rights (which as we shall see later includes privileges, powers etc.) attach. At the same time it may also be used to denote the legal interests themselves. The example which I like to use is that - You may believe that you have inherited your aunt's piano but it is in truth impossible to inherit a piano. What you actually inherit is a bunch of legal rights, powers and privileges with respect to the piano. A parallel sort of mistake is made by economists who talk of increasing the world's wealth which of course can not vary. While it is all very well to use these words in a vague manner in general conversation the distinctions and their parallels are of great importance in the fields of jurisprudence and philosophy.

Thus, for example, Hohfeld emphasises that we must be careful to distinguish between an *obligation* and a *contract*:

"The obligation then is not the contract, is not in the contract, nor does it constitute

37 *Fundamental Legal Conceptions* 1919 Y.U.P. (1964) - p. 27.
any one of its terms...When the contract is made..the binding law..being the obligation on promisor to perform his undertaking, eo instanti attaches...The terms ..are made alone by the parties...The obligation is the creature of the law”

(emphasis mine). 38

Again Hohfeld stressed that it is necessary to distinguish between Operative facts and Evidential facts. In any jural transaction there may be operative or evidential facts. Operative facts are causal, they change the legal relationship under general rules. For example in a contract between A and B the operative facts are that A and B are human, of legal age, A has made an offer; B has accepted it. Also the fact that A has made no misrepresentations and B has not revoked are negative operating facts. An evidential fact is one which affords a logical basis, not a conclusive one, for inferring another fact.

He then comes to the nub of the problem in that it is generally wrongly assumed that all legal relations are reducible to "Rights" and "Duties". This is a fundamental mistake. In order to illustrate this he broke down various relationships by considering their opposites and correlatives. In this regard any given legal or jural relationship involves two people (Referred to as the Dominus and the Servus as we shall see later according to Kocourek). Thus the correlatives in Hohfeld's scheme describe the same situation (jural relation) viewed first from one point of view then the other. It will be seen how these compare with the bare opposite of a situation.

He sets them out in the following manner:-

First, the **opposites**

<table>
<thead>
<tr>
<th>Jural Opposites</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right Privilege Power Immunity</td>
</tr>
<tr>
<td>No-right Duty Disability Liability</td>
</tr>
</tbody>
</table>

next, the **correlatives**

<table>
<thead>
<tr>
<th>Jural Correlatives</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right Privilege Power Immunity</td>
</tr>
<tr>
<td>Duty No-right Liability Disability</td>
</tr>
</tbody>
</table>

As they appear above (which is all that is usually quoted of Hohfeld) it seems difficult to accept. They appear to be just an arbitrary grouping, and not really of much use.

38 Ibid p.31 from Aycock v Martin (1867) 37 Ga. 124, @ 128 per Harris J.
It is only when we examine the way Hohfeld came to reach these definitions that their purpose and usefulness really become apparent.

He started by considering the relationship of:-

**RIGHTS & DUTIES**

First he looked at the way ‘right’ was defined by lexicographers to show the various meanings it included. He concluded that in law, and in general practice, it was most frequently associated with a correlative ‘duty’. The nearest synonym for right was a legally well founded ‘claim’ and the synonym for the correlative duty was obligation. In support he quoted inter alia Viscount Haldane L.C. in *Howley Park Coal etc. v L.& N.W.Ry.*[1913] A.C. 11.39

"There is an obligation (of lateral support) on the neighbour, and in that sense there is a correlative right on the owner of the first piece of land."

Thus ‘Right’ in Hohfeld's sense should be thought of as a **Claim-right** or well founded claim. **Duty** is the associated correlative on the part of the other party. Where X has a right viz a viz Y, then Y has the correlative duty. So for example, if I owe you £100. You have a claim against me and I have a duty to pay you. In short you have a **right** to the £100 and I have a **duty** to pay it.

However this by no means covered the potential uses of the word rights. The first problem we come up against is - What about the case where a so called ‘right’ involves no correlative duty? These situations he classified as **Privileges** rather than **rights** and the distinction is important because as we shall see they do not involve the same correlative. Therefore they are not the same thing.

**PRIVILEGES & NO-RIGHTS**

A right can and must be distinguished, as he did, from a ‘Privilege’. The

39 Hohfeld's primary quotes were of course from U.S. cases but such was his scholarship that there was almost invariably a leading U.K. case included in the footnotes. I have tended to refer to these where possible for convenience of reference except where the U.S. quotation is particularly apposite.
example he gave was that, Where X owns some land, we know that X has the **right** that Y
should stay off his land, and Y has the **duty** to do so (**right** and **duty** as correlatives as above).
But, in addition X, as the owner, also has the ‘**Privilege**’ of going on the land himself i.e. he
has no duty to stay off, nor does this ‘privilege’ give rise to any correlative duty on anyone
else's part. This it would have done had it been a ‘right’ to go on the land as we have
previously been using the word i.e. someone would have had a duty to let him do so. So the
proper word for X's ability to go on his own land is **Privilege** not ‘right’ - (if he had a **right** to
go on the land, someone, against whom he had that right, would have had to have had the
**duty** to let him do so - and that can happen but in entirely different circumstances).

Again referring to the example of X's land, - the correlative of X's privilege of
going on the land is that Y (who does not own the land) has No-**right** to go on to it. Hohfeld
coined the expression ‘no-**right**’ for the correlative of privilege as the only term which was
not already covered by a word in general usage. Nor does there appear to be a close
synonym.

This actually is not as surprising as it might seem, for **Rights** (claims) had
been used legally to cover both positive and negative claims and the opposite of a right or
claim was merely its absence, a no-**right**. Similarly this is the correlative of A's privilege
(from B's point of view) i.e. a no-**right**. (A has the privilege of going on his land; B has no
right to go on it corresponding to A's privilege). [In passing we should note that the opposite
of a **Privilege** (which if you like is a form of benefit) is in fact a duty].

However, just to complicate the issue, it must be noted that one can have more
than one of these relationships simultaneously. For example, if X (the owner) had, say,
contracted with Y to go on the land to do something for Y, then X would have both the
privilege and the duty to go on the land. This is important for the terms right and privilege
are not mutually exclusive but the privilege is the exact negation of a duty having the same
content.

He illustrated this by considering Professor Gray's example from *The Nature
and sources of Law* (1909), where Gray maintains that it was a **right** of his to eat a shrimp
salad for which he has paid. Hohfeld disagreed and maintained that he had the **privilege** of
eating the salad for which he had paid viz A,B,C, & D who have **no-right** to eat it. His
rights viz a viz A, B, C & D are that they should not interfere with his eating the salad. Now, argued Hohfeld, if X who owns the salad contracts with Y not to eat it, then viz a viz Y, X has no privilege of eating the salad. However his right that Y should not eat it is unaffected. This again is important because by virtue of confusing rights and privileges it is often erroneously assumed that the alteration of a privilege affects a right and vice versa. Such is not the case but it can erroneously appear so if both are regarded as ‘rights’, which is why it is so important to make sure we are using the correct word.

Another example is that a trader has the privilege of carrying on his business as best he sees fit. The closest synonym of Privilege is perhaps certain uses of Liberty (or legal freedom). However Hohfeld pointed out that, while ‘Liberty’ is used, it is not as frequent as ‘Privilege’ and it is in fact more likely to be used in the sense of bodily freedom. Indeed Kocourek emphasises this point and points out that freedom in its proper sense is non jural - This is a most important point which we shall be taking up later.

To avoid another possible confusion, privilege is not the equivalent of licence. Hohfeld did not regard Licence as synonymous with Privilege. He pointed out that a licence merely represents a group of Operative Facts required to create a privilege.

The next problem is that ‘right’ is so often used when it is intended to mean ‘power’. e.g. "He has the right to do that", meaning "He has the Power to do that. Sometimes the word authority is used but this is in reality delegated power as ‘The Sheriff has the authority to...’. So we will now consider:-

POWERS AND LIABILITIES

In analysing POWER Hohfeld felt that

“Too close an analysis might seem metaphysical rather than useful; so that what is here presented is intended only as an approximate explanation, sufficient for all practical purposes.”

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It must be remembered however that Hohfeld was concerned primarily with Legal conceptions and not particularly the philosophy involved. Later, it is intended to go into this aspect of Power as an extrapolation. Hohfeld defines Power by considering how a

40 Ibid. p.50.
change in a legal relation may occur. This may be due to some super added fact, or group of facts, which either are or are not under the volitional control of a human being (or group of human beings).

However, where the control is volitional then the person or persons whose control is paramount may be said to have the legal power to effect the change of legal relations that is involved in the problem. In other words where there is some legal relationship, it may be altered because of something that happens or is done. Where the facts bringing about the change are under the volitional control of someone, then those who have the control to effect the change are in fact exercising Power. He then proceeds to consider the nearest synonym which seems to be (legal) ability, the opposite of which is inability or disability. So he classifies disability as the opposite of power, and Liability as its correlative. This may be illustrated by the fact that, referring back to the case of the piano you inherited you have the power to contract to transfer its ownership to me. I am then liable to take up the ownership.

He points out that to use ‘right’ in this case is as confusing a misuse as is ‘capacity’ (again this word merely denotes the Operative facts). As examples he points out that X as an owner of property can extinguish his own legal interest by the operative fact of abandoning the property - (he takes the piano down to the local dump). He has the power to transfer his interest to Y, to create contractual obligations etc. He pointed out that the concepts are particularly useful in considering Agency cases where the Principle grants legal powers to the Agent with the creation of correlative liabilities in the Principal. Liability has a close synonym in responsibility. Also it must be noted that the liability can in fact be positive or negative (because the power itself may be positive or negative - rather in the manner of claim rights which can also be positive or negative).

Finally amongst our considerations a ‘right’ may often be used to describe an Immunity.

IMMUNITIES & DISABILITIES

Immunity is the opposite of liability. There may normally be a liability to

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Ibid p.50/51 My paraphrase.
perform (or avoid) an act, but there are cases where a person may be immune from that
liability, i.e. it is the opposite of the liability. Similarly Immunity is the correlative of
Disability. If the power to affect the relationship lies with X, then Y is under a correlative
Disability.

A Power bears the same general contrast to an Immunity that a Right (claim)
does to a privilege. i.e. a Right is a claim against another and a privilege is one's freedom
from the claim of another. Power is control over a legal relation over another and Immunity
is freedom from that control (power). The best synonym for Immunity is exemption or
Impunity.

As an example Hohfeld states that X, as a landowner, has Power to alienate to
Y. But X has Immunities against Y. Y is under a disability in that he has no power to
alienate the land. [or X has the power to sell or give/lease etc. the wretched piano to Y, but
Y’s disability is that, much as he may want it, he has no power to cause X to let him have it.]

If a sheriff has a writ of execution to sell X’s land, the Sheriff would have the
power and the correlative would be X’s liability to have the land sold (the opposite of
immunity).

SHORT SUMMARY

The reason for all these distinctions is by now I hope apparent. We are talking
about different things and they have different legal and philosophical ramifications. I take
Hohfeld’s view that the word “right” should properly only be used when referring to a claim-
right and that this involves a correlative duty.

It should not be used to refer to a Privilege because this does not involve a
correlative duty. The correlative here is a mere no-right.

Again, “I have the right to do that” should not be used when referring to an
immunity from a duty (e.g. a duty not to do something). So where I have a licence to come
on your land, say to do a job, I am immune from the duty to stay off your land. Of course if
questioned your response would be ‘You can't throw me off, I have a right to be here!’ but we
are being legally and philosophically technical here and what you actually have is an
immunity, i.e. “I am immune from the duty to stay off”.

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Also, and most importantly, "I have the right to do that" should not be used when we mean "I have the Power to do that". Remember Power involves the ability to affect legal relations. It does not involve the correlative duty, the correlative is the liability of the other party. An exercise of Power forms a new jural or legal relationship. A ‘right’ properly so called is just a claim under an existing jural relation. Power is prior to right (this will be discussed later).

These distinctions become very important when dealing with the philosophy underlying so much of what are loosely termed "rights" and therefore affect our approach to some of the subjects we are going to discuss in the following chapters. For example when there was a general duty to be called up for national service, the State had the Power to call you up and you were liable to join the forces. If you were at University say, you might be deferred, so that for that period you were immune from the call up. However you did not acquire a general right not to be called up.

The shades of difference are not always easy to illustrate, which is why they tend to get blurred under the one word. The most important distinctions however are those between Power and rights, and Rights and Privileges. These are particularly important when people start talking about ‘Natural rights’ when probably they may be referring to some form of privilege.

EXTRAPOLATION.

Utilizing the same terminology I have re-arranged Hohfeld's categorization into RIGHT’S based subdivisions and POWER based subdivisions as follows:-

I. A **RIGHT** is one person’s lawful claim against another.
   
e.g. One has a RIGHT:
   
   - not to be assaulted
   
   - to light

   It is interesting to note in passing that a **RIGHT IS SECONDARILY** something created by the exercise of a **POWER**.

   There is no antithesis of a RIGHT in the sense that a right can be both Positive and Negative and a further word for a negative right is therefore not required.
The Opposite of a right is a NO-RIGHT.
The exercise of a right brings about its correlative DUTY for the other party involved

e.g. one has a DUTY:
- not to assault others
- not to obstruct light
SECONDARILY to do whatever has been imposed as a result of the exercise of the power.

A PRIVILEGE is an EXEMPTION from a DUTY.
i.e is a freedom from a RIGHT.

II. A POWER is the ability to alter the legal status quo. POWERS are accorded under the Law

e.g. one has the POWER:
- To make a will
- To transfer property
- To make a contract

The lack of power or its antithesis is a DISABILITY.
The exercise of a POWER brings about its correlative LIABILITY for the other party. N.B. LIABILITY as used by Hohfeld can be both positive and negative.
e.g on the other party there is the LIABILITY:
- to inherit under the will
- to receive or take up the property
- to perform the contract

42 Here I suspect I differ slightly (though not in substance ) from Hohfeld who would say that by virtue of the contract the one party acquires the right and the other the duty to perform. I agree but it is also true that contracts are created under a power of the law so that it becomes a liability to be performed. My reasoning stems from the fact that one might contract voluntarily to pay a gambling debt but as such is not recognized the duty does not become a liability. It is not significant but I wish to avoid any question of illogicality. Of course Hohfeld might
An **IMMUNITY** is an **EXEMPTION** from a **LIABILITY**

i.e is a freedom from a **POWER**

This may be summarized another way:-

A **RIGHT** is a claim v. another [+ or -]

The exercise of a **RIGHT** induces a **DUTY** (Correlative)

Lack of a **RIGHT** is a **NO-RIGHT** (Opposite)

Exemption from a **DUTY** is a **PRIVILEGE**

A **POWER** is the ability to alter Legal Relationships

The exercise of a **POWER** induces a **LIABILITY** [+or-] (Correlative)

Lack of a **POWER** is a **DISABILITY**

Exemption from a **LIABILITY** is an **IMMUNITY**.

It is important to note that in choosing to categorize the definitions under **RIGHTS** (i.e. claim-rights) and **POWERS** I have chosen the two capacities the exercise of which involves a Jural relation. Hohfeld is not primarily concerned with the detailed analysis of jural relations. This is the province of Kocourek, and we shall examine this later. This manner of categorization is also important when considering the underlying philosophy, because it is my position that power must be prior to rights.

**RIGHTS IN REM AND RIGHTS IN PERSONAM.**

Before amplifying on the nature of Power it is extremely useful to consider Hohfeld's subsequent analysis of Rights *in rem* and Rights *in Personam*. 

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well have argued that there is a general duty to perform agreements (Stemming from the right to make them) and that the exception of non performance on gambling debts was a Privilege. And such an argument would be equally forceful because there are no lines of absolute demarcation.

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43 Extracts and quotes are from the later of Hohfeld's Articles on "Fundamental legal Conceptions as applied in Judicial Reasoning" (1917) 26 Yale Law Journal reprinted 1964.
‘Rights in rem’ (i.e. rights which avail against persons generally) ‘Rights in personam’
(rights which avail exclusively against certain persons).

Again Hohfeld points out how the expressions in personam and in rem have been used in a confusing manner and he introduces the phrases ‘paucital’ relations for relations in personam, and ‘multital’ relations for relations in rem. I shall be adopting these definitions.

The first misuse that Hohfeld clarifies is that a Right in Rem is not a right "against a thing", and he quotes Holmes C.J. in Tyler v Court of Registration (1900) 175 Mass. 71,76

“All proceedings, like all rights, are really against persons. Whether they are proceedings or rights in rem depends on the number of persons affected.”

Again the correct interpretation was set out by Austin in his Lectures on Jurisprudence or The Philosophy of Positive Law 1832:-

“The distinction between Rights....is that all pervading and important distinction which has been assumed by the Roman Institutional Writers as the main groundwork of their arrangement: namely the distinction between rights in rem and rights in personam; or rights which avail against persons generally or universally, and rights which avail exclusively against certain or determinate persons.”

Thus in rem indicates a general application and in personam a limited or specific application. Hohfeld uses the expression Multital right for a right in rem and Paucital right for a right in personam. 44

He states that the Multital right or claim (Right in rem) includes:-

1. Multital rights or claims relating to a definite tangible object e.g The landowner's right to prevent entry; chattel owner's right that the object shall not be harmed.

2. Multital rights in relation to non tangible things Patents etc.

3. Multital rights with respect to his own person. (no false arrest etc.)

4. Multital rights residing in A but relating to B. Alienation of affections etc.

44 Kocourek tends to refer to polarized and unpolarized rights.
5. Multital rights not residing in the person or object. Right not to be libelled, not to have privacy invaded etc.

Hohfeld took the position, which I support, contrary to some other legal views that a ‘right in rem’ does not comprise a single right with a single correlative duty resting on all persons against whom the right avails. Instead he took the view that it comprised many separate and distinct rights, actual and potential, each one of which has a correlative duty resting upon some one person. He proved this by reverting to the example in which A owns Blackacre and X is the owner of Whiteacre. A pays B $100 in consideration of which B agrees with A never to enter on X’s land Whiteacre. C & D for separate considerations also make similar agreements with A. In this case A clearly has rights in personam (paucital rights) against B, C & D. No one would assert that A had only a single right against the three. One of them could breach his duty without involving the others. Only if B, C & D agreed to be responsible to see that the others did not breach their duty could there be said to be a common or joint duty. Similarly he deduces that the same considerations apply to A’s respective rights in rem (multital rights) against B,C,D and others.

He quotes Collins M.R. in Thomas v Bradbury, Agnew, & Co. Ltd. [1906] 2 K.B. 627 at 638

"The right" [privilege] of fair comment, though shared by the public is the right" [privilege] "of every individual who asserts it, and is, qua him, an individual right..."

Similarly he maintains a duty in rem, or multital duty, is merely one of a large number of fundamentally similar duties residing in one person.(e.g. our duty not to trespass on any of the land of others). Again this is not a single duty - imagine the case you are under a duty not to strike people but if X threatens you his right is extinguished and becomes a no-right, and you acquire the privilege of self defence.

A Multital right or claim should not be confused with any co-existing privileges, or other jural relations that may co-exist with it with respect to the same subject matter. For example A is the owner of Blackacre: A has multital legal rights that others should not enter; He himself has privileges of entry, user etc; Power to alienate; Legal Immunities etc so in fact he has multital (in rem) right-duty relations; multital (in rem) Power-Liability relations; etc
and they should not be confused as, for example, his privileges are totally independent of his rights etc.

Finally a Multital primary right or claim (Right *in Rem*) must always be carefully distinguished from the Paucital secondary right (Right *in Personam*) which arises from a violation of the former.

**EXTRAPOLATION WITH RESPECT TO POWER.**

From a review of the above it becomes apparent that from the point of view of Jurisprudence as opposed to a discussion of fundamental legal conceptions POWER also can be Multital or Paucital. In jural relations between individuals powers arise under the laws of a particular society and these powers are in effect paucital. It is the Multital Power to affect the Laws (not the jural rights and relationships under the laws) that is the primary power of the society. That power may have its source in a military regime, a religious order of society or a democracy etc. These latter are merely the politico social set ups for the relevant society. They may be varied depending on the body possessed of the multital power to vary the substantive laws, as opposed to those possessed of the paucital powers and multital rights created by the laws. It does not matter whether the source of these powers is as Hart describes them or otherwise, at least so far as the resulting paucital powers are concerned once they are established. It may however have a marked effect on the manner in which changes are made.

A right (claim against another) is activated by virtue of enabling facts (I trespass on your land). The potential right is created by the exercise of a power i.e. the Normative laws under which rights in rem and rights in personam may arise are the result of the exercise of a multital power by the rulers of the society. Therefore it might be argued that rights (claim rights) are power dependent and can thus never exist in their own right, i.e. they can not be prior to the power to create them. Thus we can never have claim rights that are prior to the law that creates the jural relation under which by virtue of the operating facts they are activated. Of course that does not prevent the creation of whatever ‘multital rights’ (or ‘unpolarized rights’ as Kocourek might describe them) that the state wishes to create under the law, nor does it prevent such rights being given the added protection of being written into a constitution, if so desired. What cannot be supported however is the existence of any such
right prior to its creation, which is really what is being alleged by the eternal inalienable rights brigade. I suppose the closest one could get would be that one has the ‘right’ to think whatever one wants. But again it will immediately be perceived that this is not a right properly so called. There is no jural relation, no right to voice the thoughts without possible reaction and retribution. It is at best a Privilege. The idea of rights existing prior to the power to create them is what I call “The Great Rights Myth”. Later I shall be introducing the concept of an Inherent right but I shall seek to show that it is not a pre-existing right.

GENERAL

There are of course further uses of the word RIGHT that Hohfeld did not consider and these relate to its use in the moral sense of right as opposed to wrong. Even here it contrives to be a slippery word and may be used in the sense of:

1) **Just**, the Latin *justus* (= just, equitable, honest, lawful, proper, right);
2) **Meritus** (= merited), or
3) **Aequus** (= equal, level, fair).

So for philosopher or lawyer RIGHT is a word which should only be used when its meaning is clear i.e generally as a Hohfeldian claim-right. As failure to be explicit can undermine both philosophical arguments as well as legal interpretation I would suggest that we could do a lot worse than adopt Hohfeldian definitions which are to my mind amongst the clearest and most logical, as well as legally and philosophically supportable, so far produced.

THE APPLICATION OF HOHFELDIAN PRINCIPLES TO OTHER ASPECTS.

A further problem often arises outside the field of law. People often speak of Moral rights and Moral duties. This again leads to confusion as a ‘moral right’ is not enforceable by law and might therefore be best distinguished from a right, unless we are prepared to realise that the addition of the prefix moral nullifies the enforceability. My view therefore is that in this case we might be best to refer to a ‘Moral Claim’. The correlative would be a **moral-duty**. This is of course unenforceable as it is not covered by law.

I. CONSIDERATION OF MORAL RIGHTS, DUTIES ETC.

First restating Hohfeld we have:-

<table>
<thead>
<tr>
<th>Right</th>
<th>Privilege</th>
<th>Power</th>
<th>Immunity</th>
</tr>
</thead>
</table>

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Jural Opposites

{ No-Right  Duty  Disability  Liability

and

{ Right  Privilege  Power  Immunity

Jural Correlatives

{ Duty  No-Right  Liability  Disability

So we might have when considering **MORAL RELATIONS**:

{ Moral Claim  Freedom  Authority  Dispensation

Opposites

{ No-Moral Claim  Moral Duty  Inability  Obligation

and

{ Moral Claim  Freedom  Authority  Dispensation

Correlatives

{ Moral Duty  No-Moral Claim  Obligation  Inability

CONSIDERING NOW MY PREVIOUS RE-ARRANGEMENT:-

I. A **RIGHT** is a claim v. another [+ or -]

The exercise of a **claim-Right** invokes a **Duty** (Correlative)

Lack of a **Right** is a **No-Right** (Opposite)

Exemption from a **Duty** is a **Privilege**

II. A **POWER** is the ability to alter Legal Relationships

The exercise of a **Power** invokes a **Liability** [+or-] (Correlative)

Lack of a **Power** is a **Disability** (opposite)

Exemption from a **Liability** is an **Immunity**.

WE CAN NOW APPLY IT AS FOLLOWS TO THE MORAL EQUIVALENTS:-

III. A **MORAL-RIGHT** is a **moral-CLAIM** against another.

The exercise of a **moral-Claim** invokes a **moral-Duty**.

Lack of a **moral-Claim** is a **No-moral Claim** or **NO-CLAIM**.
Exemption from a **Moral-Duty** is a **Freedom**.

IV. **Moral Authority** is the ability to influence moral relationships.

The exercise of **moral-Authority** invokes an **Obligation**.

Lack of **moral-Authority** is an **Inability** (to influence)

Exemption from an **Obligation** is a **Dispensation**.

The adoption of the above, or a similar set of distinctions would provide a useful tool in clarifying the problems, and might thus aid in their resolution.

**KOCOUREK**

For the non specialist: Kocourek was another of the great legal/philosophical geniuses of the twentieth Century, and as such dealt with very complicated issues. In fact he devoted a whole work to the definition and analysis of **jural relations**. So detailed is it that he required a great many extra definitions. As these contained terms such as ‘Allophylaxis’ and ‘Autophylaxis’, ‘Biactive integral conflicts’ and ‘Polypolic’ relations you may well breath a sigh of relief that I shall be referring to only two of them namely **zygnomic** and **mesonomic** jural relations, and like everything else about Kocourek they turn out to be exceptionally logical. They will be further explained when we need to use them.

The importance of Kocourek is that he followed Hohfeld and provided an even more profound analysis particularly of jural relations. Like Hohfeld, Kocourek starts by analysis and definitions. Thus the reader always knows what a word is intended to encompass and is not met with sudden re-definitions halfway through a theory. The first thing he points out is that legal phenomena involve three things:-

1. A system of potential rules. They await application in concrete cases.
2. Situations of fact upon which the rules operate, and
3. Jural relations - The connecting link between the law and the social activities upon which the law is to operate.

“It is not enough that there be law in the abstract, set over against a material content of social activities. It is just as necessary here that there be a connecting principle, as that the steam compressed in a steel tank be connected with a system of valves and
levers...... The connecting principle between the force of the law and the material
social context upon which it is to operate is the jural relationship, `juris nexus,' or
`juris vinculum'. Since the law does not govern every possible situation of fact, it
follows that jural relation, likewise, does not attach to every situation of fact. Jural
relations come into existence, are subject to modifications during their existence, and
lastly they submit to destruction. There are always large fields of social activity
where jural relations do not exist. These are the fields of liberty where legal
regulation does not extend except in a negative sense.(emphasis mine).45

He goes on to point out that there are only two ultimate jural relations - claims
and power. Thus Kocourek takes up from the point I had extrapolated from Hohfeld by
dividing the generic concept of rights into the two basic categories of a) rights (Hohfeldian
claim-rights) and b) power. In addition I had shown that power was prior to rights which is
of vital importance philosophically, though possibly not from a jurisprudential viewpoint,
where I suspect it is quite naturally assumed.

Like Hohfeld, he takes immunity to be the reciprocal of claim, and privilege
to be the reciprocal of power. However as we shall see he makes a greater distinction than
Hohfeld did with respect to freedom. He maintains that the capability to claim an act from
another is a right (in a strict sense). The capability to act against another being a power.

“If the word right is given a strict meaning it is never correct to say that one has a
‘right’ to do this or that. One may have the ‘liberty’ to act or the ‘power’ to act.”46

So he too maintains that the correct use of right is a claim even though
in general use it encompasses other things.

One of the most important points Kocourek makes very early on is that jural
relation may be roughly described as

“a situation of fact by which one person presently or contingently may affect the
natural physical freedom of another person with legal consequences.”

Freedom however is non jural. One may act for himself and this is freedom.
As freedom is a non jural act it is not protected as such. If freedom is exceeded it becomes a
wrong.

45 *Kocourek Jural Relations* p.3
46 Ibid. p.3
According to Kocourek the central idea of law in a formal sense is power (in its technically restricted sense). This is translated to all jural relations. The example he gives is the best explanation:- A has the power to make an offer of contract to B. B has the power to accept (or refuse). A has the power to revoke his offer before acceptance. B has the power to perform the contract and the power to destroy it by non-performance. Thus even though a duty may flow from the Servus\textsuperscript{47} its performance is by way of power. In short power is the fundamental determining factor. Thus as I have argued, the concept of power, (and also in its unrestricted sense), is prior to claims (rights) because no jural relation can come into existence without its operation. In these circumstances I believe my assumptions are fully supportable.

To Kocourek a right, in its broadest sense, is the generic term for the dominant side of a jural relation. It may include a claim, immunity, privilege, or power. It \textbf{excludes} Liberty, Freedom, and all general negations of ligation (the servient side of a jural relation). Here Kocourek distinguishes liberty and freedom in greater detail than Hohfeld.

The important thing to note is that some of these terms involve jural relations, and others do not.

Thus it may be said that, given the necessity for recognizing the different uses of the word rights and given the necessity for distinguishing between jural and non jural relations, it is possible to argue that rights involving duties are not derived from interests. Jural rights are creatures of the law. As such they are politically derived and the concomitant duties have a totally different source from moral duties.

What I propose to do now is to take a more detailed look at the analysis of jural relations which involve inter alia claim-rights and their correlative duties, because I shall be arguing later that there is a positive duty to obey the law which means that I shall have to establish that there is a jural relation between the citizen and the state.

\textsuperscript{47} Servus: Kocourek points out that in any jural relation there is a \textit{Dominus} and a \textit{Servus}.
JURAL RELATIONS

For the non specialist: The following is going to appear difficult at first blush. Kocourek is generally regarded as very difficult. However most of the trouble comes about because he uses unfamiliar terms to refer to concepts which we haven't dealt with before. In fact his logic is as smooth as silk and he is a joy to follow once the initial feeling of drowning wears off. We are not going to go into his full analysis of all the possible legal relations as this is not necessary for our purposes. This has the advantage of cutting down the number of new definitions or terms which will be used. Fortunately it also cuts out the more horrendously complicated ones, and what I have done is to put the definitions of the new terms in bold print so that one can find them easily whenever that sinking feeling comes on.

Kocourek goes beyond Hohfeld in establishing a mathematical relationship of jural functions. Not only does he analyse the constituent parts of terms such as rights, defining them largely in terms similar to Hohfeld, but he proceeds to define the basic terms. Thus he defines a right properly so called as the capability to claim an act from another. This is a Hohfeldian claim-right. Power he defines as the capability to act against another. Immediately he distinguishes Power, Liberty, and Rights by saying one may have the liberty to act, or the power to act but never the right to act. He points out that one may act for oneself which is freedom, and that jural relations are situations of fact by which one person may affect the freedom of another with legal consequences.

Freedom itself is non jural and is not protected as such. Protection he says comes through the armour of legal ideas and directly through claim rights. This is another way of arriving at the conclusions I put forward earlier that the only ‘right to freedoms’ were those specified by virtue of the normative law (which by definition includes a constitution). He uses the same example as Hohfeld: One has the freedom to walk on one’s land (Hohfeld tends to refer to this as a privilege) but one has no claim right to do so. He also correlates duty to the existence of a claim.

However he points out:

“The claim that one has to an act from another must not be confused with the physical

48 Ibid. p.3.
power of a person to act on his own account. A landowner has freedom to walk on his land. This is the landowner's act. He may have a claim not to be molested by another, but that claim is to the act of another.

Freedom is not a legal relation because it is one sided. A relation always involves two elements or two sides. Freedom is protected by the law by various claims and powers, but in itself is not within the law. It is rather the end of law. Where Freedom ends the Law begins, and where the law ends Freedom begins”.49

A relationship according to Kocourek can be seen in two ways:-
In the ‘Wide sense’ it is any fact that is shared between any two things e.g. A is red and B is blue. The concept of colour is a shared concept. However in the ‘Narrow sense’, which is where our interest lies, it is an interconnection between two things with no third point of reference.50

In Chapter IV he defines JURAL RELATIONS as:-
"The conceptual fact of domination of the legal personality of one person in favour of another. The term is used interchangeably with Legal relations. The proper distinction is that a legal relation is a concrete relation while a jural relation is the legal relation considered abstractly. Courts deal with Legal relations. Jurists and theorists deal with Jural relations".

I have quoted the above rather more complex definition in detail because, although it is phrased in the way of legal personality this is merely designed to include such things as bodies corporate. Our concern is with jural relations and legal relations, primarily between people. However it is interesting to note the closeness to legal relations. In every relationship there must be two parties, a Dominus and a Servus and a single, although at times highly complex relationship.

At this point one should clarify a few more of Kocourek's terms:-

DOMINUS ="The legal person who controls a Right".
SERVUS ="The legal person who bears a LIGATION".

50 Ibid. Ch. V.
LIGATION = "The generic term for the servient side of a jural relation. It includes duty, disability, liability, and inability; it excludes such terms as no-duty and no-liability since they are not relational in a jural sense".

N.B. Rights and Duties involve a relationship between the Dominus and Servus.

RIGHTS = "The capability to claim an act from another".

POWER = "The capability to act against another".

In practice Kocourek's analysis is comprehensive, and breaks jural relations into 22 different types requiring 17 pages of Glossary of new terms, but for our purposes it is really only necessary to consider the two which I mentioned before; Zygnomic and Mesonomic relations-

ZYGONOMIC are those where there is a constraint on the Servus with the support of the law.

MESONOMIC where it brings about a result of which the law will take notice.

To use Kocourek's example:- D makes an offer of his promise for the act of S. This creates a power in S to accept (and the law takes notice of this) but there is no physical contract implied. So far the relationship is mesonomic.

The acceptance by S will constrain D into a zygnomic relation.

Now the whole point of this, as far as I am concerned, is that it shows by virtue of Kocourek's very detailed and consistent theories that the duty when it arises, arises as the result of the zygnomic relationship, which is, as I propounded, a creature of the law, and is brought into being by an exercise of power. It is not, as Raz alleges, created by someone's interest creating a duty which in turn gives rise to a right.

It is possible that Raz would argue that his proposals relate to moral duties and that the law is, at least in part analogous. I would counter by saying that moral duties are only analogous, in that while the law acts upon a zygnomic duty to enforce the same, a moral duty is one which may be regarded as being voluntarily self-enforceable. It is not even

51 The detailed break down by Kocourek is designed to cover all the intricacies of complex legal situations.
mesonomic so it stands no chance of becoming zygnomic. For example:- if I am a member of a religious organization which maintains it is one's moral duty to give X % of my income to the organization, I may so do. The reason that I do is because I wish to belong and be deemed a proper member of the group. Let us say that it is also regarded as one's moral duty to eat only raw root vegetables and wear jute underwear to scourge the flesh. Hell fire and immediate plague is threatened to those who disobey. Unfortunately I become allergic to raw root vegetables and my jute underwear is causing other problems. I give up both and find that rather than fire and plague I am no longer plagued with flatulence and my sores heal up. Vastly disillusioned I reject the religion, i.e. I no longer wish to be associated with them in any way and as for having another penny out of me...

Now in both cases, that of my belonging and being bound by a duty, and that of no longer belonging and rejecting the duty, the governing factor has solely been my desire to belong or not. There may have been ancillary inducements (such as the threat of hellfire and plague) but these are indirect. Raz may argue that my desire (one way or the other) is an indication of my ‘interests’ but there is no way that these give rise to a duty to wear jute underwear. Even if I am the high priest and it is in my interest that my flock have sufficient faith to endure the hardships, this cannot possibly be said to give rise to a duty in others. The whole question of moral duty involves intentionality, and intentionality is one thing that Raz omits from his ‘reasons’ for obeying the law.

SUMMARY

What we have done is to provide several very useful definitive words to enable us to avoid confusion by using the word ‘rights’ in a sloppy manner. More important still we have shown by investigating ‘jural relations’ that words such ‘right’ properly so used i.e. as a claim-right involves a jural relation. ‘Power’ also involves a relation, but a word such as ‘privilege’ which is frequently described as a right, in fact does not involve a jural relation. And it is this that makes the distinction important because it shows that we are talking about entirely different concepts. Moreover this extends to other concepts such as ‘Freedom’. One simply can not lump concepts that involve a jural relation and concepts that do not under a single word without causing confusion and inaccuracy. Therein lies the great Rights Myth.
We have also seen that as Freedom is a non jural state there are no natural Hohfeldian rights to freedom. There are only those ‘rights’ created by law. It is the failure to realize this that has given rise to the great rights myth.

We have also noted for the first time the importance of intentionality, which will feature in later discussions, particularly with respect to criminal law.

Having dealt at length with the factors involved and analysed some of our more difficult terms we can proceed to the more practical aspects of the various inter-relations between the subject and the state.

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CHAPTER 4.

OBEDIENCE TO THE LAW & CONFLICTS OF LAW AND MORAL OUTLOOK.

Having established a proper meaning for certain words it is now possible to start considering questions of conflicts between obedience to the law and moral outlooks. Often these are incorrectly expressed in terms of rights; rights to freedom, animal rights, the right to do what you earnestly believe etc.

Because of the frequency with which attitudes or alleged freedoms are presented in terms of "rights" it was imperative that we conducted the investigation of the previous chapter. Without that understanding, false claims can appear more logical than they really are. We have also established some ideas about the philosophical difference between law (as I define it in a positivist fashion) and justice. However definitions do not always cure problems, even though they may help define them, and there are a few problems quietly ticking away. The first is really exemplified by the exponents of Natural Law theories. The fundamental proposition here is that the validity of any law is founded in morality. If it can be claimed that a law is invalid because it is grossly wrong then presumably it does not have to be obeyed. This of course strikes at the roots of legal positivism and is the reason for the apparent irreconcilability of the two theories. Even the positivist, who may accept the validity of an objectionable law is faced with the problem of how far it is permissible to go in disapproving or fighting a law which he believes to be morally wrong.

Now the interesting thing is that while people often talk of things being morally wrong they quite frequently fail to link that with justice. A morally unsound law is bound to be an unjust law. In this chapter we will look at the practical aspects of obedience to the law and moral conflict. In the next we shall examine the fundamental role that the concept of justice has to play in two areas namely 1) Reconciliation with Natural Law theories and 2) How the law deals with those cases where it does not actually cover the situation before the courts - Dworkin's “Hard cases”.

To look at why anyone should obey the law it is, in my submission, insufficient to say that the law is a reason for its obedience. Facts are never reasons. One has to look at the ‘objects’ of law generally (as opposed to its specific purposes). Laws came into being with societies as a means of regulating the behaviour patterns of those societies. Originally such structures were purely and simply top down structures i.e. the law was

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52 Ronald Dworkin Taking Rights seriously. Ch.4.
decided by the rulers with virtually no input from the governed. Despite libertarian theories such as those of Rawls, today's societies are still essentially top down structures. Even with the most advanced democratic society once the government is elected it puts its policies into practice. It is true that there is a regulating factor in that if it goes too far it is unlikely to be re-elected. Even so, the government that is elected in its place will essentially carry out its own program and there is no guarantee that any, let alone all, of the wishes of the people will be met.

The relationship of a government with the governed is that the object of the government (apart from remaining in power) should be to run the society in a manner which will be competitive and preferably better than those of other societies with which it has contact, i.e. so that it is just, and flourishes in the Aristotelian sense. If it does not so flourish the society will fail, its people will suffer and ultimately it stands in danger of being taken over by another stronger society. In order to carry out its policies the government provides a behavioural framework for its people. This framework ideally has to be consistent with providing them with protection and, at the same time, giving them as much freedom as is consistent with safety and competitiveness with respect to other societies.

From this approach it may be argued that people in a society do have a moral obligation at least, though many would argue that it is more, i.e. a duty, to obey the law. This is because that society represented by its government, offers the people protection, it offers them law and order, and in return the people who accept that offer, have a jural relation with the society, to obey its laws. So long as they are free to leave and do not, that duty prima facie remains extant. Moreover it would seem that this argument is accepted in practice. Every society expects its citizens to obey the law. If they do not, punishments are imposed. If there were not a duty to obey the law the punishments themselves would be ultra vires.

This is an extremely simplified resume of one argument allowing for a duty to obey the law. It is enough merely to show that it is possible and logical for such to exist. The important issue is that however such a duty arises it brings about a jural relation between the individual and the state. This means that the whole system of rights of the type that a philosopher such as Raz would describe them, as arising out of 'interests' (which are undefined) of a 'sufficient' (without a means of determining the quantum of sufficiency) nature as to create a duty (but with no parameters governing the manner of their formation), falls away. The frequent confusions between duties and moral obligations also falls away for we are now dealing with the jural relations of the law, and as both Kocourek and Harris J. (in
Aycock v Martin) recognized it is the law which creates such duties.

Indeed as Raz acknowledges, though for different reasons (i.e. because he is a positivist), morality is not directly relevant to the law. However it is my argument that it is highly relevant to concepts of ‘justice’. Thus if there is a prima facie duty to obey the law, Civil Disobedience would be illegal and it would not be necessary to have to contrive to make it illegal, as Raz does, by suddenly introducing the concept of having a legally protected right to political participation as a form of justification.

There is another argument, which is the one I prefer, which goes as follows:-

In any society in which there are laws which provide for punishment for non-compliance therewith, those laws have established an unpolarized jural relationship between the State and the people. The law specifies the duty to obey by virtue of its provision that the specified acts are unlawful. Moreover the law provides an indication of the sanction to be applied if it is breached. A breach of the law causes it to become polarized as a legal relationship between the State and the criminal. The State has a right to punish, and the criminal a duty to accept the punishment. Looked at the other way, from Society's point of view, having accepted the State's protection in return for society's compliance, it then becomes the State's Duty to punish and the criminal has a Right to be punished. At first blush, the idea of a right to be punished may seem strange. Nevertheless you will recall my quote from Mabbott (See ch.2. p.41). This is in fact the same as saying that the criminal has a No-Right not to be punished though I feel it is more difficult to follow when put this way.

It should perhaps be noted that the criminal law which is what we have been talking about is negative and is thus reflexive, and involves two relationships a) Society and the State and b) The State and the Offender, which makes following the jural relations difficult. In the case where there is no law relating to an action the citizen is free to do or not do it. As to any moral duties he may feel, they do not, as I have argued elsewhere, create any jural relation.

In case all this sounds rather theoretical and not frightfully relevant it might be wise to consider two very practical matters that our decisions with regard to point a) above will bear on, i.e. 1) Civil Disobedience and 2) Conscientious objection. In order to examine these thoroughly let us examine the position taken (and the difficulties encountered) by Raz who has written extensively on the subject. His view is that of a positivist but also that of a dedicated libertarian. I have particularly chosen Raz because although he is a positivist, his views on the nature of law and particularly of ‘rights’ are developed on a completely different basis from mine. In his first work he dismisses Hohfeld with an uncharacteristic attack, and
pursues a course of ‘practical reason’ to build up his theories. However to:-

A. CIVIL DISOBEEDIENCE.

Prior to dealing with this subject Raz has argued for and concluded that ‘there is no moral obligation to obey the law’\(^{53}\). He then asks whether there is a moral right\(^{54}\) to break the law.

He is anxious to emphasize that his argument for denying a moral obligation to obey turned in part on the fact that on numerous occasions a breach of the law has no adverse effect.\(^{55}\)

However he states that this is hardly ever true of Civil Disobedience which almost invariably has some adverse consequences. So we see that he has perceived a need to deal with conflicts which he foresees will arise from the extraordinary starting point that there is no moral duty to obey the law. Nevertheless (it gets worse) he goes on:-

“No doubt, civil disobedience is sometimes justified and occasionally is even obligatory.”\(^{56}\)

But he then hastily steps back and adds that it is not his intention to justify disobedience but question whether there is, in certain circumstances, a moral right to disobey. Nevertheless questions still abound. For example, one finds this somewhat difficult to square with the preceding statement.

Raz’s argument for denying an obligation to obey, stems, as we have noted, from the rather curious reason that certain breaches of the law have no adverse consequences. In an attempt to get out of the dilemma which this approach immediately conjures up Raz introduces a distinction between an unjust state and a reasonably just one, so that

“in a reasonably just state any consideration in favour of disobedience has to overcome a presumption against it based

\(^{53}\) A position with which I fundamentally disagree.

\(^{54}\) This in my submission would be at best a privilege, unless he is going to argue that there is a correlative duty on the part of society to let people break the law on moral grounds.

\(^{55}\) So does closing your eyes and firing a gun. However on the odd occasion you could kill someone. Not exactly the best argument for no moral right not to indulge in the random firing of guns. So much for practical reasoning, which is how Raz arrived at this strange conclusion.

\(^{56}\) A. of L. P.262
on the accompanying undesirable results.”

But to this one must ask What results? and judged by subjective, utilitarian, or whose standards? Raz does not say.

The question Raz seeks to answer is:- ‘In certain circumstances is there a moral right to disobedience?’ He starts from the presumption, with which he agrees, that civil disobedience, which he defines as

“a politically motivated breach of law designed either to contribute directly to a change of a law or of a public policy or to express one's protest against, and dissociation from, a law or public policy”.

is sometimes justified or even obligatory. He says that many authors favour a stronger view that there is a right to civil disobedience. Here, it is not altogether clear as to whether he is referring to a right as something which one is entitled to do, i.e a privilege (equivalent to walking on one's own land) or a full blown claim-right (entailing correlative duties on the part of the law to allow such disobedience to take place). No doubt there are those who hold the full range of views. He attempts to distinguish between the two degrees of right by discussing the moral right to freedom of speech. Now again it will be noted from our previous findings that whereas there may be Moral arguments in favour of this or that freedom, there can be no moral rights in favour of any freedom. Once the freedom is enshrined in a law it becomes a right (moral, immoral or amoral!).

Again he is anxious to preserve the idea of a right to disobedience as he says (at p. 266)

“ At first blush it may be thought surprising that one should have a right to do that which one ought not. Is it not better to confine rights to that which it is right or at least permissible to do? But to say this is to misunderstand the nature of rights. **One needs no right to be entitled to do the right thing. That it is right gives one all the title one needs.** But one needs a right to be entitled to do that which one should not. **It is an essential element of rights to action that they entitle one to do that**

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57 A. of L. p.262.

58 Ibid. p.266.

59 Here again Raz uses ‘right’ where in some cases the word freedom would be more appropriate, and in others where ‘privilege’ would be better. Unless the Hohfeldian distinctions are maintained, the only result is confusion.
which one should not.” (emphases mine)\(^{60}\)

and (at p.267) he says:-

“The evil the disobedience is designed to rectify may be so great, may indeed itself involve violence against innocent persons (such as the imprisonment of dissidents in labour camps in the Soviet Union), that it may be right to use violence to bring it to an end.”

He starts from the idea that everyone has a right\(^{61}\) to political participation. He maintains there are limits to that right, i.e. to respect the right of others to participate. It is, he says right that the restrictions should exist and it is best that they should be enumerated by the law. Then he says, to the extent that they are reasonable they become morally binding. His argument is similar to saying that insofar as the restrictions are just they are valid but, in my view, it is very far from being the same thing. He then says, States divide into those that are liberal (allowing adequate recognition to the principle of participation) and illiberal when it does not. Unfortunately there is no definition of ‘adequate’ participation and we are still faced with the fact that it is quite possible to have a benign dictatorship with just and reasonable laws which would apparently fall into Raz's ‘illiberal’ definition.

Nevertheless, Raz concludes, as a result of his stated preference for a liberal state,

1) That all states ought to be liberal and

2) while there is no right to civil disobedience in a liberal state there is in an illiberal one. He argues that, given that an illiberal state violates its members "right to political participation", then people whose ‘rights’ are violated are "other things being equal" entitled to disregard offending laws and exercise their moral right as if it were law. One must point out however that this reasoning, though sometimes accepted as politically correct today, has certainly not always been so, even in acknowledged liberal societies.

Raz maintains that the case is reversed in a liberal state. This is because one's right to political activity is protected by law. - “It can never justify breaking it.” However, apparently frightened by such a forthright statement, Raz immediately pulls back from the

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\(^{60}\) Unless it is very clearly qualified, the underlined statement is quite terrifying. It is the underlying philosophy of every fundamentalist and terrorist that has ever existed. Yet nowhere has Raz imposed a qualification, or managed to establish objective criteria for what is right. This is hardly surprising, such a definition having eluded mankind to date. According to this statement one could justify the murder of Salmon Rushdie, etc. Moreover it seems quite apparent from the words in bold print that he really does appear to be talking about a right i.e a claim right. If he really means what he has said, then libertarianism has acquired a deeply seditious new aspect.

\(^{61}\) A. of L. p.271. But as to whether this is a Freedom or privilege, or a claim right he does not say. If the latter it would, in my opinion, have to be based upon an interpretation of our adherence to conventions, or a long standing aspect of the common law. This again shows the weakness of using the term ‘rights' in an undefined way.
brink and says

“this does not mean that civil disobedience is never justified” and he points out that "
a liberal state was defined in a rather technical narrow sense. It may contain any
number of bad or iniquitous laws. Sometimes it will be right to engage in civil
disobedience to protest against them or against bad public policies.”

Thus presumably only in liberal states where all the laws are good laws, is
civil disobedience wrong. However Raz maintains that a person, to justify his act can show
that the act is right. Or, says Raz, he can show that he has a right to perform the act (even if it
is wrong). Raz says in a liberal state that the second argument is not available. The only
moral claim must be based on the “rightness of the act”. But as I have pointed out it may be
possible to hold the view, and it certainly was held, even at the beginning of this century, that
much of what Raz may think is right, was then considered wicked, pernicious, evil and
wrong. He does however reject the concept that civil disobedience is a matter of last resort.

This subject is important because the question of disobedience and its
‘justification’ must ultimately affect one's basic approach to the law in general, punishment,
and the whole society one lives in. Whereas the attitude of the disobedient to the acceptance
of punishment (because of the so called ‘justification’ of their actions) may be irrelevant to
the principles underlying the disobedience, they certainly are relevant to the question of
punishment under the law.

Raz's whole philosophy on Morals and Ethics is subject to his determinedly
libertarian stance. One gets the impression that he has very fixed ideas of the end position he
intends to reach and he attempts to get us there largely by Practical Reasoning. However
when he feels he is headed in the wrong direction he tends to bring in a qualifier to bring us
back on course. A perfect example of this is the requirement for a state to be liberal, and
provided it is, then one should not break the law. I am afraid that I find making up the rules
as one goes along a) highly disconcerting and b) philosophically disingenuous. It leaves me
with the feeling that I am being led to a predetermined destination, and if the road we are
going down heads in the wrong direction we merely throw in a traffic diversion to bring us

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62 ‘Practical Reasoning’ to the uninitiated is something which started out in good shape under Aristotle but which
of late has become a specialist subject in its own right and has now a very high I.Q.(which here stands for
Incomprehensibility Quotient). I attended a four day symposium on the subject and was about to throw myself
over a cliff when a very learned head of a philosophy department quietly admitted that he had been completely lost
after the first ten minutes. There are several good books on the subject, but whatever you do don’t hang around
when the ‘Cabots’ start speaking to the ‘Lodges’. A postal course on quantum mechanics is much more fun.
back on course.

**A Different View**

How are we going to deal with these problems? Perhaps they are not resolvable, or perhaps we can only get somewhere by looking at a different set of questions. The intractability seems to stem from this question of the validity of various laws. Now I have made my position plain, I am a positivist who believes that a properly constituted and/or recognized law is valid - period, full stop, end of message! There is therefore in my view a prima facie duty on people to obey that law. Break it and you render yourself liable to the consequences.

However the law already has the power to ask, though it does not make much of a show of doing so, two further questions, namely 1) Is this law Just? and 2) Is the application of this law just in this case? Judges have been known to say ‘I find you guilty of the offence as charged, but justice will not be served by sending you to prison..etc.’ This may well happen in the case of extenuating circumstances, or of course as is already incorporated in the law, where a person is mentally incapable of realizing the effect of their actions.

So by granting a prima facie duty to obey the law we do away with considerations of whether the state is moral or not, or whether the law might be invalidated because someone doesn't like it. But we do have two slightly different questions to ask in relation to Justice. So you may ask What have we gained? The answer is - a lot. As I indicated earlier, when faced with a restriction on liberty, i.e. in this case the law we are concerned with, the question to ask is, ‘Is this restriction (law) Just’? At that point we know the following:

1) The law is ascertainable.
2) The concept of Justice based on the moral precepts of the day, is ascertainable, And
3) The answer is therefore ascertainable.

Note however, the fact that we may have determined that a law is unjust does not necessarily mean that it is invalid, that it ought to be repealed or that we have any right to defy it. Other factors come into play at this stage, e.g. wartime emergencies, the public good, etc. etc.

Moreover, even having ascertained that the law is just, there still remains the question ‘Is the law just in respect of this person in the light of the circumstances of this case’? The law is already used to answering that question and the practice, at least in the case of *mens rea*, or intention, or the defendant's capacity, is well established.

So let us look at a some practical examples - First:
The case of Twyford Down. Here the new Winchester by-pass was finally determined. There had been twenty years delay while every conceivable objection had been heard at innumerable public hearings. Even the fate of flowers, moths, and the possible extinction of sundry creepy crawlies had been mulled over. The European commission had been brought in and very probably the Parson's cat had been consulted as well. Nothing of course is mentioned of the injustice done to those who were killed and maimed over the twenty years that the old and highly dangerous road had to remain unaltered. Finally after the most long winded and thoroughly democratic and expensive consultations a decision was made. Those who didn't like it promptly took to the trees and at great expense and after further delay (in which no doubt further road deaths occurred) were finally removed. What should have happened of course was that a declaration of ‘fair Judgement’ should have been made; the tree dwellers should have been informed that the trees would be cut down at a certain time and the rule of Volenti non fit injuria63 should have been invoked so that anyone being felled with a tree who broke their arm (or preferably their neck) would have to pay their own hospital bills/funeral expenses. That would have stopped what has now become an anti establishment game.

Of course Twyford Down was a very clear cut case in that the consultations were extraordinarily thorough. So let us look at a far more difficult case, a case where tempers (and fists) can really fly: What about Fox Hunting, where saboteurs seek to disrupt and smash the property (and sometimes the person) of wicked people who chase cute looking cuddly little foxes on horrible great horses with hounds that tear the cuddlies to bits with their blood smeared fangs? - (View 1 complete with poetic licence).

The fact that these cute little cuddlies are in reality verminous, mange ridden, tick carrying, highly offensively smelling, cold blooded multiple killers (and not just for food) in their own right and the best potential spreaders of rabies were it ever to appear here - (View 2 complete with poetic licence) is not allowed to enter the equation. So, there is not much agreement here. The case has not been adjudicated or subject to Public enquiry. Nor would a public hearing do much good. The views of both sides are largely entrenched, though not necessarily always as vehemently as I have tried to put them in the interests of establishing a case of maximum conflict.

63 Volenti non fit injuria: That to which a man consents cannot be considered an injury, or a volunteer shall not complain of his injuries. So for example participating in a boxing match. So also no-one can enforce a right which they have voluntarily abandoned. Unfortunately the law is making inroads on a previously robust principle.
For the Hunt Saboteurs it is a matter of Active civil disobedience in pursuit of a cause about which some of the participants feel very strongly morally justified. In my submission there is a moral obligation to obey the law and therefore active law breaking (let us not pussy foot about calling this civil disobedience) is not to be countenanced and should be put down particularly harshly ‘pour encourager les autres’. If one objects to a situation, there are many ways of making out one's case, and the excuse that Civil Disobedience (lawbreaking) is an effective way of publicising one's cause is not sufficient. One can imagine the reception one would get to smashing a windscreen of a car, and leaving a notice inside saying "Don't buy Bloggo Trainers"! Yet the only difference here is the depth of feelings involved. But need it be? The person wielding the brick may earnestly believe his children's feet have been ruined by Bloggo Trainers and he believes it his duty to save others. If passion of belief justifies crime, then we must exonerate Hitler, and allow Salmon Rushdie to be murdered. You simply can not have it both ways.

But so far we have considered a society such as ours where there are alternate means even though they may be less effective. What about the Suffragettes fighting for the right to vote? Here often the main harm was self inflicted e.g. chaining oneself to railings, and yes this is a privilege that everyone has (providing you do not block a right of way). Note this is quite different from active civil disobedience. In some countries people go on hunger fast to publicise their beliefs. This too is a Privilege which is not denied to one, and it is all the more effective because it shows the depth of the feelings held. Setting fire to oneself is somewhat more flamboyant and of course there is less chance of being around to see if it was effective. Nevertheless it is a recognised and practised form of protest. If a person is prepared to endure hardship their views must command some respect. If they are merely prepared to play costly and obstructive games with a soft hearted administration then they should be forcibly quashed. That is just, but to punish a man who is on hunger strike for his beliefs would be quite unjust. So the protesters could go on public fast, or set fire to themselves. Instead they choose the soft option of playing games at public expense. That option should not be available.

However the problem becomes difficult when there is a substantial minority, often well organized, pressing a claim e.g. to ban fox hunting, which they maintain, rightly or wrongly, is in reality the majority view. When things have reached such a pitch the only thing to do is to put it to the test. Where there is a large and powerful group making such a claim the Government could challenge them to put up the finance (possibly with some fiscal aid) to cover a referendum. The result would be acted upon by the government. If the result
were positive the law would be changed and if not no further referendum would be accepted for say seven years.

B. CONSCIENTIOUS OBJECTION.

In considering conscientious objection Raz says one must distinguish between the private act and the public one. However in the case of the conscientious objection the law has to be assumed to be morally valid (e.g. conscription) and the person's view, though deeply held, as wrong. As he very correctly points out one cannot give such a morally wrong view priority just because it is intensely held. However this, he maintains, is directly distinguishable from the situation above, where he allows that a deeply held moral conviction may permit disobedience. The distinction appears to be in the moral validity of the law.

Raz maintains that society is right in that it requires a person to shoulder the responsibility of his own convictions. However he foresees the difficulties of providing a law recognizing a right to conscientious objection as threefold: 1) It is open to abuse, 2) It encourages self doubt, and 3) Unless the basis of a simple declaration is allowed, there will have to be a necessary invasion of privacy of the objector. His solution is that the laws should wherever possible be framed so as to avoid conflicts with justifiable minority views. He concludes that this is not an ideal solution and that any right not to have one's conscience coerced must remain a prima facie one. The trouble that occurs when he considers Civil Disobedience was that he allowed for a case in which the laws may not be morally valid. Regrettably, nowhere has he given us any parameters for distinguishing between the two.

In considering the case of Conscientious objection, we have the reverse case to Civil Disobedience. Here a person refuses to perform a positive act on the grounds of a firmly held conviction. Here the question, to my mind, is not, Is the law just?, but rather - Is it just that the law should be applied to this person in these circumstances? Both Raz and I obviously feel that the law is just. Raz feels that unless a simple declaration is accepted there will have to be an invasion of privacy of the objector. Not so in my submission. Once the objector refuses to obey the law, which Raz acknowledges to be morally valid (and therefore just), the onus shifts and it lies with the objector to show that his views are long held and genuine, not merely a temporary convenience.

64 A. of L. p. 281/282.
65 A. of L. p.287.
However the case that Raz did not consider is that which happened in the U.S.A. There, many youngsters who might well have fought for their country had it been attacked, refused to take part in a war which they felt was unjust and none of their country's business. In this case they would be unable to justify their stance on the ground of long held general moral principles of non violence.

It seems to me that this is a most difficult case and that the objectors only options were to leave the country or go to gaol. This is not a good solution and it leaves the problem of what the state's attitude should be when those who left try to return. It is possible that the state could refuse to have them back unless they served their prison sentence. On the other hand it could be argued that this is not the proper punishment. So my argument would proceed - What has the state lost? - The services of a soldier for say two years. So perhaps the punishment should be the cost of replacing that soldier e.g. by a mercenary. This would then be imposed as a fine and the person not allowed re-entry until the fine plus interest, were paid. Of course this could result in the objector having to remain outside the country for some time but they took the decision to flee, and can hardly expect to be welcomed back.

Presumably a person might always be likely to disobey a law if that law were regarded by him as being so unjust as to be morally repugnant. And if there were sufficient like minded people the disobedience of the law would become apparent. But in such an event each agent's reasons would include his attitude which would have to be such as to overcome a positive duty to obey. There would be no question but that such disobedience would be punishable. Of course such a system would be more strictly positivist, in one sense, than some positivists would wish, but it would still allow the courts to apply ‘justice’ to each situation within the law.

This still leaves us with the problem of can we break the law? if so when? and Why? Now it seems to me that the answer to the first question should always be - Prima facie No. Raz would agree if the state is a liberal one. But this seems unsatisfactory to me because he indicates that this is because the subjects are assured of political participation. But at least in our society that does not mean that the people get what the majority may want (e.g. the re-introduction of capital punishment even if a majority wanted it), nor does it cover the case of the benign dictator. It seems to me that a straightforward prima facie No, based on a duty to obey the law is much clearer and more effective. I think the Great Law Myth is that I only obey if I like it (oh well if you want to be unctuously sanctimonious - if I morally approve). To which the reply is - And who is to say your moral high ground is right? Not necessarily I for one!.
This gets us only so far, but the problems arise when we start to take in moral viewpoints, because for example in the case of Conscientious objection Raz assumed, and rightly I believe, that the law [requiring military service] was a justifiable one. However the pacifist could well most earnestly believe that it was a total moral affront and an iniquity. Of course we could argue that acceptance by the majority, or by officialdom (per Hart) justifies the law. But that might let in the situation in Germany or Russia, so we are back in trouble whenever we try to place an objective assessment on the law as a criteria. What I think we have to do is accept that the law, if it is not ultra vires, must prima facie be obeyed.

Even so there remains the question raised at the end of chapter 2. i.e. with respect to the question as to whether a restriction of freedom (or a law) is just. It will be recalled that I suggested:-
1. Ascertain the restriction (or legal requirement).
2. Ascertain the current moral ethical view as to what might be just in these circumstances.
3. The answer as to whether the restriction (law) is within the parameters of the moral precepts of the day is then ascertainable.

If according to the moral precepts of the day, as currently accepted, the answer to 2 is that it does not conflict, then the answer to 3 is that the restriction (law) is just. If the answer to 2 is that it is no longer considered just, then we have a different situation.

Perhaps it is best to explain with an example. Take the change in the laws against homosexuality:-
In answer to 1 there was a very definite restriction on freedom.
In answer to 2 for many years the prevailing moral attitude was that these laws were morally correct, and just.
Therefore in answer to 3 the laws were regarded as just.

Time passed and the time came when the answer to 2 became ‘No’. This does not mean that those who felt this way necessarily approved of homosexuality. Many did not but they came to realize that the laws were not just. Thus they came to be changed.

Now let us take an interim stage where there is a law and some people start to believe it is unjust. The majority still believe it is right. This actually occurred in the above situation and it was gradually appreciated that imprisonment was unjust. It took time but the change was effected by persuading parliament. A similar case obtains today for example with respect to smoking cannabis. Arguments are being presented that in some cases it has a medical benefit etc. Changes in this fashion are slow, particularly if they are brought about by a change in the moral response to question 2. In the meantime those who feel morally
justified in their disagreement may or may not break the relevant law (not any other law) at their own discretion depending on the strength of their feelings. They do however pay the consequences if caught. As public opinion changes there comes a tendency for the law to be less rigorously enforced. Moreover these days, because of the access to information and speed of communication, changes in attitude are liable to be somewhat faster than in the past. As to whether that is a good thing or not is an interesting question, but not one that can be pursued here.

But what about the case of Animal Rights? This is a hard case for some because the minority are not acting for themselves but for a group that can not express its own feelings. Here a vociferous minority believe that society's actions amount to an outrage against the animals concerned. Admittedly they couch this in terms of Animal's rights, which I maintain is a philosophical error. My view is that it is arguably a breach of the fundamental responsibility which goes with the power of the dominant party in any relationship. This will be developed later but even this theory gives rise to cases where I would side with the unjustly treated animal. So the minority feel that although society is currently answering question 2 as ‘yes’, it should properly be answered ‘No’.

It is still my view that their proper recourse is to persuade parliament to change its mind. Here I am completely at one with Raz, because we know that this can be done in our society, therefore there is no excuse for breaking the law. If they wish to go on hunger strike, or set fire to themselves, or any other thing which may persuade but does not violate the established or normative claim-rights of others that is one thing. To take the law into their own hands is not acceptable. When they feel they represent the majority they should organise a referendum to prove it.

When, if ever in our society, does breaking the law become acceptable? What if I perceive an immediate danger to society from toxic waste for example? It is still my view that in a society such as ours the solutions are persuasion or the Gorbachov solution. This does not rule out, nor is it the same as saying that there are situations when one can justify a breach of the law - e.g. assaulting a person in self defence, but this involves a justifiable overriding of the law, not a moral objection to it.

If then the law should be broken, that decision of necessity must be made on a subjective basis. There can be no objective external measuring scale. For example, I believe law X is evil. Therefore a) I will not obey it. Or b) I will fight it. In case a) we fall into the conscientious objection category as before and the court will have to consider whether the law is just in its application to this particular person.
In case b) fighting a law. There are many ways this can be done: In chapter 2 I set out the five reactions to living in an unjust state. In a just or substantially just state the parallels are not exact and the order is reversed, so that we have the following:

1) Giving in and complying, which the majority follow;
2) Leaving (Tax exiles);
3) Disobeying where it affects you (Conscientious Objection);
4) Persuasion (Lobbying etc.);
5) Joining the system and altering it,

Here, we wish to oppose the law. In a civilized society this reduces us to options 4 & 5. There are still many ways to do this. One can petition, lobby one's representatives both local and national. One can form a party with ones objectives clearly set out and persuade others to join you until you become powerful enough if your cause is right. This is moving towards the Gorbachov position and is a less dramatic version of it. Finally you can protest, go on hunger strike or set fire to yourself. All these are available to you in a democracy. What you do not do is break the law or another law to make your point. Once this is acknowledged as legitimate or even acceptable, you are started on the slope to anarchy.

Very well, I hear the Rights lobby say, even if we accept this (which isn't half as much fun as joining in and encouraging rent-a-mob and sitting down and being carefully carted out of the way by policemen and subsequently appearing on Television), what about the really serious case which Raz cited about people being arrested without trial and sent off to the gulags. Well what about it? In a society such as that was at the time, sitting down in a frozen Moscow street would not have got you very far. The rules of such societies are different, and the cases are just not analogous. You would merely have ended up in the gulag without trial. All you would have got for your trouble was arrest and possibly piles or frostbite. Of course you are justified in resisting such a law, but in this sort of society it seems to me that passive non conformity or civil disobedience will be ineffective.

One is then faced with a more active alternative and a drastic one. Perhaps if a number of people had set fire to themselves it would have had an effect. More likely it would not, the deaths would have been covered up and not reported. As I say the whole situation is different. The only course in the case of such repression appears to be to take up arms, go under ground if necessary, and fight. But it is disingenuous to use it as an example to support a ‘right’ to resist by breaking the law in lesser situations.

In fact in some of our end conclusions Raz and I are not as far apart as I may have implied. For example where he argued at p. 267
“The evil the disobedience is designed to rectify may be so great, may indeed itself involve violence against innocent persons (such as the imprisonment of dissidents in labour camps in the Soviet Union), that it may be right to use violence to bring it to an end.”

I would agree. There definitely are evils against which one is right (morally justified) in taking up arms and committing violence in so doing. Where I disagree is that this should in any way be related to the normal disobedience designed to change a law which morally offends some (but not everybody - e.g. fox hunting).

A better example, I feel, is the one I cited, the use of animals for experiments. The situation Raz gave as an example where people are being tortured is virtually a situation warranting violent action if only in self defence. On the other hand the example I chose is something that also deeply disturbs me. Yet I believe my duty to obey the law is such that I would not participate in the actions of Animal rights activists, which have been on occasions robust to the point of violence.

Perhaps what is needed is a means of distinguishing between the two. In one sense Raz has already given us this when he says that there is no justification for civil disobedience in a society that is liberal (which in this case he defines as one in which political participation is guaranteed). For the reasons I have given I do not agree with this criterium, though I agree with the conclusion.

There are plenty of ways in which we can attempt to get the law changed without disrupting other people from going about their legal activities (however abhorrent they may be to one personally). In short even where it is not possible to get the law changed as quickly as one would wish I believe that there is still an overriding duty to obey the law. There is little short of a quasi war situation which would morally permit us to break other laws.

This may sound unduly harsh but I am convinced that the imperative of maintaining the rule of law in any society is of the highest priority. Only where the means of changing the law by legal means is absent, and where the government cannot be changed (i.e. not because it has an overwhelming majority, but rather because there is no legal means of changing it) may there be a case for breaking the law, and as I said previously this will be tantamount to a civil war situation.

However there seems to be a case which slips through the net we have considered, and it comes about because most people take a liberal society as being synonymous with a just society. This is simply not so. There is a tendency for a liberal
society to favour freedom for the individual in principal but in practice the opposite can easily be true. Under the banner of utilitarianism, and pandering to and protecting the masses against their own stupidity, there can grow up a vicious and evil bureaucracy, benevolently conceived but which then grows like a malignant cancer, convinced that its knowledge of what is best is absolute, and red in tooth and claw in its determination to maintain and expand its control. In the name of what is ‘right’ this army can inflict hideous injustices on the individual. Already we have seen children torn from their parents in the dead of night, and a man who shot a bureaucrat who ordered him to pull down a house he had built on his own land because it apparently had not been granted ‘permission’.

A few years ago there was a case of a cheese manufacturer, Duckett's Dairy in Somerset, whose whole business was destroyed, not because there was anything wrong with it, but the ministry had found a means of doing so without resorting to the courts and they could not resist the exercise of power. The case was described in the press as “a saga of official incompetence which promises to break all records”66. Otherwise it seems to have been ignored. There need apparently be no compensation and the man and others were presumably destroyed.

Now that sort of injustice does not bring me out in favour of Civil disobedience, it practically brings me out in favour of armed revolution. So great are the injustices committed by bureaucrats that I can sympathise with the man who shot the planning official, and had someone tried to remove even my dog in the dead of night there would in all probability have been another dead or seriously wounded bureaucrat lying in the gutter. It seems that in this monstrous world where planning and regulation transcends justice there is no recourse for the individual who is not in a position to defend himself. This appears to me to be a primary cause for the deterioration of the standing of the law, with a consequent growth in the incidence of Civil Disobedience. Now it seems that if we are to discourage Civil Disobedience and encourage obedience to the law in general we have, inter alia, to provide a means for the citizen to counter the deadly bureaucratic hand.

There are of course a number of solutions, but in order to correct these injustices it would virtually be necessary to re-establish a separate court of Justice, where a wronged person may go to plead that the law in its present application to him in these circumstances results in an injustice, or that the remedy decreed is unjust. Moreover such a court would have to be free to all citizens, but to prevent its abuse there would have to be a

preliminary hearing rather like the former grand jury to establish a prima facie case. The case ultimately would have to be heard by 1-3 Appeal Judges (or their equivalent) aided if necessary by experts. The proceedings would be simplified as to evidence and documentation. The result, being specific to the circumstances would not necessarily set a precedent, though it should be free to the court to award damages against the authority or even the specific bureaucrat responsible.

However these are political solutions, long overdue, and they can not be pursued in depth here, except that they emphasise the overriding importance of justice and the need for an individual to be assured of obtaining it. Where an individual's life can be virtually destroyed without recourse it is but a short step to the gas chambers.

I believe that the individual may be justified in fighting back in the case of monstrous personal injustice, and that this, like self defence, may over rule the prima facie obligation to obey the law. However I maintain that this is excusable only in extreme circumstances, and that the need for general obedience is paramount in order to prevent a reduction to chaos.

SUMMARY

We have seen that there are two specific areas of disobedience:
1) The moral defence of conscientious objection to a positive act required from us by the state. Here both Raz and I have reached the same conclusion that while the person may do so (in my case I would say has the power to do so), the state will exact some form of penalty. We both seem to take the view that that is just.

2) The case where law B is broken because we object perhaps on strong moral grounds, to Law A. Here again we tend both to agree in the end result, that there is no right to civil disobedience (in Raz's case where the society is ‘liberal’ - in my case irrespective of whether the society does or does not guarantee political participation), but we get there by entirely different reasoning. Plus

3) The terminal case where it is necessary because the society is so oppressive, to fight for one's beliefs. This, I believe is a different case and not analogous. The individual has the ‘power’ to decide to take up arms. Raz may regard this as a ‘moral right’, followed by a decision to do so - so the action is ‘justified’. I consider the individual has the power to do so, based upon a moral decision which ‘justifies’ the action in the eyes of that individual. If sufficient numbers agree then his action will be deemed generally ‘justifiable’.

However the idea that a law may be invalid because it is deemed by some to be immoral and they therefore in some way have a right to take action by way of breaking
that law or others as a means of showing their opposition is the great Law Myth of our time. It has really only blossomed since the permissive 60's and if not stamped out will lead to eventual chaos.

POSITIVE DUTY TO OBEY THE LAW.

I have referred to this on several occasions. I maintain that this is present by virtue of the fact that:-
1) Power is prior to rights and Duties.
2) Rights and duties are created by the law.
3) The state has the multital power required to establish unpolarized rights and duties by establishing the law.
4) Traditionally all states stand in a Dominant position with respect to their citizens.
5) The state establishes jural relations in an unpolarized form between itself, as Dominus, and the citizen (Servus). It also establishes in the laws, unpolarized jural relations which may occur between the citizens.
6) These jural relations become polarized to form legal relations by virtue of the operating facts which themselves are initiated by an act of power. (We each have the power to initiate an act creating a legal relation).
7) Insofar as the state establishes codes of conduct for the citizens and requires compliance therewith, the state of Dominus and Servus and a jural relation exists.

The state has the right, long established by precedent in all states / recognized by the authorities (per Hart) / inherent in the establishment of any state (Lundstedt) to demand obedience from its citizens and the citizens have the Duty to obey.

These rights and duties are prima facie valid. Invalidity may occur, for example due to a law establishing a duty being ultra vires i.e. beyond the power of the state to effect. - e.g. a minister makes regulations which he does not have the power to do.

The validity of the law is not subject to question by virtue of its morality. Nevertheless a state may enter into an international agreement to, say, preserve a specific right (e.g. free speech) A law subsequently passed restricting that right may be invalid, but not because it is morally offensive, but contradicts another law which (say) could not be overruled without a 2/3 majority in parliament, or whatever other restrictions might have been agreed to.

Only in the case of overwhelming injustice is it possible to over rule the prima facie duty to obey. This is virtually an equivalent to self defence.
So far we have removed the question of morality relating to validity. This is necessary because morality changes and without some criteria for establishing when a question of morality becomes "the law" we can not have it change the law. Otherwise the whole system would be subject to springing and shifting changes, and uncertainties that would create more harm than good. The idea that morality can govern the validity of a law is the great Law Myth.

So have we eliminated morality altogether? To this the answer is definitely no. Morals and ethical principals have a large part to play in concepts of justice. However justice as such does not automatically over rule the law. The court decides upon the law and enforces it. There is a certain latitude with the judges to temper harsh cases and in their obiter dicta the judges may well reflect the necessity for changes but they rarely over rule the law. Where they do manage to effect changes it is usually on the grounds that the law does not cover the precise situation. Whereupon they import a concept of justice to reach a solution. This relates to the problem raised by Professor Dworkin as to what happens when the law does not cover the actual situation (i.e. his hard cases). This as I hope to show will lead us towards a rapprochement with some Natural law theories, and the substantiation of the right to a claim for justice in the next chapter.

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CHAPTER 5. RULES OF LAW - PRINCIPLES OF JUSTICE.

For the non specialist: Here we are going to discuss, amongst other things, the conflict between Positivism and the Natural Law theory. As a quick synopsis you will recall -

Legal Positivism is the antithesis of the Natural Law Theory. The Natural Law Theory is based on Natural (or reasonable) moral standards providing the foundations of valid laws. Legal Positivism is based on the concept of law as an authoritarian statement (Austin maintained it stemmed from the Sovereign's will) and is therefore definable as valid without being based on a moral evaluation.

At this point we are about to examine one of the most fundamental roles that the concept of Justice has to play. It is in the area between the positive law and the Morality and Ethics of a Society. Justice is uniquely placed to serve us here because while it is behind the law it is not of the law.

In any society the law can only provide the guidelines and even though it may appear to be fairly specific, it is in reality still only a generalization. It does not, and can not allow for each and every circumstance. That is why there is, as we saw earlier, a need for a law applying body - the courts where the judges apply the generality of the law to the specific facts.

It is here that Professor Dworkin's 'hard cases' arise. These are cases where a direct reference to the enacted laws appears to leave a gap. One of the best examples is one Dworkin used, the case of Riggs v Palmer, where the court ruled against a murderer inheriting under the will of his victim, even though there was no law to this effect. One of my favourite examples is Rylands v Fletcher. As Dworkin says, most lawyers probably accept that in such cases the judges use their discretion. In fact as he points out they do far more than merely use their discretion.

This also brings him into conflict with Hart, because in deciding these cases Dworkin maintains, correctly in my view, that the judges are making new law which does not come within Hart's rule of recognition.

Up to now I have taken a fairly strong positivist view but there are distinct loopholes in this approach, and the most expert exposers of these loopholes is Professor

67 The facts and details are set out in Chapter 6.
Dworkin. He shows up the problems with his ‘hard cases’. There is no problem when a case fits precisely within the law. However the law itself is composed of generalizations meant to embrace a large number of cases the facts of which are never quite the same. Hart describes the law as open textured. Dworkin describes it as having furry edges (I think I rather prefer Dworkin's ‘furry edges’). In most cases the judge will adjudicate on the case within his interpretation of the law (which may or may not be appealed against), and the case is decided within the law even if the case sets a new precedent.

So far so good, but Dworkin then cites cases in which judges make new law. He particularly relies on Riggs v Palmer (where a murderer was not permitted to inherit under his victim’s will) and Henningson v Bloomfield Motors Inc. (where the manufacturers were not allowed to limit their warranty when a manufacturing defect made the car dangerous). These are excellent examples and show up the point he is making very clearly.

Dworkin's explanation is that the judges refer to Principles of Law, as opposed to Rules of Law in these instances. He emphasises the different qualities of a ‘Rule’, which is fixed - i.e. if it is overruled it ceases to be a rule. If it is varied it becomes a different rule. On the other hand Principles are far more flexible. They are subject to being overruled without being defeated and ceasing to exist. Variations, possibly brought about by conflict with other principles in the light of the circumstances, do not fixedly alter the original principle. Therefore he argues that Principles of law, which are a vital part of the law and its application, do not fit under Hart's rule of recognition.

At this stage Dworkin tries to dismiss Hart's rule of recognition. There have been arguments from his opponents, positivists such as Raz who have argued eloquently and eruditely that Dworkin's objections are invalid and that these Principles can be fitted within the rule. I shall not go into the arguments, because despite their undoubted ingenuity I am still left with the view that Dworkin has a valid point which refuses to be demolished. Where I want to differ with Dworkin is in what he does next. I feel he wants to sling the baby out with the bath water whereas I am desperately hanging on to the plug trying to salvage what is best from the rule of recognition.

The reason I feel I can do this is that when I look at Dworkin's Principles I do not see Principles of Law because they do not fit within the positivist’s definition of Law. Rather I see every one of them as Principles of Justice. And what difference can that make? - A very great deal. You will recall from Figure 1. in chapter 2 that I laid considerable emphasis on the different philosophies lying behind each category. We see that, unlike the law, Justice is derived from Principles of Morals and Ethics. The law, on the other hand,
may be based on the grounds of utility, necessity etc. Therefore it would be quite wrong to try to fit these Principles (of Justice) within a rule of recognition for the law. Moreover I have tried on several occasions to emphasize the malleable nature of Justice - its need to produce fairness in a way that is acceptable within the mores of the day.

Given this, we now have an aspect of the legal amalgam which incorporates a basis in morality and ethics which in turn plants a foot squarely in the natural law camp. Again if exponents of Natural law theories will go along with me sufficiently to appreciate that their ‘Natural Law’ (which again does not fit within Hart's Rule of recognition) would in reality be better defined as ‘Natural Justice’ by my definition, then we can begin to effect a serious link up between the two. The secret however lies in accepting that they are two different things with different philosophical backgrounds that co-exist, rather than taking the previous view which has always been that one or the other must knock its opponent out of the ring.

Once having got this far we are still a long way from a solution and we have many more hurdles to surmount. However the first one is that we do not have to throw out the rule of recognition - it is quite valid for determining what is or has become the law, or a rule of law. However we are now dealing with Principles of Justice. I am sure the purists will say ‘but you have failed to produce a single rule to cover everything’. To which my answer is “How right you are, but who said I had to have such a rule anyway? - so it is no good becoming in togam torquendo because you have set up some impossible barrier upon which I refuse to impale myself”.

But once we accept that we are dealing with principles of justice which answer to Dworkin's characteristics of resilience and mutability we are still faced with the most major problem of all - How can we relate these two? In order to do so let us abandon our stance as a positivist (already somewhat Dworkinized) and look at it from the point of view of Natural Law theory. Here I presume we must take the view that there is either a whole range of natural laws - which if their theory is to hold together, would have to be capable of being set out rather like our positivist laws, and these presumably would require us to establish some rule of recognition for them. Moreover these would be the equivalent of legal rules and would thus be subject to being over-ruled, defeated, amended etc. as is the case with all laws. This is not what we want at all. What we need to import are not natural laws, but the principles of Justice from which we derive flexibility and the application of

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68 “Getting one’s toga in a twist”
morals and ethics to vary and if necessary set the law aside.

It occurs to me therefore that if there is to be a natural law there will be only one, but it will invoke the Principles of Justice into all other laws. Therefore we may say that the Prime Natural Law (which subsequently I shall call The Prime Inherent Law) is:-

“In any anomic or mesonomic relation which may involve an exercise of power or a ligation the Servient party is entitled to Justice at the hands of the Dominant party”.

If we unwind this rather fierce looking definition we find that it covers the following:-

In any situation, whether it is potentially covered by the law (Mesonomic), or even in situations which are not covered by the law (Anomic), if there is a relationship, agreement, obligation, or understanding between two or more parties, then where such a relationship involves one party being obliged to another, or under a duty to the other to do something or perform or desist from any action, then not only shall the senior (Dominant) party (i.e. the one who is in a position to benefit from the performance or action or non performance of the action) always treat the other (Servient) party fairly, BUT the party who has to perform his or her obligation shall be entitled to and have an enforceable right to be treated justly by the dominant party. Similarly this applies to obligations between the State and its citizens.

Again where one party has power over the other then, in the exercise of that power, the subservient party is nonetheless entitled to be treated justly. This is particularly important when it comes to treatment of its citizens by the State. This is why it is put negatively, i.e. that the subservient or weaker party is entitled (has a right - a Hohfeldian claim-right) to justice at the hands of the other. We shall see later how this can be related to all acts of power, giving rise to a responsibility to those under our control such as children and animals. All of which shows why, if you squash it into three lines it makes the Prime Inherent Law look rather formidable - and, I might add, properly recognized and applied in any society it would indeed be formidable!

Now the effect of this law is to introduce the Principles of Justice into the general law, not only inter partes but most importantly between the State and its Citizens. This is because, as you may recall, my views of the relationship of the Citizens and the State is one of constructive Contract - a jural relation. The citizen accepts the protection of the
State in return for obedience to the law. Thus there are duties and ligations involved, and by the Prime Inherent Law Justice is invoked between the citizen and the State.

How does the Prime Inherent Law exist? What brings it into being? The answer is that it is the prime factor inherent in any civilized State. This is why I tend to regard this law as the Prime Inherent Law which describes its manner of coming into being. However others might well consider it to be the Prime Natural Law. I would argue against this because the fact that it is inherent (which is what brings it into being) is different to being derived from nature. Any State which ignores this law, either between itself and its citizens or in administering the law between citizens can no longer call itself civilized. It is thus a necessary element of any civilized State and must therefore exist. Alternatively it may be said to exist definitionally. There is no way it can be eliminated without fundamentally altering the nature of the State. It is interesting to note that while I tended to disagree with Raz when he introduced the right to political representation as the fundamental distinction of a civilized society (because I think it would be possible to have a civilized society without political representation), I have, by the introduction of the concept of justice provided a foundation from which he could argue towards and arrive at the same conclusions as before. This is why although we appear to disagree over some fundamentals - I could never agree to his definition of rights and their creation for example - we often seem to reach similar conclusions in relation to morally based matters.

It is my belief that with my solution we can overcome many hurdles and found our conclusions on a firmer footing. We have produced a law which is necessary to any culture which is civilized. It does not have to be authorized by anyone or brought into existence. It is necessary to, and inherent in, the existence of any civilized culture. In short it is part of the definition of civilization. We have hereby tied the Natural Law into the Positivist's Laws and we can see, through the many examples given, that the two do co-exist and indeed how they interact as in the cases cited by Dworkin.

What we have now is a society based on positive law, together with principles of justice which impart flexibility. From this our case law proceeds. We do not need prior rights - all we need is justice. After all, according to my definition, a right involves a jural relation and these jural relations are set out under the law. The concept of what is just in any society feeds through as limitations on any restriction of freedom. Again you will recall that Freedom is a state and does not involve a jural relation. It is only when it is restricted in some manner that a question of justice is involved with its concomitant introduction of the Prime Inherent Law, thereby establishing a mesonomic jural relationship.
What we must now do is to see whether my concept answers some of Dworkin's further points. While I have been happy to be Dworkinized as far as we have gone, he lays claim to rights pre-existing legislation, and at first blush this tends to make me feel that either we are talking at cross purposes or he is advocating a whole series of natural laws which are unwritten but which can unseat the law of the land. Those aspects of positivism which I have so far not shed instinctively make me bridle at such an idea. Yet are we really so far apart? I have introduced one law prior to legislation and this is designed to bring in ‘Principles of Justice’ which I have already noted bear a remarkable resemblance to Dworkin's Principles of Law. Moreover we must remember that Dworkin is referring mainly to the type of society that has a constitution which outlines certain basic freedoms and political objectives. These in themselves create potential or unpolarized jural relations. These in turn become polarized by virtue of the operating facts (relevant circumstances) and may be called upon to be interpreted by the courts. In so doing the courts rely on Principles of Law (Dworkin)- my Principles of Justice, and may create new law, which - according to me anyway - would be recognized in future by virtue of the rule of recognition. Thus may an application of the Principles of Justice graduate via case law to become part of the law of the land.

I believe that I can accomplish all of Dworkin's results by my method, and this is a method which will work for a country without a constitution, as well as one with one. In fact it is my argument that once the principle of inherent Justice is recognized one has a more flexible system without a constitution.

Next we should perhaps deal with Hart's view that no rights or duties of any sort can exist except by virtue of a uniform social practice of recognizing those rights and duties. Hart has a general theory of the concept of obligation and duty together with a specific application of that theory to Judges. So, if law is a matter of rights and duties and not simply the discretion of the officials then the law is subject to this and must be subject to a test of uniform social practice. Dworkin most effectively unseats the concept of social rules as playing a basic part in giving rise to uniform social practices. His arguments are, I find, most persuasive. I do not believe in law being based on social rules in this manner. Law defines the social rules, and it is not something we obey only because we agree to the contents of the law. You will remember that I started from a fairly contractarian viewpoint - Our duty to obey the law stems from our acceptance of the benefits of citizenship, not our

69 See Taking Rights seriously Chapter 3.
agreement to any specific law. I have already set out the possible avenues of action if we do not like it and no longer wish to accept it.

Obviously there is a degree of majority acceptance in that no society would work if there were complete rejection by everyone of all the laws, but this is very far from implying that social rules have any necessary part in the defining of a law. Anyone who has experienced the raw side of politics and who still believes that the law is made up of a consensus of what the citizens actually want is looking through rose coloured spectacles of such a deep hue that it is unlikely they could even see the telescope let alone hold it to their blind eye! Politics is primarily about the manner of exercising Power.

So while Hart supposes some social rules exist in the community of judges to fix the limits of the judges’ duty to recognise other rules or principles of law, Dworkin rejects this. I am afraid that again I agree with Dworkin, and in my view, while the judges are bound to recognize the rules of law, they are also bound to produce a just judgement. When they find the rules of law (statutory and case law) are not doing this they are entitled to take into account the relevant Principles of Justice and if necessary weigh them all in the balance. The ability with which they do so determines whether they are a good judge, a bad judge, or sometimes a great judge.

We may, however, accept Hart's rule of recognition insofar as it is recognition and acceptance by the courts for the purpose of establishing the validity and limits of what is the law.

We then accept that the courts may go beyond the strictly defined law and apply the relevant Principles of Justice when necessary. Their authority for doing so is the Prime Inherent Law which I have cited. The Prime Inherent Law requires no authority to establish it because it is inherent in the definition of a civilized society and we can therefore accept Dworkin's rejection of the social rule theory and drop it gently overboard. If it swims along we may find a use for it later, but my feeling, despite the eminent arguments to the contrary, is that Dworkin has effectively holed it below the water line.

Now if the judges’ duty is to consider the Principles of Justice where appropriate, it is their judgement as to when and how far these apply. The Priorities of the Principles of Justice may differ from State to State and even from time to time within the same state. This is what permits the flexibility and changes in the law. One cannot reduce law to fixed stringent and immutable rules as if it were a science. The difference is that while science may be said to be logical, the law may be said to be biological. When it comes to an application of justice each case is decided by the weighing and balancing of many factors and
there can be no discernable rule for saying this is just and that is not, or if there were, it would be like Davidson's concept of mind/brain state relations - anomalous. On the other hand this in no way affects our use of the rule of recognition to determine what the regular body of law is.

**Hard cases - Principles of Justice v the Rights thesis.**

Having ruled out the possibility of a social rule governing the judges in cases where the statutes or previously decided case law does not adequately cover the situation, we now have to consider whether the application of Principles of Justice does.

Again Dworkin is the leading exponent of an alternative approach to these cases which he calls ‘Hard cases’. His answer is to introduce a ‘rights thesis’ which at first glance appears to involve rights which pre-exist the law. Now as I have been at pains to point out, ‘rights’ according to my definition cannot precede the law except in the case of the Prime Inherent Law. Furthermore my Prime Inherent law introduces only one right - a right to the application of the principles of justice. This is important in the sense that any so called rights brought about by this application will be derived rights, i.e. they will stem back to the assessment of the relevant principles having regard to the operating facts of the case. One case does not necessarily establish a so called right as a rule of law unless and until the same is incorporated within the statute law or accepted as a rule by virtue of subsequent recognition by the courts.

The alternative is to try to produce a number of rights which operate by virtue of a series of independent natural laws. For obvious reasons this latter approach does not appeal to me because while I can (to my satisfaction anyway) justify the Prime Natural Law as inherent in the definition of a civilized country, it would not be possible to justify a whole series of different natural rights in this way - They would according to my definition require a source of power enabling their creation. You will recall my extrapolation that Power is prior to rights, these being the only two forms of jural relation. So I cannot accept Dworkin’s ‘political rights’ as such - where do they get their power from etc.? If of course they are rights derived from what may be regarded as political intent from or by virtue of the Constitution then they could come within my definition as any Constitution is itself the equivalent of a statute of law, albeit in a somewhat more immutable form.

However Dworkin explains that the rights thesis is that judicial decisions enforce existing political rights. Now I appreciate that Professor Dworkin comes from a jurisdiction where not only is there a written constitution but judges are actually appointed politically. So while Dworkin may be happy seeing judges applying political rights I by
nature shy away from such an explanation. As he goes on “Judges like all political officials, are subject to the doctrine of political responsibility”.\textsuperscript{70} That may be so for U. S. judges but as far as I am concerned the doctrine of political responsibility may well differ in the USSR, Iraq, Cuba, Zimbabwe, etc. No red blooded Englishman, who tends to regard the average politician as a life form two below that of a good horse thief and roughly on a par with an estate agent, would set to sea in a coracle that leaky.

However Dworkin's theory of political responsibility in fact turns out to be less problematic than one might originally think. In the first place this is because his examples show that it is directed towards consistency of policy. In political decisions he feels policies are aggregative and for example if a grant is made to one manufacturer it does not follow that every such manufacturer must necessarily receive such a grant. However when principles are concerned they must be applied evenly and not in a contradictory manner.

He feels that judicial decisions are political decisions in the broad sense that they attract the doctrine of political responsibility, i.e. arguments of principle must be consistent with earlier decisions which are not overruled. This is so, and judges usually explain their decisions in their judgements in this light - This I would describe as judicial consistency, not political responsibility which generally speaking is nowhere near as consistent or responsible.

Generally it seems to me that Dworkin's arguments are based very much on his training and background, i.e. that there exists a Constitution setting out ‘grand rights’ which he tends to regard as political rights. However many countries such as the U. K. do not have a written constitution and although we may sign treaties containing references to rights in the general sense or even adopt a constitution (Heaven forfend) these are factors additional to the basic workings of the system. If all Dworkin's rights were to stem from constitutional rights it would merely be the equivalent of dealing with nominated or specified rights. These are quite simply treated in the same way as if a principle of Justice had been set out. The question is however - Do any of the rights Dworkin refers to, purport to be inherent rights? My suspicion is that they are all deducible from Principles of justice, and if I am correct in this then there is no conflict between us. The guidelines for the principles may well be derived from the Constitution (which is just) or having regard to the intention of the

\textsuperscript{70} Ibid p.87.
legislation (which one also assumes is just), but what happens when neither are there to help? That is where the Inherent Law comes in.

He is also concerned with precedent, and a third factor, that judges may have to make judgements of political morality. Quite apart from the fact that I am highly dubious about the existence of political morality I think he is referring to what I would call communal or social factors, which may have nothing to do with political issues. Our trouble, as always in discussing theories, is to be sure that we are talking about the same thing. Political issues to me refers to an issue on which there are different political viewpoints and proposed solutions. I find it hard to regard it as a general term such as I would term a sociological issue. Always we have to beware the limitations of our language and I do not want to reject what may be a perfectly valid theory on the grounds of my simple misinterpretation of it.

Fortunately Dworkin gives us definitional examples. To him :-

**Arguments of Principle** are arguments intended to establish an individual right. Of course I do not cede that individual rights can be established this way, but if these arguments are based on principles of justice to establish a moral claim to a right to the application of justice in a certain way then the courts may in the appropriate hard case find in such a manner that a right is thereby granted. I know it may appear that I am quibbling but it is important. What I am doing is going back one step further to relate each case to principles of justice and thence forward again via the application of the Prime Inherent law. This I do in order to provide a logical and consistent link for any decisions in hard cases later to become part of the general law (by virtue of their recognition and application).

Dworkin’s **Arguments of Policy** are intended to establish a collective goal. Now the example he gives is that it is natural to say that Freedom of speech is a right. I am sorry to appear picayune but I would say it is a Privilege unless it is transformed into a right by legislation or otherwise incorporated into the law. Furthermore that right would then have to be circumscribed by the legislation. He says it is a right, not a goal because citizens are entitled to that right as a matter of political morality. (His political morality and my Justice are beginning to look more and more alike in this instance). Now I would argue that any privilege is based on lack of restraint of a freedom i.e. that unless restrained by the law of our society we are in a state of freedom of speech. If that freedom is restrained then the question is - Is that restraint just? And that is a matter of Morality. Thus although we go about it differently I can not see that our end positions will differ. This is very important because it will be my argument that Dworkin has expounded a specific application based on a U. S. example of a state with a constitution. And that such example does not clash with the more
basic rules which I am proposing which work equally for a State such as the U.K. without a constitution or for one with one.

I maintain that Dworkin has actually taken a short cut when he argues that rights are based on morality. Morality cannot grant rights (claim-rights) to a freedom which exists as a non jural state, it can only censure any restraint of that freedom. That censure amounts to a moral claim to justice which can be brought into consideration by the courts by virtue of the Prime Inherent Law. So while it may be convenient to talk of a right to a freedom of speech it is really a shorthand for the right to prevent an unjust restraint of the freedom and therefore it falls under the Prime Inherent Law. So, although I may be using slightly different terms, and starting from a general theory one stage back, it would seem that our end position will in each case be similar. This is most important because having been convinced by a number of Dworkin's arguments, I believe that insofar as my theory provides an alternative explanation of his theories they are compatible.

With regard to his example with respect to goals he cites increased munitions production as a goal because it contributes to the collective welfare. He then, by distinguishing rights from goals, begins by attempting to provide a guide for discovering which rights a particular political theory supposes men and women to have. I do not wish to follow this course because I believe that in each case he ultimately comes down to saying ‘it is unjust that such and such should be the result of the case’. Once the word ‘just’ is used to describe a situation or result we are on common ground and within the influence of the Prime Inherent Law. Again what is regarded as just or unjust is a question in Dworkin's terms of political morality of that State at that time. As a result I see no reason why our reasoning should lead us to conflicting results. I just find it much simpler to look at whether a restraint is just or not rather than try to build up a series of rights (Privileges) abstracted from a general political moral background, and then to try to insert these into a legal system which by its very nature incorporates a perfectly adequate means of dealing with it. The fact that judges do not refer directly to the Prime Natural or Inherent Law does not mean that it does not exist. Their very actions are consistent with its existence so that in my view it is far more clearly defined than any political morality or political goal. These latter are the variables that affect the definition of ‘just’ in any society, They can change without changing the Prime Natural Law which is what makes the latter of such great importance.

This in no way undermines the importance of the distinctions which Dworkin makes between Goals and Policy, Principles and Utility, Principles and economics etc. But in each case he is referring to factors which affect, or do not affect, a decision of what is just
in the circumstances. I also believe that Dworkin tends to slip into the habit of referring to Principles as rights, which is easy enough to do. For example at p.96 of *Taking Rights Seriously* he refers to "the right to equality between races". Now the point is that he is weighing it against other arguments and, by his own definition, it is only Principles that can be weighed against each other without being overruled or changed. By all means we should ‘take principles seriously’ but once we promote them to rights we cloak them with a rigidity which means that they can only remain absolute or be overruled (again by his own definition). At that stage their character is irreparably changed. So again I find we can go along with Dworkin reading ‘a moral claim based on Principles of Justice’ for many of the so called rights.

The basic point is that each of the so called rights seems to me to be only that to which a person would feel entitled in order to feel that they had been justly treated. Therefore are these rights any more than a right to justice under the prime law? I would suggest that they are synonymous.

Later Dworkin worries that his rights thesis, which he feels is secure in Civil Law (i.e. one party has a right to win), does not apply to criminal Law insofar as the state has no right to punish. My worries are the other way round. As will be apparent later, I believe the State does have a Hohfeldian claim right to punish (but that punishment must also be just). On the other hand I am not so sure that in all civil cases one party necessarily has a "right to win" as Dworkin claims. I am sure there must be cases where the right to win is blurred. All the cases of *Novus Actus Interveniens*, last clear chance, etc. seem to raise general doubts on this issue. Mrs Palsgraf certainly set out thinking she had a right to win, as did the plaintiffs in *In re Polemis*. So did Rigg, but the Judge intervened to see that the Principles of Justice were taken into account. I do not see how we can say that one party had a right to win except ex post facto.

However with my explanation one does not have to go hunting around for rights to win, one merely has a right to involve the Principles of Justice. Dworkin's thesis provides that judges decide hard cases by confirming or denying concrete rights. They must be institutional rather than background rights and legal rather than other institutional rights.

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71 *Taking Rights Seriously* p. 100.

72 See Chapter 6.

73 Ibid.
For example he looks at chess rules. Even here after examining the case in detail he concludes that ‘the hard case asks what it is fair to suppose the players have done in consenting to the forfeiture rule’.

**Legal Rights.** Here Dworkin says the concepts include the intention or purpose of a particular State. These provide a bridge between political justification of the general idea that statutes create rights, and the hard cases that ask what rights? The second concept included is of the principles that include the rules of law. This provides a bridge between political justification of the doctrine that like cases should be judged alike and the hard cases in which it is unclear. These, Dworkin maintains, define legal rights as a function of political rights.

He then gives the example of his mythical Judge Hercules who considers first the constitution as just and settled, ‘for reasons of fairness’. He then says, citizens take the benefit of living in a society whose institutions are arranged and governed in accordance with that scheme and they must take the burden as well. So far Hercules could not be doing better if I had written his script for him.

When Hercules considers Statutory Interpretation Dworkin has him considering which articles of principle and policy might have persuaded the legislature to enact just that statute. Here I confess to being a little lost by the arguments. However it does seem to me that in cases of doubt and in reviewing the various principles involved Hercules would have reached the same conclusion by applying principles of Justice. It is I think fair to say that our judges do not pay ostensible attention to parliamentary intention when interpreting statutes, preferring to rely on the wording so far as it goes. However if this appears to produce a miscarriage of justice they tend to find their way round this by applying common sense (which would probably be their description of the principles of justice if they thought about it). The principles of justice are more likely to involve the political intent assuming the legislature has attempted to be fair.

It is a very interesting question as to how far legislative intention should be a proper matter for consideration by the courts, and while there is a difference between the U.S and the U.K. I do not think that it undermines the application of The Principles of Justice. It would be possible for some countries to consider it proper for inclusion amongst the factors

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74 Taking Rights Seriously p. 104.

75 Ibid p.105.

76 Ibid p. 106.
governing the application of justice whilst others excluded it or gave it a much lower persuasive value.

**Precedent**

Here Hercules has to consider a hard case not covered by statute. **Spartan Steel** is the cited case - a case where the plaintiff's factory was put out of operation by the defendant's negligent act in breaking a power cable. The case is not covered by statute but there are cases awarding other sorts of damages, and what do we find:

“That the gravitational force of a precedent may be explained by appealing not to the wisdom of the enforcing enactments, but to the fairness of treating like cases alike”

(Emphasis mine)

- A nice Aristotelian concept of justice if ever I saw one.

All in all I cannot see that Hercules would reach any different conclusions working on my thesis than he would with professor Dworkin's. Nor do I see that he would in any way be prevented from constructing his scheme of abstract and concrete principles to provide a coherent justification of common law precedents and statutory provisions (which include Constitutions when applicable). True, I suspect Hercules of applying a greater emphasis on Statutory intention and economic policy than I would expect of Sir Hector Grindit-Fineleigh (his U.K. counterpart) but I do not find the discrepancies fatal. It is interesting to note Dworkin's contention that Judges no longer tend to make rules as they did in **Rylands v Fletcher** but tend rather to cite reasons in the form of precedents and principles. I have the sad feeling that this is true and that the law is poorer for this. Indeed I feel that both Hercules and Sir Hector might find their task easier if it were not so. But this is an aside. Even so, given the tortuous difficulties facing Hercules I feel that Sir Hector Grindit-Fineleigh may find it easier to get to the right decision following my path (despite his naturally more ponderous disposition). The main thing is, I suspect, that the decisions would not be too far apart - again allowing for Sir Hector's less adventurous nature which would cause him to err on the side of a conservative interpretation of all principles.

One could go on making a detailed comparison of case law but I hope that by now I have illustrated that the theories are not mutually destructive despite the fact that Sir Hector would not agree to there being any Hohfeldian rights prior to their acceptance as 'law' by virtue either of Statute or precedent. Of course Sir Hector would not instantly recognize the Prime Natural Law as such, having not previously been interested in the jurisprudence or philosophical thinking behind the idea of equity.

Not only do we have Dworkin's Hard cases, which I hope I have shown can be
similarly resolved by my explanation but we have the important question he raised concerning individual rights existing prior to rights created by law. As he points out both the left and the right reject the current positivist approach. The left on the grounds that economic utilitarianism allows poverty to promote efficiency, and the right tend to argue that the State should not be entitled to dictate its idea of the good by means of social engineering which may well ignore the wishes of the people.

Neither, he feels, object on the grounds of pre-legal rights. Whereas the objections of the left and the right as expounded by Dworkin are the proper concern of political philosophy they fall outside the ambit of this book. However Dworkin's proposition about pre-existing rights definitely does not. As by definition ‘rights’ involve a jural relation, and as I have argued that Power is prior to rights it looks as if I must be in direct conflict with Dworkin. Yet curiously I suspect that this is not entirely so.

The first point that lessens the apparent disagreement is that Dworkin appears to me to be using the term ‘rights’ in these cases to refer to moral claims, not established Hohfeldian claim-rights. These Dworkinian rights only become enforceable after the judge has considered them and incorporates them into the judgement. Similarly they may be based on ‘political morality’. These fall within the latter part of my definitions in chapter 3 and are not enforceable per se. I would argue that they are brought into consideration via the Principles of Justice as previously described, so that the apparent conflict as first thought, being brought about by a different use of the word rights, dissolves.

Secondly we must remember that in the U.S.A. they have a written Constitution of Political Objectives. Where this covers any specific matter it gives these moral claims a more Hofeldian aspect.77

So, although in the course of expounding any point the writer's basic assumptions and viewpoint must be taken into account, the advantage of the above system of Justice and the Prime Inherent Law is that it is equally applicable to many societies. It is applicable to a goal based society, an equality based society, even a benign dictatorship. In fact it is applicable to any society which purports to be civilized in that any civilized society incorporates the concept of justice. It is, as shown in Figure 1.in chapter 2, independent of the form of governance and provided a society is ‘justice conscious’ an awful lot of variations can be made with respect to other matters.

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77 More technically they might be said to set out unpolarised mesonomic jural relations between the State and subject.
At one point it almost looked as if Mill were coming close to something akin to the first step when he said that Justice involved a personalized right similar to a legal right. However he failed to appreciate the importance because he was founding his concept of justice on the desire to punish based on self defence and sympathy for the person affected by the injustice. He felt justice to be a rule of conduct and a sentiment. It is more than that; the law provides the rule of conduct and moral judgement provides the ethical basis for our consideration of what is just.

One point of interest arises though. Can a series of small injustices give rise to a cumulative injustice? It is arguable that it might be. After all, unjust profiteering, particularly with regard to essentials such as food could give rise to a situation where the poor and elderly are deprived. The State then has to pay additional benefits to them or for their hospital bills because they are not so fit. Even so no law has been broken, the offence is purely moral. It is difficult to see here how Aristotle's grasping unjust man can be brought to any legal account. Perhaps living off immoral earnings should take on a new meaning. Certainly there should be a means of condemnation, but, in our present material society where the goal of wealth is worshipped above all else the current interpretation of ‘just’ is far from Aristotelian, which may well account for a number of evils in our society.

**POWER AND RESPONSIBILITY**

The fact that the Prime Inherent Law gives a right to the application of the Principles of Justice has an important side effect. If there is a right, then according to my definitions there is a correlative duty. But more importantly the duty involves a responsibility. So far we have taken this for granted, i.e. If I owe you £100 you have a right to obtain it and I have the duty to pay. It is also true that the duty fixes who is responsible for the payment, namely me. It is by virtue of the Prime Inherent Law that the Legislature in using its power to pass laws has the duty to enact fair legislation and is therefore its responsibility to do so.

We are beginning to see the connection between Power and responsibility because all acts of power resulting in a jural relation are governed by the Prime Inherent Law. Thus where there is a failure of justice in an exercise of power the responsibility lies with the persons exercising the power. Moreover it is a short step from there to realise that Power and Responsibility are directly connected. Rephrasing this -

**The responsibility for the justness of any act of Power rests with those exercising the Power.**
Thus the state is responsible for its multital acts of power, and the individual is responsible for their paucital acts of power. This may be said to be directly derivable from the **Prime Inherent Law**. It may be stated simply - **With Power goes responsibility**. Now this may be seen to have very far flung consequences, from acting as the basis of the justification of laws against crimes of genocide downwards. Moreover the denial of this responsibility is a denial of justice. Thus it may be possible to justify claims against those exercising power, and in fact it might be argued that the government official misusing his power unjustly should be directly responsible to those that are harmed.

I shall revert to the question of responsibility for actions later. If the responsibility for the consequences of an act of power can be derived from the Prime Law we have to determine the parameters of that responsibility. It is not as easily ascertainable as a right and its correlative duty. This is because with rights, once the right is established and defined then so is the correlative duty. However as responsibility for acts of power is derived from the Prime Inherent Law it is a **Principle of Responsibility**.

Now we will be examining responsibility with respect to acts both criminal and civil later, but the responsibility in those cases is legal responsibility. Here we are primarily concerned with the moral responsibility flowing from acts of power. The test is the Justness of the act.

Where an act is unjust and damage flows it is those who effect the act who are responsible. The degree of responsibility varies with the power and the harm done. It is very probably subject to all the same equitable principles which we shall be discussing in the next chapter, but there is often no quantum of damages assessable as if it were a legal responsibility leading to a claim.

Responsibility is a concomitant of Power. They walk hand in hand which is why even the highest in the land will agree “The Buck stops here”. In other words one cannot shed one's responsibility for acts of power. They are not like acts of God. Even so the question as to where responsibility lies is a fascinating philosophical point. The question of responsibility appears to be subject to many of the same rules of foreseeability which we shall be discussing, for justice has its part to play. However it may be questionable as to whether the variables associated with intentionality arise, in that acts of power are per se intentional.

Thus we may well find responsibility subject to the foreseeability test. With regard to intentionality however, if the harm done by the act of power proves to be greater than intended there seems to be no reason why the greater responsibility should not attach.
And if responsibility attaches, as indeed it does as a matter of justice, then we can find another logical chain in our interactive behaviour.

Society has dealt with responsibility for prohibited acts by enacting the criminal law. We have also, to a large extent, dealt with responsibility for negligent acts in the civil law. What we have failed to develop fully in our law is the responsibility for acts of power, and this is where society is becoming increasingly unmindful. This is because no modern government is there out of duty. Rather it seeks power and is granted that power by the Society. Even so that does not absolve it from responsibility for the effects of its act of power. Nowadays there is far more power taken upon itself by the average government than there used to be. The only way to curtail this appetite for power, and yet more power and control, is to enforce the responsibility for the exercise of that power.

By passing a law which treats a citizen unjustly the government does not absolve itself from the unjust damage it does to such a citizen. Here again we come back to professor Dworkin's goals. These are goals of government and one of the things we will have to decide is how far government is permitted to pursue its goals to the unjust detriment of the individual citizen. Although this comes more properly under the philosophy of governance it is important to note that what gives its citizens any foundation for claims against the government is that so long as any government claims to be civilized the Prime Natural Law is inherent.

So for example it is not sufficient for individual civil servants who reach a decision (an exercise of power) which say denies a citizen planning permission to claim that there is no responsibility for that decision merely because of a policy. Some policies are quite fatuous and it is the right of the citizen to have compensation if necessary. This is obvious in the case for example where a house is appropriated, because that is a positive act. But it is equally true that negative acts denying freedom to a citizen must also be liable. Unless officials are made liable for their acts to a degree, there is no chance of restricting the mushrooming bureaucracy which will lead to a reduction in the effectiveness of the state as a whole, and its ultimate downfall.

**ACTS OF POWER - NON JURAL OR ANOMIC RELATIONS.**

In most of the cases we have been looking at, an act of power creates a jural relation. This occurs either by virtue of an act of the State (multital), or of the individual (paucital). Power you will recall involves the ability to alter legal relations (per Kocourek). In fact it is the ability to alter any relationship. Life in any society does not just involve jural
relations. These are relations ultimately governed by law. If we follow Kocourek's reasoning the jural relations are polarized by operating facts, to become legal relations. But in many respects non jural relations can be of equal importance. They involve those relations where it is either undesirable, or it has not been thought necessary, to legislate to provide the background of a jural relationship.

The most important example we have come across so far is that of the relationship of parent and child. True, the care of children is a matter which is increasingly being brought under the jurisdiction of the State, and this has created an erroneous impression. Many like to talk of the ‘rights’ of the child and this has even led to children suing their parents. This is quite wrong and irreparably damages the parent child bond. The whole concept is antipathetic. It is again directly attributable to the pernicious and totally incorrect attitude of thinking of everything in terms of ‘rights’. The correct approach is that the failure to care properly for children is a breach of a duty imposed by the State (Not the child). Therefore abuse of children is a state or criminal offence and should be prosecuted in all cases by the State and not the child. (We are currently beginning to see cases where children are being persuaded to sue their parents - another tragedy of the rights based approach).

A fortiori animals do not have ‘rights’ against humans - One can just see the case Peter Rabbit (by his next friend) v J. Bloggs for an order of Mandamus to supply proper nourishment or for an injunction to stop forcing the inhalation of tobacco smoke. One cannot deal with animals by anthropomorphizing them. One should not try to force non jural situations into a jural framework. How, therefore, is one to deal with such matters?

The answer, both for animals and children, in those circumstances that have not been covered by the law, lies in the nature of Power. Any exercise of Power necessarily involves a Dominant and a Servient party even though the latter may not have a legal persona. Thus we can again call on the Prime Inherent Law to invoke the Principles of justice into the relationship. At this point it must again be emphasized that the whole question is a moral one, as indeed it must be where there is no legislation involved. (As soon as legislation is involved there is the groundwork of a jural relation, either inter partes or between the State and one of the parties).

It is very important to appreciate the difference between law which provides for jural relations between citizens and law which provides for situations in which the relations are non jural. There may be some difficulty in distinguishing these, and here remember a jural relationship is a two way relationship. Ownership of a car for example is
unidirectional. Both may be covered by legislation, but the relationships involved are different. For example in the case of criminal acts involving non juveniles we have the triangular relationships discussed in chapter 7. In the case of animals however there may well be a law protecting an animal, and A (a citizen) has a duty to obey that law. There is however no right in the animal per se. It has no right to protection as do the members of society because it has no duty to obey the laws. A horse doing 30 in a zone restricted to 20 mph will not get a ticket! Nor is a stray dog fouling the pavement given a £50 fine. Nor is an animal required not to harm people such as A. In short it is not part of a jural relationship. This is because a jural relationship is one between two legal persona. To give an example which will make it even clearer: The State imposes on me a duty, say, to maintain and preserve an old building which I own. When I knock it down, the State sues me - the building has absolutely no rights against me for assault, GBH (Grievous Brickerly Harm?) or otherwise for damages. This is because not only is there no anomic (non-jural) relationship between myself and the building, there is no relationship at all.

Now in the case of animals there is also no jural relationship. The relationship of my duty of care is moral or anomic. However once a law is passed that duty of care becomes legal and if I break it I become liable to the state, because my duty is to obey the law. It is true that Public opinion may well represent and ultimately determine what is regarded as just in the case of any animal. These are often said to be the natural rights of the animal. In fact they are actually privileges which we feel should be protected, because they represent what is considered to be just treatment of that animal, in just the same way that we feel some of our privileges should be protected.

So what is the relationship (if any) and how does it arise. Let us examine this further from basics. An act of Power invokes the Principles of Justice which apportion responsibility. In short those possessing the power are responsible for its just application. Thus there is a direct relationship between power and responsibility. In the case where power involves a non jural relationship the responsibility is moral. Similarly where the act of power transforms a jural relationship to a legal relationship the responsibility becomes legal. Moreover the responsibility appears to be directly proportional to the power exercised. There would appear to be the same adjustments to be made with respect to foreseeable consequences of the act of power and parallel possibilities of amelioration and exoneration as will be discussed in chapter 6 (with respect to foreseeability and intentionality).

For anyone to evade the consequences of their act of power would amount to a denial of responsibility, or an act of injustice. At this point it should be clear that the greater
the potential power which anyone has with respect to anything else, the greater is one's responsibility to act justly. Therefore for example in the case of an animal, say my dog, over whom I have literally power of life and death (in the case of having it put down), my responsibility is correspondingly great. This responsibility is a moral duty to treat the animal justly. My argument therefore is that where my power is so great, my moral duty is correspondingly great. Now this is the point that arguments as to the extent of one's duty can arise in much the same way as was discussed in chapter 4 with regard to duty to obey the law. In those cases the law was clearly set out, but here we are concerned with moral duties.

Thus it is with regard to our moral duties with respect to animals that the differences of attitude appear. From this would flow what might be deemed to be just treatment of the animal involved. It is this which will govern those matters which we feel should be the subject, if necessary, of legislation importing a fixed duty on the individual to do or not to do certain things. Again failure is dealt with by the State as it is a statutory duty. It is never a matter of a right possessed by the animal. It is with respect to the extent of the moral duty that the differences of opinion, which are becoming more and more apparent in today's society, occur. However it is my feeling that there is a far greater chance of reaching a more logical solution if approached via the just treatment of animals than there is in trying to conjure up so called 'rights'.

For example it is possible that there is a difference in the duty of care which might be morally regarded as due to domestic animals, farm animals and wild animals. Certainly in my view the duty of care due to an animal in one's care is very high indeed and in the case of domestic animals approaches that due to children. There is no possible excuse for cruelty and of course that is recognised already by legislation (though I would increase the severity of the punishments considerably). Further along the scale it seems there is the moral question as to whether we should breed and kill animals to eat. It is fairly universally accepted that it is morally permissible (with some minority exceptions) provided the animals are treated humanely. This brings up the manner of the killing. Again it can only be morally right that this should be as humane as possible. If there are religious requirements for inhumane forms of killing it is my view that these should be banned. The grounds for this is that unnecessary cruelty is wrong and that any God that still requires acts of cruelty when better means are available is either asleep at the wheel or is not one that I would want to have any truck with.

It is of course the same with the transport and general conditions for farmed animals. Needless harm for purely economic reasons would, at least in my view, be
insupportable. Of course there will be arguments (usually utilitarian) against this view, but my feeling is that the only valid argument for battery farming (assuming that it is necessarily in a cruel form) would be the necessity to supply a specific nutritional requirement that could not otherwise be supplied, e.g. in the case of a starving population.

When it comes to wild animals i.e. those other than domestic and farm animals, it seems to me that again there will be different categories. First there are those of higher intelligence, Whales, Dolphins, Apes and Baboons etc. where we should at least prevent their slaughter. It must be remembered however that in nature life is cruel. Most animals kill others to eat, though only a few such as foxes and mink appear to kill for the fun of it. It seems that moral arguments must be worked through for each group and that the duty of care lessens as we descend through the groups. Thus if we find it justifiable to keep and kill animals to eat then I find it hard to say that we should not kill mink (a vicious little killer in its own right) to provide warm clothes. Again the proviso should be that the keeping and the killing should be humane. Certainly where the culling of some animals is thought to be necessary (e.g. seals to preserve fish stocks) it seems wrong to say that their hides should not be used. It is of course difficult to say this whilst looking at a film of young seal pups, and it is a subject where logic can give way to emotion very easily.

There are certain Buddhist monks who cover their mouths to prevent involuntarily inhaling and killing a mosquito. However it is generally hard to anthropomorphize a mosquito so, by and large, they get a pretty poor press as the saying goes. We are thus heartily trying to rid ourselves of the malaria mosquito by any means possible and if the brute lies writhing in extremis not many are going to bat an eyelid! Animals that we fear, we will kill without compunction, and if they are small enough and annoy us, Swat Them. Certainly a case of de minimis non curat lex!

So while animals do not have rights as such we do owe them differing duties of care. As to the extent of those duties and the extent to which the moral duties should be legalized, argument still abounds. Even so the conclusions reached in chapter 4 are most apposite and it is not for anyone to break the law to try to enforce their moral view.

Thus it is possible to begin deducing moral responsibilities via the power

78 Having seen a host of slaughtered ducks I naturally have a personally more jaundiced view of foxes.

79 In passing an anomaly should be pointed out. We usually associate Buddhism with concern for animals, but anyone who has witnessed the treatment of dogs in some of these countries such as Burma will be very perplexed. This is because the dogs are usually regarded as having the souls of those who have fallen back from a human existence due to their bad karma. So throwing stones at them is accepted - And this explanation came from a Buddhist monk!
responsibility link. If we link power directly to responsibility we must hold a man, being
sane, to be responsible for his acts. We also seem to realise innately that the degree of
responsibility is directly proportional to the power exercised. It is probably this background
thinking that has inadvertently given rise to the concept that absolute power corrupts
absolutely. This in fact is not a true statement at all but is based purely on the cases of the
failures of those in power to accept their responsibility. Again it must be noted that the
greater the power the greater is the effect of the corruption in the failure to be responsible for
it.

It is not a necessary fact that great power will corrupt any more than a small
amount of power. The abuse of a small power may well pass unnoticed. The abuse of great
power certainly does not. However the degree of corruption is the same. It is merely their
effect which differs. As Glaucon showed, though he did not make the point directly, the
temptation to use the ring of Gyges really lies in the probability of getting away with it.

It is the realization of the relationship of power and responsibility which leads
people like presidents to say “The buck stops here”, and, in the past, for many captains of
ships to go down with them. The fact that today we have a society largely bereft of ideas of
duty and obligation is a political phenomena. While it is not possible to discuss this here, its
presence must not be allowed to obscure the philosophically logical link between power and
obligation.

One thing we can do at this stage is to see how the deduced theory might work in the
case of current disputes. It might be interesting therefore to consider three cases that give rise
to considerable antagonism: Fox hunting, Bull fighting, and the possible extinction of a
species
e. g. some whales.

**Hunting:** here there is a vociferous lobby determined to ban all hunting (i.e. with
hounds). When we considered this in chapter 4 we were concerned merely with the question
of obedience to the law and not primarily with ways of examining or resolving the dispute. It
is now possible to take a further look at the subject in the light of general principles which
have been deduced. Quite apart from any social or class antipathy which is as inaccurate as it
is irrelevant, the anti hunt group want hunting banned. Treated as I have advocated the reply
from the hunters would be that such a ban is a restriction of our freedom. The question then
to be answered is not whether it infringes some right, but simply - Is such a restriction Just?

At this point the anti hunt lobby are required to show that it is just, and their argument
would be that hunting in this form is a breach of our responsibility (by virtue of our power
over them) to the animals involved, to wit foxes. Now foxes are wild animals who
themselves hunt. Moreover they would if left unculled soon become a menace to farmers,
and, as sources of their food grew shorter, to other animals. There is no dispute that some
would have to be killed. The question therefore resolves itself to a question as to whether the
manner of their disposal is a breach of responsibility (by being unnecessarily cruel). The fact
that the hunt may bring pleasure to the hunters, or even that a certain degree of employment
may be in jeopardy, is quite irrelevant at this point. It may be in some cases that economic
factors would have to be considered as an overriding concern, but that is not the case here,
and in any event it would be irrelevant to the basic question. Now it seems that the killing of
the fox by hounds is certainly as instantaneous as most shooting would be and probably faster
than gassing or debilitating drugs such as “warfarin”. So the question is now down to
whether chasing the fox is cruel. Foxes have a turn of speed designed for escape (and many
do) so the chase is part of their instinctive life pattern, and one cannot anthropomorphize
them by considering their so called “anguish” concomitant with a contemplation of the
possibility of their demise. All in all therefore it would appear that the anti hunt case fails.

So what about bull fighting. Again the arguments resolve themselves into a question
as to whether there is an abuse of our responsibility to the animal. The fact that the bulls are
bred specifically to be killed is irrelevant - so are pigs and cows and chickens. So is the claim
that one is for sport and the others to eat. These issues are external to the main question.
They may relate to morality; they certainly do not relate to cruelty. However in the case of
the bull fight, the animal is goaded, it is then wounded by picadores to anger it further and it
is only finally despatched when it has finally got the measure of the Matador and is about to
get its own back. There is no doubt that cruelty is inflicted, and death prolonged for
entertainment. Accordingly the anti bull fight lobby has a valid case, and accordingly the
opposite decision to fox hunting is reached.

Let us now consider the potential elimination of a species. A whole set of different
factors are involved. The Dodo was eliminated by man apparently because it was pleasant to
eat and easy to catch. It does not appear to have permanently damaged our ecology, but on
the other hand we can no longer say “Shall we have Dodo for Christmas this year instead of
Turkey?” Do we have a responsibility to keep species alive just because they are there? To
this I think the basic answer is no, because species develop and some increase and some
decline naturally, particularly if they are unable to adapt to their environment. However man
and his whims do not rate as an environment, and despite early Christian teaching that
everything was placed there for our use the current view is somewhat more responsible. The
poor old Church, it keeps having to downgrade its bloodthirsty views - no more burnings at the stake and now all this kindness to animals. It is hardly worth the candle anymore (to say nothing of the bell and the book!). But certain species of whale (and other fish) may be eliminated by over fishing. There are additional concerns in the case of whales that they are highly intelligent and may even according to some have more than a basic realization and conception of their surroundings. In this case although different factors are involved you will recall that it was part of my argument that different duties of care apply to different animals. Although whales can hardly be rated as domestic animals or pets, their basic intelligence places them in a very high category. The result of this is that we owe a responsibility not to act recklessly or heedlessly with respect to such animals until we know sufficient about them. It may be, as is the case with seals, that it is necessary to cull them in order to preserve our food supplies, but this is required to be in a humane manner and only to the extent necessary. Thus even in cases where there are different factors involved the Power-Responsibility rule has a very definite application.

Let us take a further example. The use of fur in clothes. Where for example it is necessary to cull seals there seems to be no point in banning the use of their skins. Not to do so is merely a waste in satisfaction of an emotional ego salve. And what about Mink farms. Now we use beef leather but our excuse is that we eat the cow. Even so we need a lot of leather even if we went off beef. Is the excuse that beef feeds us and we enjoy its flavour any more logical than the excuse that fur keeps us warm and we enjoy its looks. Provided the mink is properly farmed and the veal properly raised it could be argued that both should be permitted.

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CHAPTER 6. JUSTICE IN RELATION TO FORESEEABILITY AND INTENTION.

For the non specialist: At this point we are going to have to branch out again into new territory as we are now starting to prepare the ground for considering the law and justice as they relate to punishment. Before doing this we are going to have to understand quite a bit about intention. Not the intention of the law this time, but the intention of the Agent at the time of the action resulting in a crime. Unfortunately this is a mental state and we run full tilt into the problem of ascertaining a past mental state at a time subsequent to the crime. In our investigations we shall examine some of the works of Hart and also of R. A. Duff, and we shall even delve, albeit lightly, into the philosophy of Mind. The study of intention is primarily philosophical but most practical examples are to be found in legal cases.

Reference is also made to Mens Rea. This is an expression, now rarely used but it has formed a part of our criminal law for many years and as such is a useful concept and will be referred to in some of the cases we shall examine.

Mens Rea: Often referred to as a guilty mind, or more explicitly the state of mind either expressly or implicitly required in order for the action to qualify as an offence. For example the difference between running an enemy down deliberately with a car, and losing control of the car and hitting someone. You see what I mean about latin tags being a useful abbreviation - two words for all that! We shall also refer to:

Malice Aforethought: This is the factor of Mens Rea in murder. It includes the intention to kill even if it was a different person. The expression is no longer used but again it will crop up in the earlier cases. Both expressions will be dealt with in greater detail as they occur.

In looking at Intentionality and its correlation to Law I have attempted by starting from first principles to clarify some of the problems and explain others. I shall seek to show that Intentionality even when used in its legal sense is not some infinitely variable state which has to be redefined to fit each situation but that intentionality may be regarded as having three forms and that it is the rules of law or evidence which effect the variations, and that indeed, looked at in this light many of the anomalies will be seen to be clarified. The rules introduced by the law have, in each case, been attempts to promote Justice.

Further if the question of Foreseeability and intended consequence are treated in the same fairly straightforward manner a logicality of results may be promoted. Also, I have sought to indicate my reasons for separating and clarifying the distinction between Intention, Desire, Belief and Reasons in relation to causal events.
For our present purposes we are not concerned whether the law is a good law or a bad law or whether it is designed to effect an objective (e.g. Tax Laws to redistribute wealth). But we should again note that in our law there are also positive guidelines, (e.g. for making a contract, will, or running a business) as well as prohibitions. Generally the laws of all nations fall into two further, but not coincidental, divisions; Civil and Criminal. It is in the field of civil law that the rules tend to be positive in effect, i.e. how to conduct various activities, even though their format may be in part negative. Breaches of the code of conduct are usually adjudged in a manner so as to restore the parties (or compensate them if restoration is not possible) to the state they would have been in had everyone obeyed the rules. That is, it may generally be said to be an application of Justice in restoring where possible what should have been. Generally, Civil judgements, at least in our society, are not retributive they are compensatory. (A notable exception being triple damages in U.S. anti-trust cases but then this may be argued as being quasi criminal).

One thing which should be noticed about laws in general is that they are only laws if they are capable, at least theoretically, of being enforced. "Think nice thoughts" can never be a law properly so called because it just isn't enforceable. I can sit there smiling seraphically whilst in my mind I am sticking pins in a little wax image I keep at home. This sort of thing at best is a moral injunction, at worst a pious hope. This limitation to the law, when it is forgotten, can cause untold problems, for we cannot legislate to control ‘intentions’ even though our laws are much concerned with them.

Philosophically it could be said that law is a coercive force for the application of moral standards adopted by a society. This is not the same as its purpose - to provide for the regulation of the conduct of the citizens of a state. This is where the influence of moral thinking may affect the political input to the formulation of law, i.e. it is at the stage prior to the influence of justice (See fig. 1 in ch.2.). Its relationship to those moral standards will depend on the type of law and the society's view of it i.e. whether, for example the society is religious or secular. There is inevitably an overlap and this may have an effect on who is to be held accountable and under what circumstances.

In English law Intention plays a very marked role, both in civil and criminal cases but particularly in establishing the nature of a crime, especially where the offence is a serious one, and again in considering the punishment. (While there is an increasing tendency to establish a series of absolute or strict liability offenses these are usually of a more minor nature).

The first of our problems is brought about by the fact that ‘intention’ itself may take
different forms and indeed is sometimes regarded differently by lawyers and philosophers. Hart classifies the forms of intention into three\textsuperscript{80}, as Bare intentions (which I prefer to call future intentions); Intending to do something (which I prefer to describe as a Primary intention); and doing something with a further intention (which again I prefer to describe as a Secondary intention) This is discussed further under ‘Intention - a philosophical perspective’. However first there is a further complication to consider: -

DIRECT AND OBLIQUE INTENTIONS.

This is well illustrated in the case of \textbf{R v Desmond, Barrett et al (1868) 11 Cox CC 146}. Here Barrett, in trying to help two Irish Fenians to escape, dynamited the prison wall outside what he thought would be the exercise area. As a result of the explosion people were killed. Now the question that can be asked is ‘Did Barrett intend to kill those people?’ This question raises difficulties because there would appear to be a difference between a death which is foreseen as a possible consequence but not desired - often referred to as an oblique intention - and a death which was purposive i.e. a Direct intention.

Hart suggests that

"whether he sought to achieve this as an end or a means to his end or merely foresaw it as an unwelcome consequence of his intention, is irrelevant at the stage of conviction where the question of control is crucial. However when it comes to the punishment it may be (though I am not at all sure that this is the case) that both on a retributive and a utilitarian theory of punishment the distinction between direct and oblique intention is relevant"\textsuperscript{81}.

Hart then discusses (p.122-125) a system which distinguishes between direct and oblique intention in a way that english law does not. This is the DOCTRINE OF DOUBLE EFFECT

The example he gives is where according to Catholic doctrine a doctor may save the life of a pregnant woman having cancer of the womb by removing the womb with the foreseen consequence that the foetus will die. On the other hand he is not permitted to perform a craniotomy killing an unborn child in order to save a woman in labour who would otherwise die. Hart points out that in both cases it is the removal of the foetus which is required to save the mother's life and "in both cases alike the death of the foetus is a ‘second


\textsuperscript{81} Ibid. p.122.
effect’, foreseen, but not used as a means to an end or an end”. Also in both cases the same end is the good intention to save the mother’s life. Here while I agree with the general point Hart is making surely the technical difference is that in the one case (the craniotomy) there is a direct action to kill the foetus even though it is not desired. Hart goes on that the distinction between direct and oblique intention is used to draw the line between what is, and what is not, sin in cases where the ultimate purpose is the same, so that the morality is determined by prohibiting all intentional killing as opposed to knowingly causing death. It is a fine point and it seems that when one is in a situation where one is faced with the choice between two evils any decision, or governing rule, must of necessity be arbitrary. Duff\textsuperscript{82} points out that

i) Bentham distinguishes a matter to be directly intentional when it constitutes one of the links in the chain of causes by which the person was determined to do the act. It is oblique if the consequence was in contemplation (and likely to ensue) but did not constitute a link in the chain;

ii) J. W. Meiland distinguishes purposive and non purposive intention (the expected side effects) and;

iii) R. M. Chisholm refers to the diffusiveness of intention, i.e. a man acts to bring about $p$ and who believes that by bringing about $p$ he will bring about the conjunctive state $p$ and $q$ then he does act with the intention of bringing about the conjunctive state of affairs $p$ and $q$. However he also considers the view that such expected side effects are “consented to but not intended”.

This is a very real and unresolved problem philosophically for one can see the merits of both arguments, i.e. that what is contemplated must be within the ambit of intention, and the counter argument that there is a sharp distinction between what is intended and what is seen as side effects. As will become apparent later I shall be inclined to the argument, for legal purposes at least, that Intention is purposive, that this simplifies the concept of Intention and that we can then rely upon the rules of law to bring other actions and their consequences within the sphere of deemed or constructive intention. In taking this approach I am by no means attempting to dismiss the strength of the counter argument.

Duff raises the question as to whether bringing about the effect was relevant to the action. Was it part of the necessary train of events? For example would Barrett’s intention have been thwarted if people had not been killed? This is a useful way of distinguishing the

relevance of the foreseen consequence to the crime but it does not, in my submission, help us in a determination of responsibility. This is because as we shall see the law is often going to hold a person responsible for things which were not relevant to the accomplishment of an intention.

Also we shall see that while we have so far been considering actually contemplated or foreseen risks and consequences there is a very real problem with regard to foreseeability. Before proceeding to this we should consider some of the differences in civil and criminal law. We have noted that Civil Law generally comprises positive conduct rules covering such things as trade and commerce (Contract) and civil wrongs or Torts. In these cases breaches are dealt with inter partes on a compensatory basis.

What then distinguishes a crime?

Legally it is defined as an act which is prohibited (or the omission to perform an act which is commanded) by law, the remedy for which is punishment of the offender at the instance of the state\(^8\). The Shorter Oxford includes two further qualifications besides prohibition viz. 1) or injurious to the public welfare (usually a grave offence) or 2) an injurious act (usually a grave offence).

What can one say of this philosophically? First of course crimes seem to be

a) a grave matter
b) defined by the state
c) which are worthy of punishment as opposed to a compensatory approach. What has been omitted is any reference to intention or at least the exclusion of accident. So let us try for a philosophical definition. Perhaps a start would be:-

An act which is designed to alter adversely the status quo of a third party without his consent.

This would cover all crimes against the person and property. It would incidentally, I am aware, also cover breach of contract (though it may be argued that such an act is usually designed to benefit the perpetrator and only incidentally harms the other party). However leaving that aside for a moment the thing to note is that already we have had to introduce the question of intention in order to exclude accidents, negligence, and the acts of a madman. Now we could alter our definition to try and exclude intention and it would have to develop into:-

An act (whether of omission or commission) prohibited by the state, saving and

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\(^8\) Mozely and Whiteley's Law Dictionary. Abbreviated.
excepting those acts which are accidental, negligent or committed by a mad person, and which alters adversely the status quo of a third party without their consent.

Here we see we haven't really gained anything because we now have to define accident, negligence and madness all of which tend to involve the concept of intention, as indeed does the concept of consent. All we have done is to remove the concept of intention by one stage and lose precision in the process. Moreover we have still omitted the case where say a burglar, intending only to frighten, takes a gun and in the course of his crime kills someone. At this point it will be appreciated that we are of necessity going to have to add further subclauses and that before long we are going to end up with a horrendously complicated definition.

The alternative is in effect to do what the Common Law has in fact done - i.e. Having regard to 1) the seriousness of the offence, 2) the ambit of foreseeable incidental injury and 3) the intention or presumed intention, it has made rules to cover the various situations likely to be encountered. These rules themselves form part of the law.

There are two other points that can be deduced from our review so far: 1) The legal approach, so often regarded as purely arbitrary, can be seen to have a certain underlying philosophical basis and 2) It is beginning to look as if the idea of intention cannot be dismissed (though there are those who would reduce all crime to purely strict liability - See Wootton[^84]. I shall not be pursuing this particular argument though the reasons for my almost implacable opposition to it should become apparent from my views relating to the intrinsically integrated relationship of some intentions and actions).

If we return to a consideration of the standard definitions of crime we see that in the first place the individual society or its government in fact decides what is and is not to be regarded as serious. While most societies agree on some prohibited acts such as murder there is by no means agreement on all categories of offence, nor of the seriousness with which they are to be regarded. This is one of the reasons why difficulties increase as groups become larger, particularly when they attempt to become multicultural. It is easier to become multi-racial, where for example the English of West Indian descent share a language and a religion, than in becoming multi-cultural by integrating say non English speaking Muslims of Pakistani origin. The difference with which offenses may be regarded is particularly marked when we come to the fixed or statutory absolute liability offenses. It could well be that the Germans and Poles might consider the contents of the average British sausage, were they

ever to be truly known, to be a fit subject for criminal prosecution!

In the case of crime, as opposed to civil wrongs the state has become involved because it defines the conduct and the seriousness of the various actions. As we have seen these fall into two parts, crime against the person, and crime against property. How then is the state to deal with these crimes and indeed why should it? It could after all allow things to be settled in the same way as for civil wrongs, i.e. inter partes and by way of compensation. But this would not work, not least because the crimes here include intimidation and oppression of the weaker by the strong. The individual is at a disadvantage - How can he find out who stole his sheep, car etc.? So the state intervenes of necessity on behalf of the individual and prescribes a punishment for the offender.

PROBLEMS FOR THE COURTS’ DETERMINATION.

There is a basic problem for the Courts in the determination of the factual situation with respect to intention, motive and the like. There is, unlike medicine, no opportunity for surveillance or questioning before an event (as there would be, for example, in a medical or psychological experiment). Moreover after the event the consequences may be such that the intention or motives may be seen, even by the participant, in a new and contradictory light. For example A assaults B - the thought ‘I don't care if it kills B, me or anyone else' may even flash through his head. In the event B dies and A may then become remorseful. Given the bare facts it is going to be difficult to establish A's true intention at the time of the event. Was it:-

a) to kill
b) to wound
c) to frighten
d) to punish
e) a state of oblivious or foolish carelessness (negligence)
f) a state of total recklessness and abandon or
g) a blinding red fury in which events are not even recallable.

Further, A may later genuinely review his actions in a different light. Any admissions of intention may well be coloured by the prospective punishment

a) because A wishes to obtain the lightest possible punishment (the usual case) or,
b) once remorse sets in, A's sense of guilt could become so overpowering that it makes him believe that anything but the harshest punishment would be inadequate.

An example where the latter appears to have happened was in case, a few years ago, of the man in Brighton who set fire to a flat to scare the people remaining at a party. When
the joke misfired and people died he then committed suicide.

So the problems involved are difficult and compound and although the example given above relates to criminal law and Mens Rea there are useful parallels of the necessity for rule making and assumptions in civil law in both contracts and torts. In contracts the courts are often faced with the question as to whether the parties ‘intended’ to be bound or not. Often one did and one did not. Here the courts are looking for a consensus ad idem, for, until the parties are deemed to have agreed no contract can exist.

In the field of torts there has been a much more prolific series of situations and cases whereby circumstantial rules have been established. Faced with the problem of determining intentionality, particularly in cases where a whole series of unpleasant consequences may flow and may even have been perceived to flow from the Agent's decision, the courts had little option but to develop a series of rules or guidelines. Sometimes, looked at in isolation, one could say that these rules are arbitrary and to an extent this is a justifiable criticism. However the rules may be the only way justice can be best approached when the attempt is to attribute a cause or an intention retrospectively from an action. There is little else that can be done. Moreover the law is also constrained in that it is required, within limits, to display a degree of 1) certainty and 2) of uniformity. To this end it has produced its rules to aid the resolution of certain questions. No rule can possibly be perfect or apply in all cases (even some of our most cherished scientific laws fail here) but as has been shown above, it is highly doubtful, even given all the facts, that one could always determine the parties' state of mind beyond a peradventure. Despite all these limiting parameters the rules must be philosophically and sociologically acceptable if justice is to be seen to be done. It is this above all which requires a constant review of the one in the light of the other.

Quite apart from the intention behind an action and the effect that that may have legally, we are faced with the problems brought about by varying results of the action. These may of course be those that were foreseen, foreseeable, and necessarily incidental, as well as those not foreseen, contingently incidental, and unforeseeable. The Law has provided us with many fascinating insights as to tackling these problems, particularly amongst some of the older cases. This is because formerly the law was considerably less governed by statute and far more dependant on precedent. As a result the judgements relating to new situations were often profound and showed considerable philosophical insight. Nowhere can this be better seen than in the case of some dissenting judgements in the court of Appeal and the House of Lords. It is a fact that many of the dissenting judgements of Lord Denning when he was an Appeal Court Judge were subsequently incorporated into our present laws.
One of the matters the law had to deal with was the vexed question of:-

FORESEEABILITY

One thing the legal approach did was to condense a number of approaches and sort out the contributing factors. It is useful to start with the subject of ‘Harm resulting from an action and its relation to foreseeability’: This really can be reduced to three categories which I believe are best illustrated with an optical analogy:-

Imagine a light source L (representing action) throws out an unfocussed beam of light which covers a certain area. See Fig.1. Imagine that this is an action and the area of its foreseeable harm.

In figure 2 we see the effect of introducing a convex lens. This concentrates the light (harm) to a reduced area H1. This is the area focused on, i.e. of foreseen Harm. The outer annulus H2 comprises the area of foreseeable but not actually foreseen harm.
Thus, as I hope we shall see, it is sufficient to divide the harm resulting from an action into only three categories and not the rather more profuse number which were beginning to appear when we approached the problem via intention. While the civil law cases refer to foreseeability with regard to the harm done, exactly the same criteria apply to the consequences of an action which is the usual subject of discussion in criminal cases. Of course the responsibility both moral and legal will be affected by the Intention and this brings upon us a whole new set of problems which will be dealt with separately.

Before examining Intention with respect to its effects on criminal cases (by far the most important aspect) it is of interest to examine briefly some of the rules in Civil Law.

**INTENTION & CIVIL LAW**

In the case of Contracts the courts are primarily concerned with establishing a) When two parties intended to form a binding contract - the establishment of a "consensus ad idem" and b) When one of the parties intended to breach the contract. In practice the former is much more important because the simultaneous ‘intention to be bound’ actually forms the basis of the contract. Admittedly there can be other requirements e.g. in England the necessity for a written document with respect to land. Even then the rule still holds for if someone signs under duress or in the mistaken idea that they were signing something else...
there would be no intention to be bound and therefore no consensus. In the case of breach, the law takes an entirely opposite view. You may well do something intending to breach the contract but if your action doesn't actually breach it your intention is of no direct\(^8\) consequence and you will not be liable. This is because the law here is concerned with the harm arising and until harm arises by actual breach there is no case.

If we turn to the Law of Torts we find a really interesting line of cases which show how the concept of Foreseeability came to affect the situation. They also illustrate the philosophical thinking behind the cases:

Originally it was thought (wrongly) that for liability in Tort there should be either wrongful intention or culpable negligence. This would, at first, appear to be both philosophically and equitably sound and many examples could be given illustrating this. The great advantage of the law, however, is from a philosopher's point of view that sooner or later (and usually sooner), it will throw up a situation which does not fit the theory. Moreover the prime intention of the civil law is to give reparation for damage done rather than to punish the offender. This distinction must always be born in mind when considering civil cases. Nevertheless they contain many practical philosophical ideas for dealing with matters whose scope has to be determined ex post facto.

A typical example of the sort of situation which didn't fit the basic assumption came about in

**Rylands v Fletcher (1868) L.R.3 HL.330.** Here the two defendants constructed a reservoir on their land (as lessees) to supply water for their mill. There was in fact the shaft of an old mine, which connected with the plaintiff's mine, under the property. Through the negligence of the contractors this was not discovered. When the reservoir was filled water escaped causing £943 damage to the plaintiff's mine. The court ruled that the law was one of strict liability (without wrongful intention or culpable negligence). As stated by Blackburn J.

“the person who for his own purposes brings on his lands and collects and keeps there

\(^8\) I say ‘direct consequence’ because it is possible that your act may be part of a series designed to breach the contract and by accident it didn't come off. Obviously the act could be of use later to show a deliberate intent which might be relevant to breaking down a line of defence.
anything likely to do mischief if it escapes, must keep it at his peril and if he does not do so is prima facie liable for all the damage which is the natural consequence of its escape”.

It is interesting to note that although it is an example of an absolute rule the concept of ‘natural consequence’ was introduced.

However in the cases which involved negligence an even stricter liability was imposed at one time (in the U.K. at least). This was exemplified in the case of:

**In re Polemis [1921] 3 KB 560.** In this case the owners of the ship *Thrasyvoulos* chartered it to Messrs Furness, Withy and Co who loaded it with petrol in tins. During the voyage they leaked and there was a considerable quantity of petrol vapour in the hold. At Casablanca the Arab Stevedores (who were servants of Furness Withy) negligently caused a heavy plank to be dislodged. It fell into the hold, causing a spark which ignited inflammable gases, setting fire to the ship which was completely destroyed. The employers were held liable for all the losses flowing from the initial negligence.

It was quite clear that this rule could prove far too severe and in fact it had already been partially tackled in cases involving contributory negligence – which since 1945 has been covered by statute. Before that time however the law had introduced a number of concepts to try to reach an equitable decision. One was the concept of *Novus Actus interveniens* which gave rise to a secondary cause. Here the court took regard of the *causa proxima* and adopted the rule of *causa proxima et non remota spectator*. This was the doctrine of last clear chance.

For example in the case of **Davies v Mann (1842) 10 M & W 546.** Here the plaintiff had left his donkey in the road with its legs hobbled (negligence). The defendant came along far too fast (negligence) and killed the donkey. The plaintiff succeeded on the doctrine of last clear chance. In fact we see this followed today to a minor extent in motor accidents where it is most inadvisable to drive into the back of another vehicle because we are supposed to make allowance for emergencies but also, one suspects, though it is not set out as such, the man at the back has the last clear chance of avoiding the accident.

Not all cases were this clear and the courts used at one time to try to resolve, where there was more than one cause, which was the *Causa causans* and which the *causa sine qua non*. In these cases the *causa causans* was held to be ultimately responsible. However they
made an exception in the case of people who voluntarily intervened to rescue and were harmed. Such people were excluded by the rule of *Volenti non fit injuria* which precluded volunteers from claiming for injuries received.86

The difficulty faced by the courts was that they were trying to administer justice in a manner which was philosophically fair (equitable) and which gave some indication of consistency and impartiality. In order to do this the concept of equity was introduced into the law. It was the flexibility of our law which allowed judges to apply the law differently according to the facts by distinguishing cases from previous precedents because they were not "on all fours" and also to set forth lines of reasoning designed to act as precedents for future cases. This became the great body of law known as the English Common Law. It was the ability of judges to consider cases with this type of philosophical approach that enabled a famous American judge to produce a solution of great insight. This occurred in the case of *Palsgraf v The Long Island Railroad Co.* (1928) 284 NY 339. The facts were an almost perfect textbook case for a challenge to the strict liability approach. Here a man with a parcel under his arm, raced for a train that had started to move. A railway employee, against regulations (negligence), attempted to help him and he dropped the parcel. The parcel, which contained fireworks, fell under the wheels of the train. Mrs Palsgraf was waiting further up the platform by some scales and the resultant explosion from the fireworks shook the station causing the scales to fall on her thus injuring her. Accordingly she sued the Railway and, had the Polemis approach been applied, she would undoubtedly have won. However Cardoso J. in a brilliant judgement held that the damage was too remote. It was unreasonable for the responsibility to flow beyond what was reasonably foreseeable as the result of an action. i.e. whereas harm may reasonably have been envisaged to the passenger or his goods (the parcel), the injury to Mrs Palsgraf was too remote. This case actually preceded *In re Polemis* but the English courts subsequently followed the same line of reasoning (In *Bourhill v Young* and later *The Wagon Mound* -another ship) in what has become known as the ‘ambit of foreseeable risk’ approach. In the Bourhill case the Plaintiff, who was heavily

86  This actually stems from Roman law which permitted the act of a free citizen selling himself into slavery (possibly to pay off debts) but then held that he should not complain of the results.
pregnant (being in the eighth or more month), was travelling on a London tram when a motorcyclist negligently tried to pass the tram on the wrong side as it turned. The resultant crash not only stopped the tram but killed the motorcyclist. The Plaintiff was not affected by the stopping of the tram but, ‘out of a morbid curiosity of her own’ she decided to have a look. She therefore got off the tram and trundled round the other side whereupon the sight of the mangled remains of the motorcyclist gave her such a fright that she promptly miscarried (thereby adding considerably no doubt to the state of carnage and confusion). It was held that she could not succeed in her claim against the estate of the deceased motorcyclist. The facts of this case are cited to show just how wide ranging the application of the ‘ambit of risk approach’ could be. It was an extraordinarily clever approach that ruled out the unforeseeable (H3) harms (Fig.3) but included all reasonably foreseeable (H2) harms. The only thing left for the court to decide was, not the actual H2/H3 boundary but whether the harm fell within the class H2 or H3, i.e. was it, or was it not, reasonably foreseeable?

This was much easier than attempting to establish the precise boundary because for example while philosophers might spend a considerable time trying to determine the precise boundary between the two, the court would usually be able to say ‘in these particular circumstances this should be regarded as foreseeable (H2)’. In other circumstances it might be able to distinguish the case as not being on all fours and find for H3. The ambit of risk was that which was reasonably foreseeable and the test was that of common sense, i.e. applying the test of a reasonably well informed and reasonably thoughtful person - often referred to as "the man on the Clapham omnibus".

A point should be emphasized at this juncture -

In the civil cases we have been considering negligence as the factor initiating liability. This is entirely fortuitous and must not be confused with a consideration of negligence in criminal cases. My sole object is to draw the parallels between the Foreseeability of the harm caused by a culpable act (a negligent one in the civil cases) and the results or consequences stemming from a criminal act. The parallel between these cases and those involving intention can also be seen in that the intention in a criminal case, like the civil negligence, may well prove insufficient to carry liability beyond a certain point. The applications of the effects of negligence in civil cases and intention in criminal cases both involve a
consideration of the resultant harm and whether it was foreseeable, foreseen or unforeseen. However in a civil case of negligence we usually have a set of established facts upon which to base our judgement, whereas in the case of intention it often has to be construed.

The consideration of the factors involved in the civil cases is interesting because it reveals a relationship and similarity of application of the rules, particularly of foreseeability, in the case of negligence and of intention, with respect to harm done or consequence of the act. There is one other interesting point to note and that is that in the civil cases a rule arose known as the "egg-shell skull" rule. Under this it is the type of harm done which is important, and not the quantum of harm. So if injury (or damage) was foreseen in a civil case then the party responsible would bear the full liability even though he may not have foreseen the extent of the damage. (Note the similarity with intending to do grievous bodily harm by an act, which in the event kills).

In criminal law we shall find we have to separate Foreseeability and Intention, not with respect to the actual harm done but with respect to the punishment for the same harm done. This is because in civil cases we are concerned with liability for, and compensation for, harm done howsoever & whysoever caused, whereas in criminal law the concern is to punish for the crime committed. The severity of the harm (within the parameters of the defined crime) may not alter the crime but may have a bearing on the absence or degree of mercy applied in the sentence. The foreseeability will play a similar role in affecting the assessment of the crime via the intention. The intention may also bring about a variation in the category of the crime. Thus it is in the Criminal law where intention plays such a vital role. This statement actually needs further amplification because it is the legally construed intention, as opposed to the actual intention, with which the law can concern itself. Even so we will have to look at actual intentions to establish the theoretical equitability of the punishment, and then at the rules for presuming an intention so as to bring the majority of cases within the ambit of the penalty imposed for the harm done. This problem is one of great nicety and it is often by virtue of not constructing the relationship from a philosophically sound point of view that gives rise to discrepancies, confusion or apparent

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87 Salmond on Torts.
injustices. (See for example Intention and Recklessness post).

An example from the parallel subject of defences is the M'Naughten rule which directs its attention to ‘knowledge of right and wrong’. Thus a totally macabre serial killer can be found to be ‘sane’ when perhaps the involuntary reaction of members of the public would be to say ‘He must have been mad to act like that’. It must be remembered however that the courts are not concerned with the public's definition of madness. [Nor indeed technically are they concerned primarily with the administration of Justice, being more and more concerned merely with administering Statute Law]. However it is necessary for the courts constantly to see that its ideas and those of the public agree as nearly as possible or they will be regarded as being "out of touch" and their authority will decline. Thus it is the duty of the courts (and a fortiori of Parliament) to keep fine tuning the laws, rules and interpretations so that they are, as far as possible, philosophically and sociologically acceptable to the society in which they are administered.

We have seen that the law involves both the concept of intention and foreseeability i.e. that if an act was not intended it may not be a crime in the same way that if it was not foreseen it may not be a crime. We have also seen that the actual harm done may be a determining variable. In fact there are further such variables for we will also have to be concerned with the question of recklessness and negligence.

We can see from the law and the cases that in most, but not all, crimes the question of intention is regarded as the most serious. e.g. Intention is required for Murder (albeit not always for the specific act but at least intention to do serious harm) whereas Manslaughter, the less serious crime requires only recklessness. Regrettably the Statutes have recently introduced the term "heedlessly" and this causes additional problems (See Intention & Recklessness post). Negligence, the third category can vary widely from a slight neglect which sets off a train of events with serious results (and here foreseeability may be brought in to determine the limits of the culpability); to negligence bordering on recklessness.

We have now established the interactive factors and it remains to determine if there is any philosophically justifiable explanation for the way that they are utilized by the courts. In the circumstances it will be necessary to consider aspects of Intentionality and relate these to the type of harm done, its effect on the legal presumptions of intention and
(briefly) the relationship with defences. Before doing so one must first look at some of the philosophical aspects of intention.

**INTENTION AND THE DUALIST APPROACH.**

For the non specialist: This section is largely philosophical. It is not essential to the understanding of the discussion of Intention but is a useful background. The terms **Dualism** (basically the concept that we consist of a physical body and a non physical mind) and **Monism** (that the mind and its states are purely physical) occur and are further explained in the text.

One of the problems in considering the decided cases is that the language used by the judges often reflects a dualist approach. When read by a philosopher this may well be over emphasized and it must be remembered that in the case of a Judgement a Judge is setting out to give reasons for his decision because

1) He is required to do so,

2) The case, if not successfully appealed against, may set a precedent for others to follow and guide lines are therefore useful and

3) In the event of an appeal the reasons are there to justify the decision (not always successfully).

None of these factors require explanations in strictly philosophical terms.

Secondly there is a natural dualism in our manner of expressing our concepts brought about by the length of time during which dualism has been the prevailing concept. It really wasn't until Ryle and Wittgenstein's thinking took hold that there was a serious concerted attack on the concept and even the convinced Monist finds it easy enough to slip into a figure of speech which can have dualist overtones. One sees this clearly in the cases where a Judge may well use expressions such as ‘the impossibility of seeing into the accused's mind'. However this will often be as a prelude to inferring intention from the accused's actions and should not, in my submission, be regarded as a strict philosophical statement of Cartesian dualism. Moreover many of the cases we refer to will have been decided at a time when Cartesian dualism was virtually unquestioned. Certainly many of the judges will have been
educated in a largely dualist era. Nevertheless from a philosophical point of view it is necessary to examine the categorization of intention. In this regard Duff mounts a very persuasive argument.

His case is that had the courts actually applied a strict dualist approach it would have failed them. Classical dualism is predicated upon the assumption that we consist of a purely physical body and a non physical mind which feels and thinks. Bodies are public (and observable) and minds are essentially private and only knowable to the person concerned. Under such a system the defendant's intentions could only ever be truly known to the defendant and the court would have to infer them from the purely external physical evidence. In reiterating this in the judgements Duff feels that the Judges have taken an epistemological dualist approach. With this he disagrees, drawing a fine distinction and pointing out that in fact pure bodily movements do not, and usually cannot, of themselves give any indication of a particular mental state. The example he uses is of an observer in a restaurant watching Pat and Ian. They are having a row and Ian strikes Pat. Duff points out that the mere physical movement of Ian's hand to Pat's face is explainable in a number of ways. It is only the fact that I have observed the row, the angry gestures etc. that enables me to report that Ian assaulted Pat. In a way the argument is similar in type to Strawson's argument concerning Persons, i.e. that the concept of person is prior to the Mental and physical predicates. To me it is a most logical view. Moreover Duff points out that the dualist approach founders on the argument from analogy in that we have only one certain observation and that relates to ourselves. As, for a dualist, minds are necessarily private I could not even test in principle the inferences which I might make as to another's mental state.

Even more telling is the argument that if inner mental states are to be inferred from behaviour we would need to be able to identify our mental state independently of external behaviour, i.e. if A is distinct and must be inferred from B we must be able to identify A


89 P.F.Strawson. Individuals Methuen 1987. ch.3.

90 Duff. ch.6.
apart from B. Therefore if intention is a cartesian mental state I must be able to identify certain Mental states as intentions. But we can't, we really can only identify intentions through actions. The action and intention are identified together. Normal descriptions are not of pure colourless events and in fact to produce the latter type of description we are virtually forced to strip away part of the normal description. To use a different analogy which reverses Duff's approach but which I submit is equally apposite, we do not see people as skeletons to which there is flesh and blood appended any more than we see actions as bare motions with different substance mental states attached.

Thus Duff's view is that we begin with people and their actions. These actions are not reducible to basic constituents of bodies and colourless movements. To revert to my former analogy a body is flesh and blood but in considering it we don't separate the blood out and start with that even though we know the blood is there and the function it performs.

There are two further problems to be considered, people do not always do what they intend (this will be dealt with under the section dealing with bare or as I prefer to call them future intentions) and mistakes can be made in observing actions as to the underlying intention. The mistakes occur according to Duff because we infer from the available evidence and our inferences may be wrong. Nevertheless we still infer from actions or aspects of actions to the broader patterns of meaning within their context. As he points out the more we know the easier our task is. When one reads a book one does not just see marks on paper but words and sentences. Despite this there are those who argue that the special knowledge we have of our own intentions marks this out as a distinct category. Duff's explanation is ingenious and logical. It is that in the one case I am an observer and in the other I am the actual agent. As he points out his views do not affect the meaning of intention but they bear directly on the proof of intention and the distinction between actus reus and mens rea.

**INTENTION - A PHILOSOPHICAL PERSPECTIVE.** \(^{91}\)

Hart very usefully (p.117 et seq.) divides Intention into three parts one of which he describes as ‘bare’ intentions. Although I shall use the term I consider it to be an unfortunate

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\(^{91}\) References are to Duff ch.3 and Hart ch.5.
choice. ‘Bare’ intentions, as I would interpret the word, would be those things which some philosophers would seek to separate from action i.e. being ‘bare’ they have been stripped down to essentials. They are precisely what Duff has shown cannot exist by themselves. A ‘bare’ intention is rather like a fish dragged from the water, it ceases to function. In each case what Hart and Duff refer to as bare intentions are in fact future intentions. Future intentions are perfectly respectable.

THEY ARE HOWEVER IN NO WAY SEPARATED FROM THE RELATED ACTION.

“I intend to go to Glasgow tomorrow” is the example given, but the intention is totally bound up with the proposed action. If someone says to you “Tomorrow I Intend.” your first reaction would be to ask “Intend what?” and if they said “I've told you, I intend!”, the conversation would not last long before you either concluded that they were slightly peculiar or that they were being deliberately obtuse. The actual status of a non activated future intention is a subject of considerable theoretical interest but slightly beyond the scope of the present subject.

The categories of intention which are of prime concern to the law are the remaining two which Hart describes as

i) ‘intentionally doing something’ and

ii) ‘doing something with a further intention’.

Again I would prefer to classify these as :-

a) ‘An Intention of Action’ or a ‘Primary Intention’ - I buy a ticket to Glasgow (intentionally or intending to do so); and

b) ‘An Intention of Purpose or consequence’ or a ‘Secondary Intention’ -

For example - I am going to Glasgow to visit my aunt (per Hart ‘doing something with a further purpose’). Here it should be noted that this may sometimes be described as a reason. Certainly it answers the question ‘Why are you going to Glasgow?’ and the answer, most certainly in everyday terms, is understood as the reason. But is that enough? It is my belief that Intentional statements are not reasons. They may very well incorporate reasons but that is not the same thing. Let us take the example further.

I am going to Glasgow. - Primary Intention.

Why are you going to Glasgow?
To visit my aunt. - **Secondary Intention**.

Why are you going to visit your aunt?

Because she has been ill and I wish to cheer her up.- **Reason**.

I believe this distinction is of great importance. Another reason for going to Glasgow, cutting out any secondary intention could be ‘I am going to Glasgow because I love it there’. The difference is that the **reason**, when we get down to it, is not action related whereas the **secondary intention** is, as I have been arguing, of necessity Purposive or action related. Reasons are belief and desire related and they are explanations of causes of actions but they are not of themselves purposive. An excellent example showing the relation between Intentions and reasons is given by Davidson in his essay on ‘Intending’\(^{92}\) in which a man boards an aeroplane marked ‘London’ with the intention of going to London England. In fact the plane is headed for London Ontario. Davidson continues

“The relation between reasons and intentions may be appreciated by comparing these statements:

(1) His reason for boarding the plane marked ‘London’ was that he wanted to board a plane headed for London, England, and he believed the plane marked ‘London’ was headed for London, England.

(2) His intention in boarding the plane marked ‘London’ was to board a plane headed for London, England”

He points out that if you substitute ‘boarding the plane headed for London Ontario’ for ‘boarding the plane marked London’ it renders (1) above false but not (2).

Again in his essay on ‘Actions, reasons and causes’\(^{93}\) he points out that the “primary reason" for an agent's action comprises the pro attitude and the belief and that “to know the intention is not necessarily to know the primary reason in full detail.”\(^{94}\) (The importance of these distinctions will be referred to in the section on Intention, Desire, Belief and Reasons.)

\(^{92}\) Davidson. *Actions & Events*. Essay 5.

\(^{93}\) Ibid. Essay 1.

\(^{94}\) Ibid. p.7/8.
It is the secondary intentions which sometimes play an important and confusing part in the criminal law. In my submission they become easier to understand and interpret if we regard them as I have described them as ‘secondary purposive intentions’ rather than as Hart does as a different class of action viz ‘doing something with a further intention’. This is because we can define an action as intentional (or not as the case may be) and as philosophers we can proceed to ask were there any secondary intentions? Now even though the answer may appear to be no, the law will impute a secondary intention in certain cases and this is where the whole question of foreseeability with its three categories of harm, H1 Foreseen, H2 Reasonably Foreseeable, and H3 Unforeseeable, come back into play.

Usually they are discussed as the Consequences of a course of action rather than the harm resulting. This is because in criminal law we are particularly concerned with the nature of the act (including the consequences flowing from it) rather than, as in civil law, the act (which is usually merely negligent) and the harm flowing from it. Nevertheless the consequences C1 (foreseen or contemplated), C2 (reasonably foreseeable) & C3 (unexpected, unforeseen) will be found to parallel H1,2 & 3 via the foreseeability link. This is not to say that the foreseen consequences are necessarily the same as the intended consequences because as I have sought to emphasize intention contains a purposive and transitive factor.

**INTENTION AND RESPONSIBILITY**

In allocating responsibility there appear to be three levels of gravity relating to the circumstances of the action - i.e. was it intentional, reckless or negligent? The most serious relates to those things which were done intentionally or purposively. After all, on the grounds of natural common sense, it seems obvious that we should be responsible for those things which we intended to do. But already I have introduced a philosophical problem by subtly changing the phraseology from “things done intentionally" to “things which we intended to do" because as we saw in the discussion on oblique and direct intentions, doing something we intended to do (e.g. Barrett's dynamiting the wall) can be argued to be quite different intentionally from killing people as a side effect.

Duff (p.34) raises the question therefore as to whether we should be concerned with intention at all. He maintains that in the Hyam case and in Moloney (both of which will be discussed in detail later) the judges “approached their task with firm, intuitive
preconceptions about the guilt or innocence of various actual or possible defendants."

I am sure Duff is correct. It would be very difficult for a judge not to form a conclusion towards which he then works. Nevertheless great efforts have been made to provide a logical (and often philosophical) approach via the concept of intention and Mens rea. The confusion arises that different judges have taken different views of “intention”. Duff (p.35) suggests that this shows that the concept cannot provide a "justificatory foundation for the intuitive judgements which they have wanted to make". He suggests we should "ask more directly and honestly which defendants we should convict of which crimes". Simple though such a solution might sound I doubt that it would fit well within our system of law. It would, I suggest, soon smack of arbitrariness. One of the great merits of our legal system, whatever other faults it may have, is that judges are required to justify themselves. However Duff seems to back away from the idea in the next paragraph and feels “we need not yet abandon the attempt to explicate the concept of intention as a concept which is, and should be, central to the determination of criminal liability”.

It is true that Baroness Wootton’s idea was that, having established as a fact who was ‘guilty’ of the action, their whole case history would be examined with a view to ‘curing’ them, and the punishment or treatment decided accordingly. There is a school of thought that has caused us to turn increasingly to the absolute liability offenses but already they are beginning to offend the public's sense of equity. Therefore particularly in serious cases such as murder the concept of intention together with certain rules of legal assumptions will, I submit, remain with us.

There is very little problem with responsibility for acts of Direct intention. The problem arises over those questions relating to matters the subject of Oblique intention and secondary intention. The importance of this springs from the corollary of our previous assumption. i.e., if I am to be responsible for things I directly intend should I therefore not be responsible for those things which I do not intend? Of course the problem is that I might allege I never intended whatever results occur.

The law's answer (and indeed ours) lies in the application of the foreseeability rules set out earlier. There are several ways in which we can categorize events. As we saw the most general has been to divide foreseeability into three parts: Foreseen, Reasonably foreseeable,
and unforeseeable. It is sometimes thought that the criminal cases bring in a fourth as in the example of the man who places a bomb on an aeroplane. As various law lords have pointed out this type of act makes the death of the passengers and crew an almost 'inseparable' consequence. It is also a matter of the obviousness of the foreseeability. The aircraft bomber must know that he will almost certainly kill people; Barrett may have foreseen that he would kill or injure people (certainly Hyam did). These are basically in my argument the "foreseen" cases. Next come the more remote "foreseeable" (but possibly not actually foreseen) cases and finally the totally unforeseen and possibly unforeseeable consequence.

**CONSTRUCTIVE INTENTION - a personal view**

Now in my view these differentiations depend on the facts of each case. It thus becomes to an extent a matter of evidence. Certainly one must have rules but they will be rules of construction from the evidence and not a matter of providing an elasticated definition or further subdivisions of intention designed to fit the circumstances of each case. It seems quite obvious that the courts are willing to find that where the result is "inseparable" the agent will be deemed to have intended the consequences. Moreover I see no reason why the courts should not take the view that, unless there is evidence to the contrary, a person should be deemed to be responsible for not only the inseparable but also the reasonably foreseeable consequences of his acts. Again this would be on the ground of "constructive intention" and constructive intention would follow the act. These are perfectly acceptable legal principles. Let us take an example: If an act were malum in se such as causing grievous bodily harm then the reasonably foreseeable consequence that it might cause death would be accompanied by the "constructive intention". Not surprisingly this is exactly the end position the law takes but it does not justify itself as I have done, though it could easily have done so.

Let us apply this to Duff's example of marking the snow:-

"I should not, however, be said to bring about intentionally every expected side effect of my actions, however certain its occurrence. I intend to cross a snow covered lawn, knowing that this will mark the snow. I do not act with the intention of marking the snow;...."

On one view it is true that I mark the snow intentionally: what makes it odd to say that I mark it intentionally is not the meaning of ‘intention’, but the conversational
convention that we should say only what there is some point in saying...”

He goes on to ask why one is not held responsible for marking the snow if it is a foreseen effect of his voluntary action. He says this is because he is properly held responsible for effects which he intends to bring about, and for some, but not all expected side effects. In fact he says that the category of intentional agency is wider than that of intended agency but does not cover all the side effects of my actions.

In order to clarify this I would suggest a slightly different approach. Let us say the lawn is newly sewn below the snow and crossing it will do serious damage to the new grass (slightly improbable I admit but I am trying to use Duff's idea so that I do not fall into the trap of choosing examples to fit my own case). Two cases then arise:
a) I rush across your lawn to call for help for Pat who has fallen down and broken her leg
b) I cross your lawn because it is a short cut to the pub.

According to my suggestion in case a) the evidence would show that the act of crossing was with good intent (to get help for Pat) therefore there is no constructive intention to harm the lawn. In the second case there is a deliberate trespass for my own benefit and that, being malum in se, the constructive intention to damage the lawn flows. (I appreciate that trespass is not a criminal offence and that therefore other points could be made but let us assume that damaging the grass is being treated as an offence under section 1(1) of the Criminal Damage Act 1971).

I believe this is a better way of dealing with the concept of intention in these circumstances. For example had we applied Chisholm's theory that knowing that if p, then p and q, means that by intending p I must intend p and q. Then it works for the bomb in the aeroplane (the example given), but not always - e.g. the doctor who knows death may be a 75% probability of the operation.

Duff claims that a recognition of the distinction between intended and intentional agency can cure the confusion but that it does not answer the question of whether intended or intentional agency should be required for criminal liability (p.80). I believe my theory may offer a way forward. At this point we should return to the manner in which the law has actually dealt with the situation:-

MENS REA
**Mens Rea.** = A guilty Mind or intent. Moseley and Whiteley's Law Dictionary. The original Maxim is “Actus non fecit reum nisi mens sit rea” - An act does not make a person guilty unless the mind is guilty. Now this is open to two interpretations:-

1) That the person is not guilty unless they intended to commit the prohibited act - an interpretation favoured by Hart, with which I totally agree, or

2) The view held by Professor Jerome Hall, that this refers to moral culpability. ⁹⁵

One of the great difficulties we are faced with in the cases is that when dealing with a crime or guilt we are always dealing with the matter post hoc facto. We never have a chance of establishing the Agent's intentions or actual foreseen consequences before, or at the time of the event, and naturally afterwards viewpoints change. This is particularly so if we find a situation in which, given one set of ‘intentions’ the crime will be murder, and with other different intentions it could be reduced to manslaughter. Here immediately we find ourselves faced with the prospect of the agent's possible conscious or unconscious attempt to reduce their responsibility in the light of impending retribution.

Thus we are faced in law, unlike other areas in philosophy, with attempting to formulate the most reasonable set of methods or rules to establish intent and foreseeability. From this it can be seen that the rules themselves could induce a significant difference. For example one could say that intention only covers direct immediate intention so that for example the person putting the bomb on the plane hoping to collect the inflated insurance on a packet of diamonds on the flight does not intend the death of the crew and passengers. Alternatively one could say that with regard to consequences all those that flow shall be deemed to apply.i.e an **In re Polemis** approach. While the primary intention or intention of action is usually fairly clear the intention of result or consequence, the secondary intention, is usually less so and it is particularly this that will have to be inferred from the evidence. So:-

“What do you intend to do with that match?”

“Light this petrol heater”.

Some time later, “Did you intend to burn down the house?”

And this reveals our real problem. If asked at the time one can ascertain true intention

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⁹⁵ For a refutation of the ‘moral culpability view' see Hart *Punishment and Responsibility* p38 et seq.
(excluding deliberate deception) but working backwards from a result is always going to involve a factor of uncertainty. Was the fact that the house insurance had been doubled fortuitous or suspicious? etc. Thus when looking at the cases we must always bear an additional caveat in mind. There is a great deal more to a case than the judgements. The evidence can only be seen from a complete trial transcript. Also in the court of first instance the judge sees the evidence being given and listens to the witnesses. Although today it seems that we are all too eager to denigrate our judges (often for something which was Parliament’s fault) they are usually experienced in assessing people as well as the law. This is why the court of appeal are loath to override findings of fact of the Trial judge. However, when we come to review the case we usually find that we are considering the House of Lords judgements and the point under consideration is usually a well defined specified point of law. Judges’ remarks on other matters not directly related to this are obiter dicta and as such not binding. Also one must remember that foreseeability, which goes to the result is in a sense a unidirectional qualifier. The fact that I could not (reasonably) foresee a result can nullify intention. How could I intend what is not foreseeable? The other way round however - the fact that I could foresee a possibility, e.g. of burning down the house, does not mean that this was my intention.

At this point it is necessary to look at the legal applications as seen from a review of some of the cases.

“Foresight of a high degree of probability is not at all the same thing as intention” .... it is not foresight but intention which constitutes the mental element in murder” per Lord Hailsham Hyam v DPP [1975] A.C.55 @ 77.

However this should be read with his definition quoting Asquith LJ in Cunliffe v Goodman [1950] 2 KB 237 at 253:

“An intention..connotes a state of affairs which the party intending does more than merely contemplate. It connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition.”

To this Lord Hailsham added the qualification...

“..and so long as it is held to include the means as well as the end and the inseparable...
consequences of the end as well as the means” (Hyam p.74.)

Here then is the distinction between the C2 (foreseeable) and C1 (foreseen, or in Hailsham's words inseparable) consequences of my earlier illustration. Moreover as Lord Bridge pointed out in the court of Appeal in Moloney v R. intention could be deduced from the evidence.

In R v Moloney [1985] AC 905 the facts are that the Appellant (M) and his stepfather (S) drank very heavily at a wedding anniversary. The rest of the family retired at one a.m. but M and S remained and were heard talking in a friendly manner. At four a.m. a shot rang out. M telephoned the police saying he had murdered S. He said they disagreed as to who was quicker at loading and firing a shotgun. M was the first to load and S said ‘I didn't think you'd got the guts, but if you have pull the trigger’. M stated he didn't aim the gun, he just pulled the trigger. Lord Bridge did not agree that Foreseeability amounted to intention. After the case of DPP v Smith [1961] AC 290 where the Lords had treated the maxim ‘A man is presumed to intend the natural and probable consequences of his acts’, as a rule of evidence creating an irrebuttable presumption, he maintained that section 8 of the Criminal Justice Act 1967 had put the issue back in the hands of the jury to draw such inferences from the evidence as appear proper in the circumstances. The Appeal was allowed.

However the guidelines set out by Lord Bridge (which omitted any reference to probability) in Moloney were held to be defective by the House of Lords in R v Hancock and Shankland [1986] 1 All ER 641 where Lord Scarman set out:-

i) The intent to kill in Murder is a specific intent - the intent to kill or inflict serious bodily harm,

ii) Foresight of the consequences is no more than evidence of intent..quoting Lord Hailsham in Moloney

“..Foresight and foreseeability are not the same thing as intention although either may give rise to an irresistible inference of such...”

iii) The probability of the result of an act is an important matter for the jury to consider and can be critical in their determining whether the result was intended.

Duff sees Lord Bridge's judgement in Moloney as leaving an area of uncertainty but I would suggest this is no longer so in the light of Hancock and Shankland. Furthermore
turning to Lord Bridge's example of the man boarding a plane to Manchester this should now be read in the light of R v Hancock and Shankland so that the fact that there is a moral certainty that a plane is going to Manchester only raises a rebuttable (even though this may be very difficult) presumption that an escapee (who may have dived aboard it) actually intends to go there. (cf. Davidson's example of the man boarding a plane for London. ante). One cannot resist the personal conclusion that R v Hancock and Shankland was ultimately wrongly decided. If the likelihood of causing death is not a probable as well as natural consequence of deliberately dropping a large piece of concrete onto a motorway we might as well declare a state of total anarchy. It is, perhaps, an example of how far the modern courts will go to reach a desired decision.

**Hyam v DPP [1975] A.C. 55.**

Mrs Hyam set fire to Mrs Booth's house by pouring petrol through the letter box and setting fire to it by means of a newspaper and a match. There were four people in the house, Mrs Booth and her three children. Two of the children died as a result of the fumes generated by the fire. The appellant's motive was jealousy of Mrs Booth who she thought was likely to marry a Mr Jones of whom she (Hyam) was the discarded or partially discarded mistress. Her account of her actions and her defence was that she had only intended to frighten Mrs Booth into leaving the neighbourhood and that she did not intend to cause death or grievous bodily harm.

The trial judge directed the jury:

“The prosecution must prove that the accused intended to kill or do serious bodily harm to Mrs Booth. If you are satisfied that when the accused set fire to the house she knew that it was highly probable that this would cause (death or) serious bodily harm then the prosecution will have established the necessary intent. It matters not if her motive was, as she says, to frighten Mrs Booth.”

Although Hailsham LC thought as quoted above (from Moloney) that knowledge of probable result did not amount to intention he went on to consider the state of mind of a defendant who knows that a certain course of conduct will expose a third party to the risk of serious bodily harm

“... without actually intending those consequences, but nevertheless and without
lawful excuse deliberately pursues that course of conduct regardless. In that case there is not merely actual foresight of the probable consequences, but actual intention to expose his victim..."

Here with respect Lord Hailsham appears to be in error philosophically (as well as contradicting himself). Had he said there would be “not merely actual foresight.... but deemed (or constructive) intention” there would have been no confusion. That this is what he meant there is little doubt for he goes on to refer to the Fourth report of the Commissioners on Criminal Law (8 March 1839) p. xx. where they say

“Again it appears to us that it ought to make no difference in point of legal distinction whether death results from a direct intention to kill, or from wilfully doing an act of which death is the probable consequence."

Thus we should not conclude that Lord Hailsham was defining a new category of Intention. Viscount Dilhorne felt that knowledge of high probability of consequences should probably be treated as intent. Lord Cross followed R v Vickers (malice aforethought) and Diplock & Kilbrandon LLJ dissented holding that an intention to do serious bodily harm was not enough. This case illustrates part of our difficulty with case law from a philosophical point of view. Lord Hailsham directed his judgement on a consideration of intention, Viscount Dilhorne's remarks on this subject were obiter dicta (and therefore do not set a firm precedent), Lord Cross followed R v Vickers on malice aforethought and the other two dissented.

A brief consideration of the Vickers case is included because Lord Goddard CJ set out the position with regard to the law prior to, and the effect of, the Act of 1957.

R v Vickers [1957] 2 All ER 741

Here the appellant broke into the cellar of a shop owned by a Miss Duckett aged 73, intending to steal money. Miss Duckett surprised him whereupon he struck her with his fists; she fell down. The medical evidence was that she was struck 10-15 times and kicked in the face. The degree of force required to inflict the injuries ranged from quite slight to moderately severe.

Now, before the 1957 act the term 'constructive malice' was often used and it
meant that if a person caused death during the course of a felony which involved violence, that always amounted to murder. Section 1(1) of the act effectively removed that from the law and provided:

‘the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence.’

Lord Goddard stated that ‘Malice aforethought’ was a term of art defined as “either an express intention to kill or an implied intention to kill as where the prisoner inflicted grievous bodily harm, that is to say, harmed the victim by a voluntary act intending to harm him and the victim died as a result of that grievous bodily harm. If a person does an act on another which amounts to the infliction of grievous bodily harm he cannot say that he did not intend to go so far. It is put as malum in se in the old cases and he must take the consequences.”

And there we have it in a nutshell - killing as a result of voluntarily harming the victim was regarded as Malum in se and Murder. Lord Hailsham confirmed this in R v Cunningham [1981] 2 All ER 863 when he reviewed all the authorities from Coke onwards. In law there was no difference between direct and implied intention.

**INTENTION AND ATTEMPT**

The question of intention was considered in the circumstances of ‘attempt’ in R v Mohan [1975] 2 All ER 193

Here the appellant was convicted of attempting by wanton driving to cause bodily harm to a policeman. The trial judge had directed the jury that it must be proved that the appellant must have realized that he was driving in a way likely to cause bodily harm, or he was reckless as to whether such harm was caused. ‘It is not necessary to prove an intention to cause bodily harm.’

The court of Appeal found the final direction was bad. It was necessary to consider intention - quoting Lord Asquith with approval that ‘intention’ denotes more than mere contemplation.

“If that interpretation of 'intend' is adopted as the meaning of Mens rea in the offence of attempt it is not wide enough to justify the direction in the present case”.

From this Duff concludes that the concept of intent has a narrower meaning
when what is required is ‘specific intent’, and a broader meaning in other contexts (Duff p. 19). With great respect I do not interpret this case that way. The Court of Appeal goes on to consider ‘intent’, not ‘specific intent’. James LJ, giving the judgement of the court, stated that, prior to the Criminal Justice Act 1967 s.8 the standard test in English Law of a man's state of mind in the commission of an act was the foreseeable or natural consequences of that act....‘So knowledge of the foreseeable consequence could be said to be a form of ‘intent’’.

“Thus, upon the question whether or not the accused had the necessary intent in relation to a charge of attempt, evidence tending to establish directly, or by inference, that the accused knew or foresaw that the likely consequence, and, even more so, the highly probable consequence, of his act-unless interrupted would be the commission of the completed offence, is relevant material for the consideration of the jury. In our judgement, evidence of knowledge of likely consequences, or from what knowledge of likely consequences can be inferred, is evidence by which intent may be established but it is not, in relation to the offence of attempt, to be equated with intent. If the jury find such knowledge established they may, and using common sense, they probably will find intent proved, but it is not the case that they must do so.” (Emphases mine)

Now from the above I submit it is clear that it is not as Duff says that this case shows that “The concept of intention is thus, it seems, not univocal in criminal law..” What the difference is, is that in cases of attempt the burden of proof subtly shifts. It is one thing for me to say to a driver who missed a policeman by half an inch "You intended to get him didn't you?" and quite another when the policeman is lying in the middle of the road. In the first case he can say “No I didn't, I'm a skilful driver and I only wanted him to get out of the way" (And prima facie the evidence does not gainsay him). In the second case the best he can say is “I didn't mean to do that" To which the not unnatural retort is "Yes, but you did in fact do it." I know the cases do not express it as a shift in the burden of proof - it would be clearer if they did - but it is in fact clear from a closer reading of them that it is the rule as to what evidence constitutes intent that changes not the nature of the intent.

**In R v Cawthorne [1968] J.C.32.**

Cawthorne fired shots into a room where his mistress and three friends were taking refuge. No one was killed but he was charged under Scots Law with attempted murder. The defence
was that he was reckless but had no intention to kill. Duff points out that Scottish law is that an attempt to commit murder requires intention whereas the fait accompli only requires intention to injure severely. Again Duff has put his finger on a very difficult point. It is clear that for an attempt, where there is a failure so that we have no evidence of the actual crime i.e a dead body as opposed to a wounded one, we must establish an intent if we are to prosecute. Also it would seem that to prosecute for intent of the greater offence we would necessarily have to show the greater intent. This seems to be the only way we can explain the law. As to the question of prosecuting attempts, that I suspect is purely a matter of public policy.

Again it is a rule of law which has virtually said ‘if you are serious enough to want to wound seriously and you overstep the mark and actually kill then we shall treat it as murder.’ This does not involve a philosophical tampering with the meaning of intention, it merely, as a matter of practice, warns people how certain offenses are going to be regarded.

To the extent that the attempt cases may be reviewed in this light they do not confuse the issue of intention.

**INTENTION AND RECKLESSNESS (including HEEDLESSNESS)**

The state of the law and thinking generally is very confused on this subject. We are going to find ourselves faced with two leading cases, Cunningham (the narrow view) and Caldwell (the broader view); a Code definition; an additional statutory definition of 'Heedless' which uses language in common with some of the judgements on recklessness; the Law commission's comments and a dictionary definition (covering everyday use).

Starting with the dictionary definition of recklessness:-

"1. Of persons: careless of the consequences of one's actions; heedless (of something); lacking in prudence and caution.
2. Of actions, conduct, etc. Characterized or distinguished by (carelessness or) heedless rashness. A good example is given - "a rough and reckless soldier, caring for nothing but a fight." Shorter O.E.D.

It is interesting to note that 'Heedless' is defined;- "Without heed; paying no attention; careless, regardless."The example given is - "There in the ruin, heedless of the dead, The shelter-seeking peasant builds his Shed." (Goldsmith).
Now the interesting part, and why I have quoted this, is that Recklessness is generally assumed to include heedlessness but not vice versa (which could usefully be used to distinguish the broad and narrow concepts). Secondly, if one looks at the examples, it will be seen that the words cannot be interchanged without distorting the sense conveyed. This at least augers well for a possible solution. But, let us note, while there is talk of careless of the consequences - a behavioural attitude - there is no talk of deliberate risk taking or importation of intention.

Now to the cases, in

**R v Cunningham [1957] 2 All ER 412.** The facts were set out by the trial judge that the accused who was living in a house very roughly divided in two (there was a honeycomb wall dividing the basements), deliberately, intending to steal money from the gas meter, broke it away from the supply pipes in the basement releasing the mains gas supply into the house. He must have known perfectly well that gas would percolate all over the house...

“As I have already told you, it is not necessary to prove that he intended to do it; it is quite enough that what he did was done unlawfully and Maliciously”.

The court of appeal quoted Professor C.S. Kenny’ Outlines of Criminal Law (1902) to the effect that:

“‘malice’ must be taken not in the old sense as wickedness in general, but as requiring either (i) an actual intention to do the particular kind of harm that was in fact done, or (ii) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it). It is neither limited to, nor does it indeed require, any ill will towards the person injured”.

In their judgement the Court of Appeal said:

“...In our view, it should have been left to the jury to decide whether, even if the appellant did not intend injury to Mrs Wade, he foresaw that the removal of the gas meter might cause injury to someone but nevertheless removed it. ...”

Now in my respectful submission there is some difference between someone who, having foreseen the danger of the removal of the gas meter,

a) ‘goes on to take the risk of it’ (Kenny- implying conscious assumption of risk) or
b) ‘nevertheless removed it’ (The actual wording of the judgement- making no reference to
conscious assumption of risk).

Nevertheless the case is cited as the view that requires conscious (i.e. intentional) assumption of the risk.

In *R v Briggs [1977] 1 All ER475; R v Parker [1977] 2 All ER 37* and *R v Stephenson [1979] 2 All ER1198* the test for recklessness was judged to be subjective, i.e. as to what the person actually foresaw.

Then came


Here the facts as set out by the house of Lords per Diplock LJ were that the respondent had been doing work for the proprietor of a residential hotel. He considered he had a grievance against the proprietor. One night he got very drunk and in the early hours of the morning decided to revenge himself on the proprietor by setting fire to the hotel, in which some guests were living at the time. He broke a window and started a fire on the ground floor; but fortunately it was discovered and extinguished before any serious damage was done. At his trial he said that he was so drunk at the time that the thought there might be people in the hotel whose lives might be endangered had never crossed his mind.

The charge under s.1(2)(b) requires:-

i) intending by the destruction or damage to endanger the life of another or

ii) being reckless as to whether the life of another would be thereby endangered.(numeral divisions mine)

The House of Lords held

“(a) if the charge of an offence under s 1(2) of the criminal Damage Act 1971 is framed so as to charge the defendant only with intending by the destruction or damage [of the property] to endanger the life of another, evidence of self induced intoxication can be relevant to his defence; (b) if the charge is, or includes, a reference to ‘his being reckless as to whether the life of another would thereby be endangered’, evidence of self induced intoxication is not relevant”. Appeal dismissed.

(Lords Keith of Kinkel and Roskill concurring, Lord Edmund-Davies concurring but holding recklessness to have been correctly defined in the
The decision has been attacked on the ground that recklessness should be defined as conscious risk taking. This of course was really part of the problem with the law before the act of 1971. This came under the Malicious Damage Act 1861. Here, where the prosecution did not rely on an actual intention, the jury were required to analyze the thoughts that passed through the mind of the accused at or before the act in order to see on which side of a narrow dividing line they fell.

Again quoting Lord Diplock (referring to the passage quoted above of professor Kenny)

“Among the words he used was ‘recklessness’.... It presupposes that, if thought were given to the matter by the doer before the act was done, it would have been apparent to him that there was a real risk of its having the relevant harmful consequences; but, granted this, recklessness covers a whole range of states of mind from failing to give any thought at all to whether or not there is any risk of those harmful consequences, to recognizing the existence of the risk and nevertheless deciding to ignore it."..

".....the restricted meaning that the Court of Appeal in R v Cunningham had placed on the adverb 'maliciously'... in cases where the prosecution did not rely on an actual intention of the accused to cause the damage that was in fact done called for a meticulous analysis by the jury of the thoughts that passed through the mind of the accused at or before the time he did the act that caused the damage, in order to see on which side of a narrow dividing line they fell. If it had crossed his mind that there was the risk that someone's property might be damaged but, because his mind was affected by rage or excitement or confused by drink, he did not appreciate the seriousness of the risk or trusted that good luck would prevent it happening, this state of mind would amount to malice in the restricted meaning placed on that term by the Court of Appeal; whereas if, for any of these reasons he did not even trouble to give his mind to the question whether there was any risk of damaging the property, this state of mind would not suffice to make him guilty of an offence under the Malicious Damage Act 1861.” (Emphases mine)

Duff appears to join the critics, asking "Why should the s.1(2) offence not require an intention to endanger life?" With respect the answer is of course that subsection 1(2)(b) is in two parts separated by “or” and the first part does import intention and the
second part does not. The point is that if Intention is, as I have tried to show, purposive, then how do we define a purposive recklessness? Are we meant to apply the recklessness to the primary intention? Presumably not, for he didn't deny setting fire to the premises. Then it must be to the secondary intention i.e. the intention to harm people. Now is this to be taken to mean that when he first thought of the idea he thought of the harm and desisted (because if he had not desisted it would have clearly been intentional) until in his drunkenness he forgot about the harm. Or are we to take it that the whole scheme was devised in a drunken state in which he was too reckless to bother about the consequences. This is far more likely but is the court not entitled, as it has done with serious injury and murder, to take the line that if a man wantonly gets himself into a state where he cares not a jot or tittle about the consequences of his act then he shall be deemed responsible for that act. This seems to me entirely logical on two grounds

a) That I am at a loss as to how to impute intentionality into recklessness and

b) The Courts had already found themselves faced with this problem and whereas others may be able to afford to discuss how many angels may sit on the head of a pin, the law is, as I pointed out in the introductory paragraphs, constrained to practicalities. One may well argue that Caldwell is wrong and that there should be no difference between the village idiot setting fire to your house, and me doing so in a drunken rage (but not having thought about it) because you do not agree with the point I have just made. I happen to think Caldwell was right.

Now it seems to me that the clearest way to separate the concepts would be to regard

i) ‘Recklessness’ as the doing of an act which objectively would appear to involve certain obvious risks either without having thought or proceeding without regard to those risks; and

ii) ‘Heedlessness’ as the doing of an act which objectively might appear to involve certain reasonably foreseeable risks but which subjectively were not considered. So the village idiot heedlessly sets fire to your house, but I in a drunken rage recklessly do so. In neither case is the factor of Intentionality required. Once that is imported you move beyond recklessness to the most serious category. I am afraid that I respectfully disagree with Duff where at p 141 he tries to separate one account as emphasizing ‘choice’ (in practice the cases don’t) and the other as relating to attitude so as to introduce ‘willingness’ and then juggling with those two
intentional states. In any event, if one is too drunk to think about something how does one intentionally decide to take risks? Intentionality in my submission is ruled out by definition and to introduce it merely muddies the waters.

As to how it may be possible to proceed without a ‘Mental state’ being involved see the next section - a hypothesis developed on Davidson.

Unfortunately the above are merely my hypothetical views because Parliament in its wisdom has managed to confuse the issue still further. In the 1985 Code quoted by Duff at p 146 heedlessness is referred to in terms of the “obviousness” of the risk to any reasonable person. This of course collides ominously with Lord Diplock's use of “obvious” in the definition of recklessness in Caldwell.

Finally in the Draft Criminal Code (1989 Law Com. No.177 vol. 1) the Law Commissioners considered a definition:-

"18... a person acts:....(c) recklessly with respect to:
(i) a circumstance when he is aware of a risk that it exists or will exist;
(ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk;"

The Law Commission commented on the definition of recklessness [in clause 8.18] that Caldwell had given a wider meaning to ‘reckless’ than that proposed by clause (c). Their fear was that the Caldwell interpretation would be given to all cases. Indeed it had been applied to reckless driving in R v Lawrence and they felt it would be applied to all cases unless specifically otherwise stated in the offence. (admittedly the contrary view had been taken by the Court of Appeal in the statutory definition of rape. They did not cite the case, though I suspect it is DPP v Morgan (1975) 61 Cr App R 136., where positive intention was required).

They then give an explanation of the narrower meaning:-

8.19 "If the Caldwell concept of giving no thought to the possibility of there being a risk, where the risk is in fact obvious, is to be a basis of liability for some offenses governed by the Code, the Code ought to have a term to express it. But the question that must first be faced is whether ‘reckless’ should be used in the code to express this concept as well as that of the actor's recognizing ‘that there [is] some risk involved and ..nevertheless [going] on to do the act which creates the risk’. We are
sure that it should not and we adhere to the narrower meaning... which seemed to have become the judicially accepted meaning before Caldwell. Our reasons are as follows.

(i) The code needs a term, for use as necessary in the specification of offenses, which refers only to the unreasonable taking of a risk of which the actor is aware. Such conscious risk taking is the preferred minimum fault element for most serious modern offenses..........

(ii) Before Caldwell, ‘reckless’ had become the conventional term by which to refer to this narrower type of fault. We do not know of an acceptable alternative.

(iii) We understand that trial courts have experienced considerable difficulties in using the complex Caldwell definition of recklessness. That definition in effect describes kinds of fault. Even if both kinds were to be needed for some offenses, they need not be conveyed by a single Code expression. We believe, indeed, that it may be of advantage to prosecutors and to sentencing courts to be able to distinguish, by means of a discriminating language, between different modes of committing the same offence.”

One is forced to comment that a reading of Caldwell, and the section, shows quite clearly that there are two parts to section 18c one of which specifically refers to intention and one which does not (see earlier). Regrettably the Commissioners seem to be taking us back to face all the same problems about deciding precisely what was in the agent’s mind at a precise moment (cf. Diplock L.J.) and, in my opinion they were far short of clarifying the terminology.

If recklessness is to require intentional risk taking then where does it differ from an intentional act? It opens a minefield of possible excuses. 'Yes M'lud I consciously took the risk but I was too drunk / stupid / careful to admit / that I foresaw that a loaded gun with a hair trigger might blow his head off!'

The two words reckless and heedless could have been used to separate the perceived from the unconsidered but the opportunity appears to have been missed.

INTENTION AS A MENTAL STATE - DAVIDSON.

For the non specialist: You will recall that referring to Dualism and Monism earlierI referred to the fact that Dualists believe that we consist of a physical body and a non
The Monists believe that there is only one aspect - the purely physical. This means that for the Monist mental states (often referred to as $\psi$ or $\psi$ states) must be reducible to actual physical brain states and that these should be determinable. The basic argument behind the Monist view is that if the $\psi$ state is not physical, then how can it affect our actions? i.e. How can a non physical thing act upon a physical thing? Therefore they argue the non physical does not exist.

Davidson's theory is that - Yes the $\psi$ state may well be reducible to a brain state, but not always necessarily to the same brain state. However the laws governing such reductions are so complicated as to be unfathomable - Hence his theory is called "Anomalous Monism". And in reducing this enormously complex subject to so few lines I can only plead E & O E and apologise to the experts (who shouldn't be reading this bit anyway!)

There is one point which is of concern and that is the assumption which appears in Moloney (certainly in Lord Bridge's obiter dicta) that all actions require an intent. i.e. the man who boards the plane for Manchester even though it is the last place he wants to go clearly intends to travel to Manchester. I realize that the point I am seeking to make is a borderline case but I would dispute the assumption. Again we need more details of surrounding circumstances. For example - A man who is seeking to escape boards a train for Manchester. Does he really have an intention to go to Manchester - a city which he doesn't know and where he has no contacts? His primary intention is to escape and, even if he had bought a ticket for the full journey, he could be planning to get off after two stops. He may well have got on the first train that was about to leave. He may not even have known where it was going. It seems to me that Lord Bridge implies that as soon as he knew where the train was going this implied an intention to go there. This cannot be right.

There is the allied problem of instinctive or thoughtless reaction - an old lady drops her parcel and you bend to pick it up; or you withdraw your hand from a hot radiator. Do these actions really require the formation of Mental states of Intentionality? I submit they do not, and while it is just a hypothesis I would explain it as follows:- Davidson has posited an explanation of the relationship of Mental and Brain states with physical states which I
illustrate in Fig 4:-

\[ \text{Input} \rightarrow \psi \text{ State} \rightarrow \text{Mental State} \]

\[ \rightarrow \text{Brain State} \rightarrow \text{Physical State} \]

(Anomalous relationships are shown by a broken line --/--)

Fig.4

But I do not see why this should not also provide for certain circumstances as follows:-

\[ \text{Input} \rightarrow \psi \text{ State} \rightarrow \text{Mental State} \rightarrow \text{Brain State} \rightarrow \text{Physical State (Reaction)} \]

Fig.5.

This would explain a whole range of actions which do not require a specific intentional state; for example how else do we explain the sudden swerve we make when an obstruction is seen out of the corner of our eye? The reaction does not involve an intention to swerve one just does it. In fact there can be times when realizes it might have been better not to swerve had one had the time to consider. A bat flies low and we duck only to realize later that this was no bat but an optical illusion caused by a trick of the light.

It would seem that there may be a range of functions which might occur without a mental state. Certainly all our bodily functions, heartbeat, breathing etc require no Mental state, they do not even require consciousness. If one looks at figure 5, it seems that certain actions must occur in this manner. I put it as a hypothesis that certain emotional states such as fear could blanket or cut out (short circuit) the mental state required for an intention and activate the brain state direct. If this is true it could have an effect on the way we should regard some states of Duress (at least those occurring while there is immediate fear or terror).
INTENTION AND DURESS

It is perhaps convenient to consider cases such as Lynch at this point. In **DPP for Northern Ireland v Lynch [1975] 1 All ER 913** The appellant was summoned by Meehan, a well known and ruthless gunman to drive Meehan and his accomplices to a place where they intended to kill, and did kill a policeman. The appellant remained in the car and drove them away afterwards. There was evidence that it was perilous to disobey Meehan who indicated that he would tolerate no disobedience. The House of Lords held by a three to two majority that the defence of Duress was available but Lord Wilberforce indicated that the difficulty in raising it would correspond with the heinous nature of the offence.

In **Abbott v R [1976] 1 All ER 140** the Privy Council held that Duress was not available to a principle in the first degree (Lords Wilberforce and Edmond-Davies dissenting) largely on the ground that this would open up a terrorists' charter.

In **R v Howe [1987] 1 All ER 771** the House of Lords again held that Duress was not available for a first degree principle and that it should not have been in Lynch's case.

Duress is clearly a case where the law feels it has had to take a certain course for practical reasons. Philosophically there is a case which might be made out that fear (certainly of immediate danger) could in some cases prevent the formation of a Mental state of intention i.e. of intending the consequences of ones actions. The person would just co-operate. However murder is an area where the law has already overruled the need for direct intention, allowing intention to do serious bodily harm to suffice. It seems that it is forced again to impute intention for if it were to find, as could be the case, that there was no actual intention it would need to be able to punish based on grounds other than intention and what could those be? Again it would seem that the explanation would be that the act was Malum in se and that this actually makes a better ground than importing intention. This is because if three criminals set out knowing one is carrying a gun (and liable to use it) and he uses it killing someone the secondary intention seems far stronger than that of Lynch.

INTENTION & DESIRE

During the course of his judgement in Hyam Hailsham LJ distinguishes Intention from desire. This distinction seems philosophically logical for I can desire that lovely car without ever intending to possess it. Here he referred to Cunliffe v Goodman
which was a civil case where a Landlord wanted to demolish a building or at least had applied for planning permission to demolish and replace. The question was did she intend to demolish the building or was she merely hoping to. The case decided that intention could not be implied where the matter was beyond the control of the person. Here what was possible depended on the grant of the licences and she could not intend demolition in advance of obtaining the licences. It also seems to me that this case can be distinguished on the ground that the Landlord's intention to demolish was a future (or bare) intention and that such intentions are always open to variation until such time as they are fixed by a primary intention or an intention of action (see above). The action of applying for the licences showed no more intention than an intention to obtain the licences. Here again with regard to intention we have to have regard to all the circumstances and the obtaining of the licences would not reveal a fixed intent to demolish. It could just have been a means of enhancing the potential, and therefore value, of the property.

In considering desire I believe that we may have to consider four interacting considerations in order to get them into perspective:-

INTENTION, DESIRE, BELIEF AND REASONS.

Duff in dealing with Intention and reasons for action (p.47) states: 'Intended actions are those which are done for reasons. They answer the question Why did you do that?' and he gives as an example in Mrs Hyam's case one can ask "Why did Mrs Hyam set fire to the house? In order to frighten Mrs Booth into leaving town". From this he goes on to state "An Agent's intentions in action are her reasons for action." At first this sounds most reasonable until we start to analyse the situation a bit further. For example we could ask the question 'What were her desires?' and we get the same answer 'To get Mrs Booth to leave town'. Now we know that Lord Hailsham very properly distinguished intention from desires and similarly desires are not reasons, they are states of mind. To solve the problem we have to bring in the fourth element, beliefs.

At this point we can analyse the situation more effectively when I suggest that what we find is that:-

An intention is to have a pro attitude to a course of action in the belief that it will effect a result. i.e. Mrs Hyam's intention was to set fire to the house (primary intention) for the
reason that she believed it would scare Mrs Booth into leaving town, which is the result that she desired (secondary intention). After all she would not have set fire to the house if she were convinced it wouldn't have any effect.

Let us test this on a primary intention. George hits Joe. George is angry. His desire is to hurt Joe. His belief is that by hitting Joe he will accomplish his desire. He would not have hit Joe if, knowing Joe to be a masochist, Joe would have thoroughly enjoyed it. Let us try this situation with Duff's explanation. George's intentions in action (hitting Joe - well hitting is the only action, so it must be this) are his reasons for action. It doesn't work. And I submit that the reason is that Duff has inadvertently very briefly slipped into the error that he actually so skilfully pointed out to us in the first place namely that the observable action contains more than bare movements. He actually goes back to the more detailed explanation when he refers to Anscombe Intention s.37 (on p 49) that reasons justify an action by specifying its desirability characteristics - the features which make it worth doing.

Therefore I submit that reasons are not intentions, they are merely a justification of the pro-attitude (of that individual) for the action. It is a pro-attitude which is required and this is that which combined with the causal event\(^96\) precipitates the. “primary intention”.

This reasoning is again based on Davidson's views (which I find exceptionally persuasive) on Causal interaction. His views with regard to psychological and mental states and their relationship to brain states is in fact supported by the arguments relating to the heterogenous nature of psychological states. He starts with the assumption that both the causal dependence and the anomalousness of Mental Events are undeniable facts\(^97\). He then pursues three principles of which we are here primarily concerned with the first.

This -The Principle of Causal Interaction- is “that at least some mental events interact causally with physical events.” This is based on his argument that any action has a primary reason as its cause and that primary reasons are comprised of a “pro attitude” or “the related belief” or both. Here we should remember that the beliefs will differ with the culture, 

\(^{96}\) Davidson. *Essays on Actions & Events.* p.4

\(^{97}\) Ibid. p.207.
training and instincts of the agent. Moreover given the belief and pro attitude of a primary reason for an action we can show that it has a desirability characteristic. Thus actions have a causal foundation. He distinguishes this from the “reasons" for an action, claiming that there must be a pro attitude assumed in order to make the reasons for acting intelligible.

Davidson points out\(^9\) that there is an argument that as a primary reason comprises attitudes and beliefs which are states or dispositions and not events, therefore they cannot be causal. His reply to this is that the onset of a state or disposition is an event. The example he gives is the case of the driver who raises his arm to signal a turn. The required mental event Davidson points out is the one usually omitted from the discussion about the reasons for the driver wanting to turn etc. The preceding event is that the driver notices his turning coming up. Davidson concedes that we are not always able to trace or determine the exact causal event, but posits very reasonably that there will be one.

**SUMMARY**

The best way of looking at Intention and its application to the Law is to take the matter in logical analytical steps. The first is to define one's concept of Intentions. To me they fall into three distinct categories:-

1) **Primary Intention** - the intention of immediate action
   
   or **Intention Actus Proximus**

2) **Secondary Intention** - the intention of result or consequence
   
   or **Intention Actus Remotus**

3) **Future Intentions** Not yet acted upon therefore subject to change.
   
   or **Intention Actus Incertus**

It will be noted that in each case the definition is action related.

The law involves only the first two but it contains offenses which can involve the different intentions in three ways as follows:-

1) Offenses involving **Primary Intention**.

Assault entails an *actus proximus*

\(^9\) Ibid. p.12.
“Did you mean to hit him?”

“Yes”...Assault.

or

“No”...it was an accident - I had no Intention.

2) Offenses involving a primary and a secondary Intention.

Theft involves the primary intention of taking (the Actus Proximus) plus the secondary intention of depriving the owner permanently (the Actus remotus).

I had been working towards the principal that primary and secondary intentions are coexistent on the grounds that:-

I gave her poison intending to kill her. After all I could hardly give her poison and then decide to kill her. However there are a number of ways of looking at this; I intend to kill her (bare or future intention), I put poison in the tea (primary intention) the reason being that I believe that this will kill her. Moreover in the case of theft I could take something, initially intending to borrow it, and later decide to keep it. As I have pointed out I believe that with compound intentionality we have to be very careful to analyse the state of affairs in detail and we should not omit the state which may involve beliefs, fears, instincts and trained reactions. Therefore it seems that the primary and secondary intentions are not necessarily coexistent.

3) Finally by virtue of various rules of law or definitions of the crime the law may impute an intention.

e.g. Malice aforethought where a killing, even though only bodily harm only was intended in the Actus proximus, will suffice to impute the intention for murder.

However these latter cases are not some different form of intention as some writers might imply but merely a rule for the application of the law. I am of the opinion that if we were to regard these as we formerly did in the old days, as acts which are regarded as Malum in se there should be no confusion. We are then free to impute a constructive intention.

Similarly if we treat reasons as what they are, the pro attitude supporting the action, and not as a form of intention which they are not, the confusion and complexities may
be eliminated.

In the case of recklessness the whole point is that the person is not thinking of the consequences therefore they can have no intention. However the circumstances are such that had they taken control of themselves they would surely have foreseen the consequences or probable consequences. Therefore the harm would come within the ambit of foreseeable risks and where the action is wicked enough it will be treated by the law as *Malum in se* and a secondary intention will be imputed. In this manner one can see how the three categories of severity arise:

1) Direct Intention
2) Recklessness - Implied Intention
3) Negligence - Intention not involved

The reason why there may appear to be confusion is that whenever a matter arises it is in relation to a different set of facts and is often considered by a different judge in a different set of sociological surroundings. In these circumstances the really remarkable thing that can be seen is the consistent pattern of the philosophical thought behind the judgements of the common law. The increasing influence of Statutory law and in particular the idea of Statutory liability without the philosophical background formerly imported by our judiciary is perhaps a contributory factor tending to undermine the effectiveness of our legal system.

I believe that there is an urgent case for a continued philosophical review of the background to our laws. In fact I would go so far as to say that unless a proper philosophical background is maintained, our laws, and in particular our criminal law, could fall into further disrepute.
CHAPTER 7. PUNISHMENT.

In a civilized society not only must the laws be just and their administration just, but the means of enforcing them should also be just. That does not mean, as some might suppose, that punishments must be mild and friendly. Far from it. Justice demands that the punishment be adequate.

Definition.

One of the best sources for a definition lies with Hart. His central case of punishment contained five elements:-

“(1) It must involve pain or other consequences normally considered unpleasant.
(2) It must be for an offence against legal rules.
(3) It must be of an actual or supposed offender for his offence.
(4) It must be intentionally administered by human beings other than the offender.
(5) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed”.

This definition covers the basic legal aspects of punishment without presupposing any of the philosophical arguments. The only comment I would make is that, in my submission, the reference to pain is not as important as the feature of unpleasantness. Fear or dread could be as important as pain. One notes that Hart refers to ‘normally considered unpleasant’ and this raises a very important point. Normally considered unpleasant, by whom? It is one of my contentions that one of our society's great mistakes is that it attempts to provide punishments in which the answer to the above question is that the punishments are considered unpleasant by society in general, or to be more specific by ‘the man on the Clapham omnibus’ - i.e. a generally law abiding citizen.

The mistake in this lies in the fact that the punishment, if it is to be effective in any of the ways that we shall be considering later, must be considered to be unpleasant by the recipient. As we shall see the recipient’s views may differ considerably from that of the law abiding citizen. Unfortunately the effect of concern for the prisoner's well being, and their ‘rights’, have resulted in regimes in prison which were described by one young car thief as "a holiday camp". The point I seek to make has nothing to do with the severity or non-


100 BBC.1. Kilroy Debate on Car theft and Joy riding.
severity of the regime in question, but rather the fact that the man on the Clapham omnibus would, no doubt, have considered being in prison, even if it were like a holiday camp, a totally mortifying experience, and certainly not one that would ever have been admitted in public. The disgrace in which he would be held, i.e. the critical reaction of his peers would be an added deterrent, So it is arguable that much more attention has to be paid to the ‘critical reaction’ of the public.

**Purpose**

One should perhaps raise a point here which is that the object of punishment (one of its purposes) is to ensure conformity with the rules in the most efficient way possible. It is the efficiency of punishment in effecting this objective that is a factor often introduced into discussions. However that object can be affected by many issues such as the likelihood of being caught; and if caught, of being prosecuted; and if prosecuted, of being convicted; and if convicted, of the unpleasantness of the punishment; and finally of the reaction, if not of society then certainly of ones peers to the fact of conviction. These matters relate to the practical issues with respect to punishment. For this reason I have distinguished them, quite arbitrarily, under the term ‘object’ of punishment as opposed to the ‘purposes’ of punishment.

With respect to the purposes of punishment there are further aspects which are usually cited under the general headings of:-

I) Retribution  
ii) Deterrence &  
iii) Reform or Cure.

There is a great deal of confusion over these because they are not mutually exclusive and indeed I) and ii) are to an extent (though the quantum of that extent is arguable) inter-related. The principal arguments occur as to which should be the primary purpose of the punishment and which is the most effective in accomplishing the primary objective of compliance with the law. However I shall be arguing that these three headings actually involve some a number of different aspects of punishment.

To start with it is interesting to take a look at what happens in Civil Law. Matters are comparatively simple here. Where damage occurs, usually as a result of a breach of contract, or negligence in the case of a tort, the preferred manner of dealing with the matter is to assess the damage and award compensation. Obviously there are cases where a writ of Mandamus leads to orders for specific performance, where that is a) possible and b) considered desirable (the object being as far as possible to put the parties in the position they should have been in had the breech not occurred, or, where this is not possible, to compensate
the loser). Thus where loss (damage) has occurred, compensation will usually follow.

However the concept of restitution or compensation by the criminal strangely does not play a large part in western law criminal law (though there are moves in this direction). Theoretically it should be as possible to determine the compensation for damage caused by a criminal act as it is in the case caused by negligence. Unfortunately in a high proportion of cases it is unlikely that the criminal could compensate the victim. There are moreover, two essential differences in the case of criminal law. The first is that society as a whole can be offended by the infraction of criminal law. This is because the rules concerned are of general applicability. In the case of a breach of a specific contract, or of a tort, it is usually only the parties involved who are concerned as to the outcome. The breach of the contract does not (usually) involve the odium of the general public, whereas a burglary does. Is it just that the rest of us could not, without our active participation, have been a party to the contract, whereas a burglary could have involved us? Is it a matter of fear; or moral outrage? These are interesting questions that would need to be pursued in a comprehensive theory of punishment. The second difference relates to the factor of intentionality (actual or construed) which was discussed in chapter 6. This factor can affect the seriousness with which any offence might be regarded. For example there may be a death caused by accident, negligence, or intentionally, and in the latter case that case may be further divided into actual or construed intention.

PUNISHMENT IN CRIMINAL MATTERS

I). Retribution.

In most societies the idea of vengeance for a wrong suffered does not lurk very far below the surface. The Vendetta concept is prevalent where there is no other adequate means of law enforcement. The lex talionis, is often used as an example of the crudest form of retaliation, an eye for an eye, by those wishing to attack the concept of retribution. In fact it is not as crude as is generally supposed for in its true interpretation it is negative, and designed to place a limit on the retaliation sought. ie. If the injury is the loss of an eye, then one shall not exact more than an eye in retaliation - it is not permitted to seek death for an eye. This actually is a limiting principle of justice and relates to the quantum of retaliation rather than the vendetta approach. However it has been misrepresented for so long that it will

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A good starting point in considering retribution is with the definition by Hart\textsuperscript{102} where he explains the strict or strong theory of retribution as containing three conditions:

1). That a person may be punished only if he has
   a) Voluntarily done something that is
   b) Morally wrong.
2). His punishment should in some way match or be related to the wickedness of his offence and
3). That the justification for punishing under such conditions is that the inflicting of suffering in return for an act falling within 1) is in itself just and desirable.

Kant goes so far as to add that the punishment of the offence is not merely desirable but obligatory.

The retributive theory need not necessarily be in the strong form but the essential ingredients will remain. *Mens rea* normally plays a part in it, though as can be seen with the introduction of modern strict liability crimes, e.g. speeding, intent may be eliminated. It is an interesting point, as to whether such strict liability crimes do not in fact aid in bringing the law into disrepute - such is the innate response, at least in modern western societies, to the concept of intentionality.

While strict equivalence of punishment is no longer advocated, the idea that there should be some degree of relative proportionality between the severity of the crime and the severity of the punishment, is retained. This is emphasized in Hart's second point. Indeed it would be possible to argue that proportionality is an intuitive concept of justice. This idea seems to be common to both retributive and deterrence theories, including utilitarian ones. There is however a practical problem because the criterion used is often that of the amount of damage done, rather than the subjective wickedness of the agent.

**ii). Deterrence.**

Most forms of retributive theory also imply that punishment is justified as a means of preventing crime. The fact that suffering will be imposed as a punishment is estimated to cause a degree of fear of the consequences of committing a "criminal" act.

This concept of fear as a deterrent may be justified on two grounds:-

1). Where the crime is one which is morally condemned the punishment may be justified as an expression of the moral condemnation of that society. Without wishing to appear too cynical, despite the often substantial justification pleaded for punishment on these moral grounds, it does seem that there may equally be said to be a strong whiff of vengeance attached to them - perhaps another rose by a different name.

2). Where the crimes are not necessarily morally condemned, e.g. speeding, then the punishment is exacted on the utilitarian grounds of its value as a deterrent.

There are many and continuing arguments as to the relative effectiveness of different punishments as a deterrent, but generally it is accepted, for example, that the driver with 9 points for speeding already on his licence will tend to think more about his speed for fear of the next step, i.e. losing his licence altogether. However the whole question of deterrence is open to the problem that the punishments are set according to the society's general view of the relative severity of the offence rather than with respect to their subjective effect on the prospective offender. The young joy-rider, addicted to the thrill of speed, may have no licence, and is quite oblivious to either the morality of the danger he may cause, or the punishment. Against this it is argued strongly that the degree of certainty of being caught, and if caught convicted, will have a major effect on the deterrent - i.e. where the chances of either not being caught, or walking away with a caution, are high, the deterrent effect of the punishment will be largely nullified.

A Failed Experiment

An interesting experiment occurred some years ago. It was decided in the case of some statutory offenses which were punishable by fine, that the fine should be varied in accordance with the wealth of the guilty party. Now this is quite different from the idea of suiting the type of punishment to the type of criminal (an idea discussed later). Here the fine was varied according to the defendant's ability to pay, theoretically on the grounds that a wealthy person would not be sufficiently discouraged by a small fine. The whole experiment was a disaster of monumental proportions. It was disliked by the courts as being difficult to apply and by the public as being grossly unfair. This is because equal crimes were not being treated equally defying the Aristotolean concept of equality. The experiment was very soon discontinued.

My suggestion that punishments should be more appropriate for the type of criminal involved (which will be discussed later) is quite different as it relates to the type of punishment appropriate to the crime and type of criminal practising that crime (e.g. fraud, or armed robbery) as opposed to the quantum. Thus if a particular speeding offence gathers 3
points on one's licence, it would be grossly unfair to give someone 6 points just because they could afford a chauffeur if they lost their licence. On the other hand there would be nothing to prevent a court increasing the severity of the punishment because the defendant was an habitual offender.

Proportionality

It is often argued that proportionality is justified in a retributive theory by equating the punishment with the moral condemnation of the action. In fact Raz takes the approach that the sanction may in part replace the critical reaction of the public.\(^{103}\) While this may be true by inference, it seems to me that proportionality is explainable as a matter of justice and that this is something which has both a moral and an ethical or social input.\(^{104}\)

Thus while it is true that defined crimes will be regarded more seriously when they are regarded as morally wrong, the public will also assess crimes which have little or no moral ramifications. These are usually offenses which arise from a necessity to organize the society along the best lines of the current political thinking. Though most of these offenses are usually regarded as less serious than offenses with a moral connotation they are none the less assessable and are treated accordingly. The very fact that they are rated less seriously is evidence that they are comparable - at least so far as any two crimes can be compared - a comparison that by its very nature can be emotional and subjective.

There is however a public or composite sense of justice which can be detected in our comparatively free society by expressions of outrage at unfair sentences passed by the courts, or of unfair acts of Parliament. At this particular time the social sense of justice would seem to favour harsher sentences for certain crimes, and at the same time that the courts should be given discretion over the current mandatory destruction of allegedly dangerous dogs. This composite sense of justice no doubt exists just as strongly (if not more so) in a rigidly dictatorial society; it is just that they would not be expressed so openly. It is

\(^{103}\) It would be my argument that any such substitution would be a mistake and undermine the deterrent effect. The essential difference with critical reaction is that it remains. The man is a condemned felon. The moment one starts to minimise critical reaction by taking the attitude that the moment the punishment ends, the criminal emerges as a jolly good fellow just like the rest of us, one has removed a great deterrent effect. However this leads to an argument as to the effectiveness of stigma, and while this is beyond our present scope, there is no doubt that a Razian rights based concern with personal freedom and autonomy founded on the individuals rights of well-being can and have had a marked, and deleterious, effect on the effectiveness of the system.

\(^{104}\) See Chapter 2. fig. 1.
the freedom of expression in our society which permits us to verify the existence of this 'sense of justice'.

However I do not wish to suggest that what is deemed just or fair could not be influenced by the state. For example in wartime Japan it was considered morally correct that one should obey the edicts of the God Emperor. These would not even be questioned, unlike our current society where it has become almost fashionable to oppose everything in the name of independence. At the same time moral values can also change independently of the state, so that, for example, adultery, which is still held by Islam to be an offence punishable by stoning, is often widely regarded in other societies as being of little significance. It is not even a crime in western cultures. However it is not so long ago that a suit might lie for alienation of affections.

In any event, as we have seen, the concept of proportionality applies equally to both retributive and deterrent theories. Therefore, later I shall be treating it as a separate part of punishment, and not purely as a part of retribution.

**iii). Reform or Cure.**

The third concept of Reform or Cure can be argued by some (for example the Laing/Wooton approach) as an alternative to the retributive or deterrent theories, or as a system to run in parallel. Basically the concept is that 'punishment' should be devoted to curing the offender and that in this regard the treatment should be personalised with respect to the offender rather than a generalized set punishment or imposition of suffering.

Unfortunately our knowledge of motivations and psychology do not appear, at this stage, to give any real hope that this approach has any greater likelihood of preventing recidivism; certainly if applied along the Wooton line of making all 'crimes' absolute and only considering intentionality etc. when considering the 'cure'. Nevertheless, one cannot be instantly dismissive of the concept because, if nothing else, it highlights the possible need for a flexibility of punishment for an offence, so that the deterrent effect could be tailored more closely to the type of offender.

**Justification**

Finally there is the difficult question of the justification of punishment. Assuming that we accept that punishment is necessary to ensure the efficacy of the legal system; And further if we accept that its purpose is one or more of those suggested above, and that if it is to be a just punishment it must have regard to proportionality, we are still faced with the question of the justification of punishment in general.

One can of course say that the argument as to its necessity overrides
everything, and that without punishment we would have no means of enforcing the laws, but even this would not answer the secondary question of justifying individual punishments. The answer would seem, as is the case with all questions relating to punishment, to be extremely complex. In one sense it is political - the State places a value on the importance of the offence by the punishment it imposes. But a free State usually, and particularly nowadays, is pragmatic. Unless there is a reason, e.g. external security, there is no point in placing a penalty on some activity to which the society as a whole sees no objection. Thus there is a moral input to justification. This is why both laws and punishments change. The punishment is considered just when it meets the moral criteria of the society. As I have pointed out, I consider the concept of Justice to reflect the moral and ethical perceptions of the state and people of the particular time.

"The ultimate justification of punishment is not that it is a deterrent but that it is the emphatic denunciation by a community of a crime." 105 It could be argued that this statement by Lord Denning accords more with the moral critical reaction, but it does not allow for the other factors, e.g. the compensating balance theory which would maintain that a crime disturbs the equilibrium of society. Punishment is then that which the state considers sufficient to restore the equilibrium. This is the justification which I would add to that of necessity. We shall see evidence of this later. As to whether the people consider the punishment ‘just’ depends on their accord or disagreement with the view of the state.

**The psychological necessity of a retributive factor.**

While there are a few people who, in the face of appalling tragedies, have forgiven those who caused the tragedy, by and large general reaction is just the opposite. In fact in most cases it is the catching and punishment of the criminal which has a cathartic effect on the victim. One most interesting case is that of Myra Hindley, the convicted multiple child murderer, a woman who all agreed at the time should never be let out of prison. In fact a majority of people would have had her hanged had capital punishment still been available. Some time later, Lord Longford started a campaign for her release. The effect of this has been so bad on the mother of one of the victims that it has almost ruined her life. She now devotes most of her time to seeing that Myra Hindley is not let out. Here we have a classic case of a victim being further destroyed by people who, no doubt with good intentions, concentrate and devote their sympathy to the criminals. Had the criminal been

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105 Per Lord Denning in the Report on the Royal Commission on Capital Punishment s.53.
executed the victims could have started to rebuild their lives more easily. Here, it would seem that justice calls out for a change of emphasis to more sympathy for the victims.

Another case of interest is the case of the Scottish schoolchildren murdered by a deranged gunman. Here (unfortunately in some ways) the gunman took his own life. This prevented society from passing sentence and left the victims’ relatives nothing left to take revenge against. The result was that, led by fervent orchestration they worked themselves up to a pitch of fury against hand guns and finally with the aid of media publicity and a government anxious to placate, they got them banned. The actual total illogicality can be seen by considering that if hand guns had already been banned the killer could just as easily armed himself with milk bottles full of petrol, some rag and matches and hurled them amongst his victims. So what would have been banned then? - milk bottles, petrol, rags or matches? One ventures to suppose that had the killer been caught and sentenced to be hanged, people would still be able to own hand guns. After all in Switzerland every household has a gun and the Swiss have an exemplary record. So we must conclude that guns cannot per se be evil and wicked and arouse the instinct to wanton killing. Indeed were we to follow the example set by the above case, then the case against the motor car which kills far more people (around 8,000 a year) would be irrefutable. One could then argue that they should therefore be banned forthwith, yet not one of the anti-gun lobby has forsworn their car!

My point is not so much that the reaction was illogical, but that the strength of feeling was such, and the need for retribution was such, that, deprived of the correct object, it was vented on something else. One can only conclude that it is a very strong need, even in the most civilized society. It would seem that we must recognize this need and channel it. We must not seek, as some try to do, to dismiss it as unworthy, because there is amongst most people a compulsive need for there to be some form of active retribution. The fact that the Scottish killer took his own life was virtually treated as an escape, which meant that there was no one against whom retribution could be exacted.

Now this feeling, which appears to be largely inherent, can be explained in ways other than a desire for revenge. I touched on this in chapter 1 when discussing justice where it includes a restoration of the equilibrium - Aristotle's rectification. A criminal is required to pay, not only for his crime but to compensate for the power or advantage he has exercised illegally over his victim. That is to say the crime may be regarded in two parts:-
1. The Theft / Assault / etc. and  
2. The unjust exercise of Power over the Victim.
This latter explains why a victim of say a perfectly ordinary burglary (no harm being done to the property) will often express feelings of having been violated - their domain has been invaded, their home feels different, unsafe - ‘violated’ is probably the best description.

It is to restore the balance here that something extra is required - not just the return of the property (assuming it was recovered perfectly unharmed).

Thus what is sometimes regarded as pure retribution may be argued to have a purposive base. This is in fact the compensatory restoration of the equilibrium or status quo. (NB. It is not and can never be a de facto restoration, that would require turning the clock back - this is a compensatory restoration, or rectification). This is why Punishment can help the victim come to terms with the crime. A parallel can be seen in cases of forensic medicine where a person who has been injured will find their injuries remain more severe until the claim is settled, after which they tend to ameliorate. One may well be sceptical and call this psychosomatic - a desire to maximise the claim etc. - but the physical effect has nonetheless been observed too often to dismiss. It is my feeling that the need to see the criminal properly punished is very similar.

There is it seems in society a collective feeling as to when a punishment is too severe or too lenient. This, its ‘critical reaction’, is related to its perception of Justice, not the law. Society, in accordance with the mores of the day, judges the justice of the punishment. It is offended by breaches of Justice:- e.g. People benefiting by selling their stories and profiting from their crime (This distorts the restoration of the equilibrium); Persons recklessly killing someone with their car and getting away with community service (Insufficient to restore the equilibrium). I view these as cases where the public perceives that one of the Principles of Justice have been broken.

The whole field of Punishment is highly complex. It can not be reduced simply to concepts of Retribution, Restoration or Deterrence. As we have seen mere restoration of say the goods taken would not be enough. In some cases such as the loss of a limb or death, there can be no adequate restoration. We have noted that there is an element of Retribution in most punishments but that is not the sum total either. There is an element of equalization of the equilibrium of the balance of society which lies partly within the retributive field, and, of course, there is an element of deterrence.

The balance between these factors depends on the crime and the seriousness with which it is viewed. This latter brings in a moral aspect and the ‘critical reaction’ as it is sometimes termed should be reflected in the punishment - again within the retributive factor,
but as a matter of proportionality. Thus so far we see that in retribution alone there are three elements:

1. The first element indicates **Proportionality** - the distaste with which the crime is rated. This itself breaks into two parts:
   a) The way the State sees it, and
   b) The way the current public morality views it (Critical reaction).
2. The second element includes a **Compensatory** quantum.(As far as the victim is concerned).
3. The third element includes a **Restorative** quantum relating to the unwarranted assertion of power over the victim. (Aristotle's rectification which is sometimes referred to as the Atonement factor).

These three elements together give form part of the overall **retributive factor**. One cannot easily quantify them, yet each should be present. Moreover each in itself should be just thus giving rise to a just Retributive factor. Additions to the amounts deemed to be just will fall either under revenge or possibly Deterrence. It may seem odd to associate Revenge and Deterrence but revenge in the sense I am using it here is extended beyond just retribution. Similarly overkill in a punishment might also provide a deterrent.

**Deterrence**

Deterrence is also complex in that it is affected by things other than the punishment such as, for example, the likelihood of being caught, and the likelihood of being punished if caught (the system of warnings only to young offenders has in some cases rendered the police practically impotent), and most important and often overlooked, the public reaction amongst the criminal's peers. This is not to be confused with the public reaction in general.

Thus the deterrence factor should affect the type of punishment. Its object is to discourage a) imitation by others, and b) recidivism. It can be seen that this alone almost amounts to the perpetrator being required to get worse than he gave. The old punishment of hanging, drawing and quartering is a good example. Of course modern sociological theorists regard it as wicked, and have now worked their way round to banning all forms of physical punishment. The great mistake here is to confuse ‘just’ physical punishment with wanton

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106 Somehow I cannot eradicate the sneaky suspicion that had they been punched, mugged and kicked in the groin their attitude would be different, and that a proper psychological investigation into the motivation of some of these people might prove interesting.
abuse. A further mistake our society makes is that we judge what might be considered as a deterrent largely by middle class law abiding standards. What may discourage the average reader from a crime (e.g. just the thought of being put in prison) may well make the average participating agent in such crime laugh. (e.g. the young car thief who described prison as a holiday camp).

We have seen that Retribution is largely governed by considerations of Justice which should determine whether the punishment should be of greater, lesser or comparable ferocity. Deterrence is governed by questions of efficacy. Both are subject to considerations of Proportionality. In this regard it is interesting to look at the categories of crime. For the purposes of discussion I have broken these down into categories relating to the type of crime as follows:-

A. Crimes against the realm
1. Treason - committed by a person of British Nationality.
2. Espionage - committed by a person of another nationality.

B. Crimes involving death
1. Terrorism
2. Premeditated Murder
3. Murder in the course of a crime (e.g. armed robbery).
4. Conspiracy to murder (This could include pushing certain drugs).
5. Causing death in anger (defence of provocation and ‘crime passionel’).
6. Causing death by negligence.

C. Crimes against the person
1. Causing Grievous Bodily Harm or lesser injury.
2. Causing Mental Stress (Blackmail; Kidnapping)
4. Threatening injury.
5. Causing injury by negligence.

D. Crimes against property
1. Arson or damage to property.
2. Breaking and entering.
3. Theft (including Fraud).
4. Squatting.
5. Vandalism.

E. Crimes involving number.
1. Rioting.
2. Intimidation by numbers (e.g. aggressive picketing).
3. Hooliganism.
5. Civil Disobedience.

Most of the above crimes are capable of variation in their degree. Even GBH can vary from, say, breaking a leg to severe and permanent mutilation. Notwithstanding such variations there are clearly some 23 categories of crime not counting breaches of regulations, e.g. speeding, weights and measures etc.

Now a most interesting question is - What punishments are there to equate with the 23 categories of crime? If we total all the punishments, past present and those used by other countries we still find comparatively few: -
1. Death.
2. Mutilation (Islamic).
3. Infliction of pain (physical) - Islamic, discontinued in Europe.
4. Infliction of pain (Mental).
5. Exile or Banishment.
7. Incarceration (Gaol - an example of how emotive words can be)
8. Forfeiture of Property.
9. Forced Labour
10. Fines.
11. Ridicule.
12. Forfeiture of rights.
13. Medical Treatment.

It is interesting to note that for 23 types of crime we currently use principally 2 punishments - Incarceration and fines, together with a little light labour (public/community service).

Given so few remedies it is a wonder we do not make use of more of them. We shall return to this aspect later, but at present we are concerned with proportionality. Justice demands that like be treated equally and unlike not equally, and this has many aspects. Certainly it adds a requirement for proportionality in the establishment of punishments. This is why all societies from the days of the Weregild (and possibly before) set out their ‘punishment distribution’, whether they be purely financial or physical or a
combination of both.

There is of course another reason set out by Hart and that is that it is necessary for the public to know what the consequences of their actions will be. It minimizes uncertainty and is part of the deterrent.

**Exemptions, excusable actions, and amelioration.**

Exemption occurs where punishment may be inappropriate, e.g. certain cases of killing in self defence. Amelioration may occur where say because of provocation the charge may be reduced from murder to manslaughter. It may also occur where there was no intention to do the act or where through mental deficiency the Agent did not know what they were doing or that it was wrong. Again we see the subject of Mens Rea occurring. It will be recalled that I mentioned before that the concept of Mens Rea was interpretable in two ways; either as being of a ‘guilty mind’ i.e. being morally culpable, or merely that of intending to do the act. It is in my submission (following Hart) that it is only necessary for the Agent to have intended to do an act which was prohibited by law. The morality involved is irrelevant.107

The trouble as we have seen in chapter 6 is that intention often has to be established retrospectively. This has been overcome in two ways:

1. By rules leading to presumptions of intention (see chapter 6), and
2. The introduction of strict liability offenses.

These latter are regarded with great distaste by most as they can lead to inadvertent breaches which may cause no harm, but are nonetheless punishable. Their justification is purely utilitarian. It is therefore a great mistake for governments to introduce too many of these, for although they may be convenient and easy their very presence lessens the esteem in which the law is held, because they are perceived as being prima facie unjust.

**Variations in the concept of Law.**

As different societies developed not all the forming social groups would have had the same laws, for these originally were entirely dependent on the character, nature, and to a large extent the security of the individual leaders. Moreover as time passed and the societies developed, their circumstances, and hence their requirements, changed. I referred in chapter 1. to Pound where in his *Introduction to the Philosophy of Law* he pointed out that there are at least twelve conceptions of what law is and that in practice each of these is in reality an explanation of the law of its time. It is interesting to look at these in slightly

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107 For a detailed review of the arguments see Hart *Punishment and Responsibility* pp 38-40
greater detail.

Pound's categorization covers the following:

1. Divinely ordained Rule. This covers such laws as the Mosaic code, Hammurapi's Code, and the laws set out in the Koran. There are also those who wish to derive laws from interpretation of the Bible or other religious works but these are of a different order, being mainly laws of morality.

2. A tradition of the old customs which have proved acceptable to the Gods. These were probably initially adopted patterns of behaviour which had been found to be beneficial. However there was usually a priesthood into whose hands the establishment and interpretation of the customs fell.

3. The recorded wisdom of the wise old men who had learned the safe course of conduct - A traditional custom reduced to writing. This is how Demosthenes described the law of Athens.

4. A philosophically discovered system of principles which express the 'nature of things' to which man ought therefore to conform. This was the Law of the Roman juriconsul being an amalgam of 2 and 3 based on a political theory.

5. In the hands of philosophers (and/or priests) 4 can (and has) been developed into a body of declaration of an eternal and immutable moral code.

6. The law as a body of agreements of men in a politically organised society, as to their relations with each other. This is a democratic version of the identification of law with the rules of law and hence with the decrees of the city state. - Plato's Minos.

7. A reflection of the Divine Reason governing the universe. A reflection of "ought" according to reason and morals. - St. Thomas Aquinas's view.

8. A body of commands from the sovereign body of a state as to how the people therein should act. Based on the sovereign Roman jurists of the Republic and the classical period. The positivist law - The will of the Emperor has the force of law (France 16th & 17th century). Also English theory of the divine right of Kings. Subsequently the people through Parliament succeeded the Sovereign.

9. A system of precepts allowing maximum freedom consistent with the freedom of others. This idea is said to allow law to unfold with the Society. It is the law of the particular time for those people.

10. A system of principles philosophically developed by juristic writing and decisions whereby man's life is measured by reason and harmonized with that of his fellows. (19th Century).
11. A body or system of rules imposed on men by the dominant class for the furtherance of its own interests - usually an economic basis.

12. Law as the dictates of economic or social laws with respect to the conduct of men in society, discovered by observation and expressed as what works.

The common features which Pound deduced were that all these systems gave a fixed standard; an absolute mode of procedure; a system of ordering conduct and, he claimed it exists to satisfy a paramount social need for general security. With all of this I would agree and yet there is one additional factor that is vital to the survival of any system of jurisprudence which is usually omitted and to consider it we require:—

**A slight political digression.**

It is my contention that the system of jurisprudence, whatever it is, must order the society in such a manner that it becomes the "fittest" (or most ‘robust’) society from the point of view of survival. This is an immutable external factor to which all societies are subject, yet because of our tendency always to divide subjects into specialized fragments it tends to be ignored. Until recently it would have been difficult to give a clear example without going back to the fall of an empire such as Rome and the time perspective in that case makes the arguments tendentious. However recently we have seen the system of the USSR, a system of one of the great superpowers able to threaten the world, suddenly collapse from within. This is actually a remarkable example - most societies are overthrown by rising stronger powers - but it was in essence because the system was not capable of adaption for survival. It had become corrupt and immensely over bureaucratic.

Now it is arguable, in rather a chicken and egg fashion, as to whether it is the system of jurisprudence (which after all is the very foundation for running the society) or the political theory, which governs some of the fundamentals of the jurisprudence, which is the causa causans of the collapse. Either way, it is arguable that flaws in the jurisprudence will be the first visible signs of a political instability which will follow if such flaws are not rectified. Therefore it is vital to the survival of the unit or society that its jurisprudential system is working i.e. that it is not only effective but efficient. At the present time there is every indication that our system is neither.

Punishment is the means of effecting obedience to the system and, as has been shown earlier, it needs not only to be effective but efficient and just. Justice is inherent in a viable scheme of punishments. Therefore the efficiency and justness of the system of punishment is a necessary additional factor in the maintenance and stability of any system of jurisprudence.
Efficiency of the system.

The efficacy of a system is governed by having a regime of punishments which relate to the currently perceived and accepted crimes in a logical and proportionate manner. For example, to apply a fine for murder, and capital punishment for adultery, is just not effective in a society unless it be one that accepts that adultery is a more serious offence than murder. Similarly a punishment has to be of a type that is efficient in discouraging others. Thus for example it is quite futile in a society which gives financial support to the less well off to impose fines on them as a punishment. There is an immediate dichotomy of objectives and a resultant collapse of efficiency.

Finally there are the difficulties, again pointed out by Pound, by virtue of the changing politico-social aims of any society. The example that he gave relates to the U.S.A. in the 1920s where the idea of security had come to mean, in a society where there were boundless opportunities, that men only needed the freedom to realize those opportunities to be assured of their reasonable expectations. Therefore their security amounted to a regime of ordered competition of free wills in which acquisitive competition and self assertion is made to operate with the least friction and waste. But with the increased wants and expectations, equality no longer means equality of opportunity. They now want equality of satisfaction of expectations and liberty does not afford this. Hence the shift to the humanitarian approach.

I have particularly referred to this example because it shows Pound's remarkable perception of the problem arising between the 20s and the early 30s when he was writing. In due course it will be necessary to consider the shifts which have taken place since then and the likely effects they will have on our jurisprudence and hence the necessary punishments. I have already pointed out the conflicts in both fining and state supporting the poor.

Very early in our history we started with a law designed to keep the peace. It was a basic law with Tariffs of compositions for every injury. Such laws were in vogue in Saxon times where the Wergild reduced everything to monetary value: Slaves weren't worth anything but killing a sheep was a shilling, an agricultural worker 40 sh., a farmer 100, a nobleman 300 and a prince 1500. Under King Alfred fines were still mostly the order of the

\[\text{108 An Introduction to the Philosophy of Law ch.1 p32}\]
day but if one couldn't pay the fine, first one's property and ultimately one's life was forfeit. In short the fine had teeth and the efficiency of the fine as a punishment had not been completely emasculated by a system of social security.

Heraclitus originally proposed the transition to the law as preservation of the status quo. This was the basis of Greek and Roman law and was maintained through the middle ages. In this period it is most interesting to note the concept of Feudal Reciprocity i.e. while the subjects owed allegiance to the lord the lord was responsible for their protection. This seems to me to be the mere recognition of the fundamental quasi contract which is inherent to any system in which there is basic freedom.

Next came the era of opportunities and men wanted freedom to exploit them. So the law adapted to permit the maximum opportunity for self exploitation.109

The Spanish jurists developed the idea of man's natural rights and this is another concept which has been distorted by ignoring the inevitably required compensating balance. This was a philosophy acceptable to the time but as the world became crowded it has led to inevitable complications.

It is only by bearing in mind the problems set out above that we are going to be able to make an effective assessment of the current position. Moreover, views with regard to punishment have followed a similar course of variations from the Weregild system of fines to the 17th century deportations for sheep stealing to our present ultra concern for the criminal, his rights (那些), and care not to humiliate him, etc., etc.

It is important therefore to look at Punishment in perspective with the concept of a free society. We know the following:-

1. The Inexorable drive is towards survival of the fittest.
2. Amongst societies that means the "physically and technologically fittest" - i.e. the most robust" society.
3. A free society can best be held together by virtue of a quasi-contract between the state and the people. The state provides an ambience in which those people forming it are prepared to live.
4. The trouble is that greed, lethargy, ignorance and inertia may cause people to accept a society that is not "robust" enough for ultimate survival.
5. The only way in which a society can operate is to have rules governing the

109 Nowadays it is taken to permit the maximum exploitation of the general public in a manner which was never originally conceived and is a situation which is deleterious to the safety of the group.
inter-relations of its peoples and defining their duties and responsibilities.

6. These concepts of the required law for a society may vary with time and the particular society.

7. The only effective way of enforcing those rules is by virtue of sanctions for non-performance, i.e. punishment.

8. Sanctions are provided and enforced by the state to prevent citizens taking the law into their own hands and thus reducing the system to anarchy and a vendetta society.

9. The efficacy of the punishments will help stabilize the law abiding qualities of the society.

10. Where the society falters the first sign may well be that of a faulty jurisprudence. Once the people start to hold the system in contempt that society is well on the way towards disintegration. For a system to be held in contempt is far worse for the fate of that society than a system which is feared.

11. Once the system of jurisprudence falls into contempt one is faced with a major problem as to whether it is the system or the politico-social policy producing the system which is at fault. One must conclude that it is almost invariably the latter and that patching the jurisprudence will not of itself return the system to the robustness required for ultimate survival.

At this point we can proceed to examine:

The incidence of jural relations\textsuperscript{110} between the State and the citizen, the State and the law breaker, and the criminal and victim.

I have already argued that the citizen has a duty to obey the laws, and that the state has a concomitant duty to safeguard the citizen. This is inter alia part of the contract of the individual with the state. Thus there is a Jural relation between the state and the citizen.

In one case the state owes the citizen the benefits of citizenship, including the duty to protect (within limits - at least by penalizing transgressors), and the citizen has a right to expect protection (again within limits) - i.e. against criminal acts.

In the other case the state has a right to obedience, and the citizen a duty to obey.

There is also a jural relation between the State and the law breaker. This is set out in the criminal Law Statutes. These set out the consequences of failure to carry out the duty of obedience to the law.

\textsuperscript{110} See Chapter 3.
What of the relationship of the criminal and the victim? It may be extrapolated that if A is under an unpolarized duty not to harm others (by hitting them over the head for their money) then this is a multital or unpolarized duty (as in the example used earlier to keep off X's land). When that duty is breached it becomes polarized and A has breached a paucital duty, e.g. not to assault B.

At this stage it can be seen that there must in fact be a jural relation between the criminal A and his victim B. However the status of the legal relationship has been largely undefined in criminal matters.

We know the legal relationship that exists between A and the State. This is defined by the law, but the legal relationship between the criminal and his victim has been largely ignored. This has been because society has been in the habit of regarding criminals as coming from the poorer social groups (and therefore unable to make proper recompense). But this is not necessarily so. Some criminals today are very wealthy indeed.

There is in fact a triangular relationship here:-
When A hits B A has actually breached two separate duties, and the situation is as follows:-

\[ \text{THE STATE} \rightarrow A \rightarrow \text{B} \]

This may be detailed as:-

1). A has breached his duty to obey the State.

2). A has breached his duty not to harm B.

3). The State has breached its duty to protect B.

4). B has not breached any duty.

Now, A's breach of duty to obey the state is covered by the criminal Law.

The State's breach of duty to protect B, has been recognized, at last, by Victim's compensation. **But note this is NOT compensation by A.**

A's breach of duty not to harm B has been neglected. It used not to be.

**Therefore there should be an additional Punishment upon A to provide Compensation to B.**

"Ah but A has no money and cannot compensate B" the bleeding hearts will say . The reply should be -"Tough, so up the punishment in lieu!". This was the basic principal adopted in King Arthur's day. If you couldn't pay the fine, your property was forfeit, and eventually your life. Our soft hearted approach has often led to criminals being well in pocket even after the penalty is paid.

To illustrate the point more clearly. If A, while driving his car negligently, hits B, then B will be compensated for his pain and suffering. If A's driving offence were sufficiently serious he might well be gaoled, but B will still recover compensation for his injuries.
What then in the name of logic is the difference if A causes the damage without a car by deliberately hitting B? Nothing except the practical aspect of insurance. Therefore B should be entitled to claim for his pain and suffering FROM A just as if this were a civil case and such compensation should feature in the criminal case. The difference being that the court would set an additional penalty in the event of non payment by A.

To those who are not convinced:– Look again at the situation where A carelessly runs B down in his car. He causes B an assessable amount of pain and suffering e.g £15,000. Suddenly we find A is not insured. What usually happens is the court slaps A’s wrist and imposes an extra penalty for driving while uninsured. But this does not take account of what A has actually done. What he has done is to cause B £15,000 worth of damage while driving. Because he cannot pay he effectively deprives B of this amount. And as this flows from his criminal offence (driving while uninsured) he should be treated as if he had stolen £15,000 from B. If the courts were to treat cases this way they would be taking full account of the result of A’s criminal act (and there might even be a sharp decrease in uninsured drivers). At the present time A gets away with a small additional fine.

So now we have an additional claim, not punishment (retribution) but pure compensation. Moreover this must be included in the punishment in order that the punishment be Just.

If this factor were included the state would then punish with a sentence made up partly of:–

1. **Proportionality Factor** (representing the Seriousness of the Crime)
2. **Retribution factor** for the wrong done.
3. **Rectification factor** for the power A has wrongly assumed
4. **Compensation Factor** to the Victim for the loss and pain and suffering.

What the state currently pays B is not on behalf of A, but as a penance for its failure to protect B. Treated in this manner punishment begins to assume its just proportions.

However so far it would seem that Punishment is one of the most complex issues we have had to deal with. We can be satisfied as to its necessity and we are reassured in this because all societies require its use.

We can also be satisfied that its primary object is to ensure compliance with
the law in the most efficient way possible. This qualifier adds to our difficulties, yet we can hardly omit it. The trouble is that it is difficult to quantify how efficient a punishment is, because the efficiency or effectiveness of law enforcement depends on many other factors - the police presence; the crime solution rate; the arrest rate; conviction rate; and the deterrent effect of the punishment.

To begin with it is important to examine those factors in punishment other than deterrence. In a sense deterrence is separable and not really a part of punishment per se, because once punishment becomes necessary it is obvious that whatever deterrent there was in that particular case at least, it has fallen flat on its face. The punishment handed out in this case may deter the next prospective criminal but the deterrent factor is always in futuro.

The true components of punishment, which we have examined so far comprise:-

1. The **Proportionality** factor. Here we have seen that this involves 2 aspects - the way the State evaluates the crime, and the way society does. This latter involves the public critical reaction which is part of the deterrent factor, and it may differ from the State’s view.

2. The **Retribution** factor. Governed in quantum by proportionality it is necessary to apply a punishment to produce a cathartic effect on the victim.

3. A **Restorative** or **Rectification** factor to restore the equilibrium of society - this is in effect equivalent to the minimum punishment where full restoration was made (e.g. Stolen goods returned etc. when there will still be a punishment for the robbery). This factor will be swallowed up in punishments for more serious cases, but even so it is important not to lose sight of it.

4. The **Compensation** factor for the **victim** for the loss, pain and suffering etc. - **The Victim Compensation factor** - due from the criminal to the victim.

All the above are usually lumped together in a confused way under retribution. If they are properly accounted for it will be seen that there is a case for arguing that the present system is far too lenient.

In addition there is a factor which is actually invoked by the courts, but rarely and to such a minor degree that we almost invariably overlook it:-

5. The **Restitution** factor - **The State Compensation factor**.
Occasionally costs are awarded usually in the magistrate's court and for relatively minor offenses. But the fact is that the cost of catching and bringing to trial a criminal plus the cost of his subsequent imprisonment is horrendous. This is quite apart from the cost of maintaining a police force, which is a cost the society has to bear. However the extra costs involved are directly due to the criminal activity involved. **They are part of the crime against the rest of the Society.** Therefore they should be compensated for in the punishment. In practice this is not done yet the expense is actually a crime against the rest of the society who may choose to spend the money on, say, health. Looked at in this way a case could be argued that the extra expense directly caused by the criminal is in itself an offence. Why should society constantly have to pay out vast sums of money in this way? The cost of the catching and trial of the criminal should be chargeable against the criminal as part of his punishment. At least as a first step the cost of each trial and of carrying out the punishment should be made known in each case so that libertarian reformers can put it in the scales to weigh against their humanitarian ego-trips.

Apart from the above we have to consider:-

**Deterrence.**

As I have pointed out deterrence is not a **necessary** component of punishment, but one which is usually regarded as part of the punishment in the form of -

6. The **Deterrent** factor. i.e. such amount or means, whether coincident or extra, as may be thought to be necessary to deter.

All these tend to blur into one another, they do not fall into neat assessable little packages (with the exception of 5 which we tend to ignore). It is to be hoped though that one day someone may find a means of arranging them comparatively with respect to various crimes. This would be an interesting if difficult project which can not be attempted here.

**Finally,** when all are added together the punishment must be **JUST** - and we have seen that justice introduces its own set of variables which play their part in the final evaluation of any punishment.

However it is possible to make some headway. First we can abstract the proportionality factor and establish a hierarchy of crimes with an order of seriousness. This
is usually done by setting the maximum sentence. The reason minimum sentences and mandatory sentences should not be used is that juries, if they felt the minimum too high might tend to acquit thus allowing the criminal to escape altogether.

In this regard though it is not strictly appropriate to our present analysis, a word should be said about juries. The reason for this is that it is interesting to see how the concept of Justice is inherent in the original concept. Juries are thought to be one of the great bulwarks of English Law. The basic idea was that a man should be judged by his peers. This meant that in the case of the common man he would not be judged by superiors who in earlier ages might have considered his life worthless and therefore handed down peremptory and harsh findings. The jury prevented the peasant from being automatically found guilty in just the same way that years ago whites in the U.S. were inclined to find anyone black as being automatically guilty. Of course as originally the juries were white the jury system didn't help much there! The trouble was that the original idea was that a man was entitled to be judged by his peers which was just (certainly in an Aristotelian sense), but this had been forgotten. So, in the U.S. it was not until coloured people came to be on juries that some order was restored.

Talk has progressed from being tried by one's peers to the concept of 12 good men and true. But unless one is judged by one's peers one could argue that the whole content of justice in the jury system is debased. However in today's climate of bias and prejudice it could equally be argued that one's peers might regard the accused as 'one of us' on trial by 'them' and let him off. In fact the only hope left is to try to find a balance, and even then the job is difficult. For myself I would argue that the average judge, trained as he is to listen to both sides of the case, is in many instances the fairest person in court. So unless we are to abandon juries a great deal more care to suit their make up to obviate bias. The point I am making is that it is necessary for us constantly to be vigilant that our whole system is Just.

Also a word should be said about our adversarial system. It is not the purpose of this book to review the workings of our legal system but it is interesting to note that our whole society seems to have sprung from an adversarial one. - From our confrontational Parliament, solemnly placed just over two sword lengths apart and facing each other - to our legal system. No doubt the latter stemmed from the idea of trial by battle when the strongest
champion won. But just as other societies have abandoned the facing opposition of parliament in favour of circular or semi-circular seating, so have more sensible minds appreciated that in the quest for justice, particularly in criminal cases, the prime object is to discover the truth. This is not aided by our manner of prosecution and defence. The French method of enquiry to ascertain all the facts which are then available to both parties is far superior. Unfortunately the French often leave the course of these enquiries in the hands of very junior magistrates, when they should be in the hands of the most experienced. Even this however was far superior to our quite recent practices of ambushing one's opponents (now no longer practised).

The reason we have had so many alleged miscarriages of justice cases is because of the lack of a proper legal manner of ascertaining the truth. Such things as the U.S. 5th amendment (whereby answers may be withheld on the grounds that they may incriminate the speaker) are blatantly unjust. If the truth incriminates one so be it. However it would be necessary to put a relevancy limitation on questions, i.e. That they are relevant to the case, in order to prevent generalized fishing expeditions.

So far we have established that punishment, which will be ordered by the state, is categorized as to Proportionality by the state in setting out its scale of maximum punishments for the various crimes. The courts will then assess the relative seriousness of the particular crime within its scale by reference to the facts, including circumstances of exemption and amelioration, mental state, intentionality etc. To help with intention the law will invoke certain rules which I referred to earlier.

The courts should also attempt to answer the problem of Uniformity (required by Justice) so that sentences do not vary wildly where the crimes are commensurate. Of course it is now possible for either side to appeal the terms of the sentence. Formerly this was available only to the convicted. It would one feels, be wise to have a single court devoted to sentencing, though with our present information technology the judge of first instance should soon be able to have ready access to all comparable sentences.

The judges will not be concerned with apportioning quantum to retributive justice, but its restorative aspect will be featured in their opinion as to the seriousness of the offence, whether any reparations can or have been made, the possible return of property, the
callousness involved etc. etc.

The quantum of rectification punishment has never been defined. However it is present as can be shown when a sentence is passed even though there is no remaining harm done. That is so because even though recompense was made, the property returned etc. the criminal is not just let off, there still remains the fact that the law was broken and therefore punishment is required.

It is my submission that more attention should be paid to rectification punishment (derived from rectification justice). In effect Rectification punishment is the bottom line or minimum punishment likely to be handed out. However this will vary with the crime. The minimum Rectification punishment for stealing from a shop (the goods later being paid for when the criminal is caught) will be different from the minimum punishment for crimes like murder (even taking into account provocation and all amelioration factors. Even so the other factors such as the cost to society of catching the criminal and the necessary deterrent factor must also be taken into account in determining minimum sentences. This is why the subject of punishment is so difficult - all the factors inter relate.

The law has already incorporated the justice of equality of equals (and the inequality of unequals) in relation to crimes. Indeed, as an example, the considerations of intentionality and its presence or absence do affect considerations of punishment.

Now, although we have covered most of the factors in punishment there remains a little more to be said on the vexed question of Deterrence. As I mentioned before Deterrence is affected by several factors such as police presence, crime solution, arrest rates and conviction rates, but there can be an element of deterrence in the punishment itself.

This element of deterrence is in itself in two parts, or even possibly three. The first is simple. It is the deterrent effect of the punishment on the normally law abiding citizen. It is quite straightforward and the normally law abiding are deterred simply by the fact that there is a punishment prescribed for a particular action. But it goes a lot further. The quantum of the punishment is relevant. It is not sufficient to say "oh the law abiding will obey anyway. To take a simple example - speeding (There seems to be a lot of speeding in this book, and for that I apologize but it is something to which most of us can relate). The normally law abiding citizen is affected by the quantum of the punishment. If for example,
through carelessness he picks up 3 relatively minor speeding tickets within three years he will find himself with 9 points on his licence and another ticket could result in losing that licence. At that point (or probably at the 6 point stage) he will become much more cautious and conscious of his speed.

The second case involves the non law abiding but thinking criminal. He may well assess the possible consequences of an action and rate them as too high. This was particularly so when the law was that anyone participating in a crime in which a gun was used and death occurred would be convicted of murder. Many criminals would insist on a ‘no guns' policy before joining an ‘enterprise'. There are definitely some, usually professional criminals, who will assess the job and reckon whether it is worth the candle.

Now it is no good exaggerating this second group. There are many cases where the possible punishment has no effect - Amongst them thrill seekers; those who are ‘sure’ they won't be caught; those who just don't think; those on drugs etc. These latter are often cited as an argument against there being a deterrent factor in punishment. But it is pointless to cite one group against the other as one is just not comparing like with like. Moreover the fact that something does not work against everyone is no excuse to discard it. As I said earlier, the fact that a spanner does not fit every nut on the outboard motor is no excuse for slinging it overboard.

The possible third group are those who whilst falling into the exception to group 2 are those who may be dissuaded from recidivism by experiencing the punishment. This is definitely a part of deterrence and/or cure (depending on the approach). Here we are concerned with the deterrent aspect. This may well depend on the type of punishment as well as the quantum.

And so our punishments must allow for all these factors and they have to be relevant to our society.

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CHAPTER 8. TYPES OF PUNISHMENT. - A review of Options.

In order to be just it is arguable that punishments should be relevant to the criminal as well as appropriate to the crime. In this chapter we are therefore going to review some alternative punishments. In order to do this there is no point in being selective before we start. There is in industry a problem solving technique known as ‘brainstorming’. In the course of this a group of people trying to solve a problem sit around and call out ideas which are then written down and subsequently explored. In calling out ideas it does not matter how bizarre they appear. The reason for this is that it has been found that a bizarre idea may spark off a sensible solution. In exploring alternative punishments some bizarre ideas have been included not because they were seriously contemplated as being useable but rather because as will be seen on the odd occasion they have produced something further.

Let us first look at some of the conclusions which we can usefully abstract from what has gone before:-

- **Punishment** is that sanction applied by a Society for breaking its codes of interrelation conduct. As such it is **Logically necessary**. One cannot do nothing or the law ceases to exist.

- **The Object of Punishment** is to **Maximize obedience to the law**. Maximization of obedience can be effected by encouragement to obey, or deterrence against breach, or an admixture of both. Encouragement to obey is incentive; Deterrence is disincentive.

  "I will give you a sweet if you take that book over to Mummy".-  “I will give you a cuff in the ear if you don't”.

  As it would be very difficult to devise incentives, let alone give rewards, to the vast majority who obey or conform to our rules of conduct, punishment must necessarily be based on disincentive.

- **Remedial Therapy is not part of punishment**. It is an attempt to prevent recidivism amongst offenders and to encourage future compliance. As such it may well include incentives. If this distinction were born in mind a great deal of useless and cross purpose argument could be avoided. It is quite possible for there to be Punishment & Remedial Therapy. To substitute Remedial Therapy for Punishment involves us in
dispensing with something that we have already shown to be logically necessary!

Laws are usually in the form of generalizations, as indeed are punishments, setting, as they do, maximum sentences and not detailed minutiae.

Judges are retained in order to apply these generalizations to each specific instance. (This in itself is a good argument for drawing judges only from the most experienced and well trained lawyers, and not allowing political appointments). Where the application is clear, i.e. the facts come readily within the generalization, there is no problem. Where there is not an all fours fit judges use their experience to interpret the generalizations. This is, so far, still a pure application of law (I am not following Hart here).

At this point, particularly when the case is not clear cut the judges may apply Equitable Principles - not the law. In the case of punishment the judges apply Discretion by which various allowances can be made.

EQUITABLE PRINCIPLES are based on PRINCIPLES OF JUSTICE. They are not generalized or over riding rules of law even though unfortunately they are often referred to as ‘Rules’ For example take the rule in Riggs v Palmer referred to by Dworkin that a man should not be allowed to profit from his wrongdoing. If this were indeed an overriding rule of law it would be applicable to the way in which various criminals make a considerable profit by selling their ‘story’ (“The Inside Story”) to the press. A generalized rule of law would be invariable and failure to apply it a miscarriage of justice. Indeed many of the public do so regard this particular principle, and the feedback from the public has resulted recently in the press adopting a much more cautious attitude. Also, and I believe for the first time, an order was made by a judge for a criminal to refund £15,000,000 within a year or suffer a further 4 years imprisonment. While this is a step in the right direction one must ask ‘Why only 4 years for £15,000,000?’ - not even the best paid Chairmen of Industry have been earning at this rate. With a sentence like that it pays the criminal to stay inside - he couldn't do better if he worked his fingers to the bone.

On the other hand a rule such as the Rule in Rylands and Fletcher (see ch. 6.) has become a rule of Law.

PERCEPTIONS OF JUSTICE.

Justice is governed by Morals, Ethics and Survival\textsuperscript{111}. Of these three, Survival is an external factor which is the instinctual factor promoting man's continued existence (or that of the group). Survival can completely overrule the law without reversing it. The most

\textsuperscript{111} I said earlier that we could not ignore these instinctual laws of nature.
dramatic example of this is the overruling of the sanction against killing in wartime. It not only becomes lawful but priests on both sides often invoke the same deity for success!

Morals and ethics are, as we have seen, mutable. Currently they seem to mutate spontaneously amongst the young. A pop star takes drugs. His followers don't question they just accept. Morals and ethics applied by the courts are usually conservative and this is justified on the grounds that change should be slow and certain rather than instantly swinging back and forth and incorporating every dead cat bounce.

However there are problems when different jurisdictions have different concepts of justice. At present the EU has rather different concepts from those of the UK, and this is why so many appeals are being made to the European court. Many will say this is good, but that is only good so long as you feel that the EU concepts are better than our own. Were we to take the lead in any matter (and we have in the past) we could find ourselves being held back by overriding out of date EU decisions. Where the public concept of justice of one country is overruled by that of another there is a potential source of real conflict.

LEGAL PERCEPTION OF JUSTICE v PUBLIC ACCEPTANCE.

The latter will be more influenced by the morals of the day. For example Aristotle would not have regarded a greedy man as a ‘just’ man but present day standards tend to honour the man who grabs what he can (e.g. the BBC were planning to celebrate with Ronnie Biggs the train robber). Conversely there are instances where the public seem to feel that the law has become more trendy than they (e.g. Capital Punishment, certain pleasant remedial holidays etc.).

It is wise that the public perception of Justice and that of the State should not vary too widely, although it is equally necessary that alterations are accepted by the State (if they are accepted - and the State is after all the arbiter in these matters) in a slow and responsible manner. One of the great requirements of law is that it provides relative stability, and it should not therefore fluctuate with every new fashion. There is a particular need with regard to Justice in Punishment, especially where the public demands are for more severe penalties or for stricter enforcement of penalties for a crime. The reason behind this is that if the punishment is derisory, or at least if the public feels it is so, it is usually because they will not feel protected against that crime and they will lose faith in that government and its laws simply because they feel that the government is not keeping their end of the bargain. This could eventually lead to a loss of power or the breakdown of the society.
THE REQUIREMENTS OF PUNISHMENT

These are that:

I. Punishment should be proportionate. This is part of the sense of justice in punishment. Hence we must, as indeed we do, establish our list of crimes and their potential punishments - The Penal Fee Sheet.

II. The Punishment must be appropriate with respect to the criminal. For example the car thief and joy rider cited earlier who did not mind gaol because to him it was "like a holiday camp" might just as well not have been punished. Now this is going to mean that there may have to be a radical rethink with respect to punishment, and an element of flexibility of punishment for the same crime may have to be incorporated. This is a feature which is not present in our legal system.

III. The punishment should if possible be such as is likely to deter as many as possible from the same crime. Again this may actually prove to relate to the type of punishment rather than its physical or temporal severity.

IV. The punishment must be just - it must make the necessary allowances with respect to the individual and the circumstances.

The above are the mainstays of an effective punishment and we shall examine each in greater detail. However there is one type of punishment that we have at present which does not fit the above pattern. In fact it offends some of the precepts. It is of course the punishment for the Strict Liability offence. The arguments for and against these will have to be very carefully weighed and this form of crime and its punishment will be considered separately.

WHAT MATTERS SHOULD BE PUNISHABLE? What are the defining parameters of an act that make it punishable? -

Here the basic answer in a practical sense is to take the Legal Positivists view, i.e. that punishable crimes are those which are specified by the State. The manner in which these are varied where the State's view differs with popular morality is primarily a matter of governance. As seen in Fig.1. in Chapter 1 in our type of society there is a feedback of public opinion, but the State legislators reserve the right to rule against the wishes of their electors. Variations of method belong properly in the field of political philosophy. For our purposes we can accept the definitions under the criminal law.

A more generalized approach would be to say that:

any act may be deemed to be a crime in which one party adversely affects the status quo of another party against that party's will and without their
This at least places a limit as to what may not constitute a crime. The State, however, will define which acts are, and which are not to come within the scope of the criminal law.

THE FORMS OF PUNISHMENT - A review of the 13 categories.

When we consider punishment we cannot confine ourselves to simply that which is currently in use. As we saw in ch. 7, there are at least 13 types of punishment which have been used. It will be necessary to examine these in detail even though some have been discarded and to examine the grounds for their use or non-use as the case may be. We should also consider whether there may be additional punishment means that might be available.

At present we use principally two punishments only, namely Incarceration and Fines. To these may be added a little light labour in the form of community service. It is little wonder therefore that the punishments are hopelessly inappropriate in so many cases and that the prisons are full and that crime flourishes in precisely the manner one ought to expect.

We have in fact painted ourselves into a corner by allowing our lawmakers to adopt ruthlessly libertarian attitudes in order to satisfy an egotistical desire to appear "civilized". The truth is that the outcry for a rethinking of our punishments often heard from the public is not an outcry of bloodlust on the part of an unsophisticated public, but the instinctive realization that the imbalance is causing the situation to get out of hand. Until the scale of punishments is revised to make the penalties more appropriate to the crimes and the criminals, we are unlikely to make much progress.

What follows therefore is a dispassionate look at the various types of punishment that have been used in the past. I have totally ignored all treaties and statutes protecting criminals' so-called rights and our present libertarian views, some of which appear to be regarded by the man in the street as bordering on the imbecilic. We know that imprisonment and fines are not working. We know that imprisonment particularly can be counterproductive and additionally that it can be enormously expensive. If what we have is not working, we are going to have to do something else and it is therefore futile to say that any alternative is unacceptable.

In the following look at the punishments used at different times and by different countries, some may immediately appear to be unacceptable. Nevertheless it is important to re-examine them for they may just contain a scintilla of a solution to some problem, or even suggest an idea for an alternative form which might be acceptable. The one
thing that is certain is that we cannot go on refusing to consider anything but what we have.

Thus, turning first to the most drastic punishment the first question we must ask is where, if at all, does the death penalty fit in the appropriate scale of punishments. Only then should one consider whether it is to be used or not.

Although there are very strong moral strictures against causing the death of another this has always been capable of being overridden - whether it be in time of war or as an exception e.g death caused by self defence.

**CAPITAL PUNISHMENT.**

**Crimes against the State:** Capital Punishment was retained for the offence of Treason. Treason was and may well still be considered to be the most heinous offence. The reason is that it represents the betrayal of the whole community by one of their own, and it imperils the safety of every member of the state. Spying on the other hand does not represent betrayal by one's own. It represents the efforts of a foreign national to benefit his own country, i.e as far as his country is concerned he is acting in their best interests. Thus there is a marked distinction between the two which would warrant a possible higher maximum penalty in the case of treason than in the case of spying; e.g. Life imprisonment for spying and Death for treason.

This, for example, would have justified the Death penalty for those who betrayed atomic secrets at the time of the cold war, but not the death of Lord Haw-Haw who broadcast against the nation during the war. Haw-Haw was in fact hanged as an act of pure revenge. He did not spy and, although originally British, he had openly renounced his allegiance to the U.K. and departed abroad. True he was a man who had changed sides but he did so before he started to do any damage.

What has blurred the issue has been a lack of clear understanding of the difference between the two crimes plus a tendency to demote the seriousness of the crimes in peacetime which is when all of the recent cases have occurred. If however we admit that life imprisonment is justifiable for the most serious cases of spying then death would appear to be logical (though not necessarily acceptable) for the most serious cases of Treason.

We have to be careful here not to confuse a justification for a higher penalty with a justification of the death penalty. For example one could always argue that 30 years maximum would be acceptable for the most serious cases of spying, whereas 50 years would be acceptable for the most serious cases of treason. Thus the fact that Treason is more serious than spying, if we accept that as a fact, is still no justification for the death penalty, and such an argument should logically fail.
In passing one should note that the primary reason the death penalty is not invoked or sought for spying is that all nations indulge in it and if one killed off all the spies one caught there would be no chance of getting one's own caught spies back! - Most governments, except the ultra crusading, are basically extremely pragmatic.

**Crimes involving Death:** Here we need consider only the most serious, which is normally premeditated murder. However if the penalty for this is life, and if this were to mean life, there is nothing to prevent the murderer from killing say a warder that he dislikes or another inmate, or, if he escapes, from killing repeatedly to maintain his freedom. At that point the state is actually in breach of its bargain to protect the public by allowing the subsequent killings to be punishment free.

So we must argue that if any crime attracts the punishment of life meaning life, there must be a further punishment, presumably the death penalty, for anyone under sentence for life who commits a further act punishable by life. This seems to me to be the one logical case in which one could argue the absolute necessity of having the ultimate penalty available in our armoury. This is not an argument for the acceptance of the death penalty, for one's attitude to this is essentially a moral or emotional one. It is not even an argument for its necessity per se, for we have not considered all the alternatives but it is an argument that in a certain scale of punishments there is a logical place for it.

In addition there is the valid argument that if you eliminate the possibility of the death penalty under any circumstances you devalue the crime. The effect of this is a domino effect on all the lesser crimes until those at the bottom come to be regarded as acceptable, and this is precisely what has happened in our society today.

Assuming that the death penalty has a place in the scale of punishments does it have to suffer all the disadvantages levelled against it by its opponents? Here the answer is of course that it does not. In the first place its presence in the scale does not mean that it has to be mandatory as it was in the past. In fact we have already been into the reasons why punishments should not be mandatory particularly because of the potential failure of juries to convict. Thus it would be possible to introduce the death penalty in such a way as to restore its effect as a last resort whilst providing safeguards against its alleged disadvantages.

**MUTILATION:**

At this point most people think of the Islamic punishment of removal of a hand for theft, and throw up their hands (whilst still keeping them attached to their arms) in horror. In the first place they make the assumption that this is a general punishment, whereas
it is rarely used and then only as a last resort after other methods have failed. Yet there are many here who, whilst condemning the Sharia law, cheerfully advocate castration for the child molester. Perhaps the best way to examine this whole question would be to look at the possible effectiveness of such a punishment.

It would seem to me that the effectiveness of any such form of punishment and thus the necessity for it, is very much in doubt. It would be difficult to attribute the greater freedom from crimes of theft in Islamic countries to the ultimate sanction of mutilation. Generally, before one reaches this stage, their laws are more severe. Moreover the moral influence of the Koran in this respect seems to be much greater and the general public condemnation is far more severe.

There is only one case I know of where the argument about effectiveness seems to break down. In a recent discussion it was suggested that mugging and crimes of violence by men could be almost certainly eliminated if the punishment were removal of the left testicle for the first offence and right for the second. Although made in jest, there are serious arguments which could be made for such a punishment in that the original first punishment does not cripple the criminal but it makes the prospect of a repeat punishment dire. Moreover it is not the sort of punishment that is going to make the criminal an object of admiration amongst his peers, as they might for example look up to one who had manfully suffered the cat o' nine tails.

What we can draw from this rather bizarre example is something useful about the nature of punishment, i.e.

1) It need not (and indeed should not) cripple the criminal.
2) The prospect of a repeat should be a real deterrent, and
3) It must be something that does not promote the criminal in the eyes of his peer group.

The question of image and the public reaction to the criminal is important. The punishment must not inadvertently help create the image which the criminal may aspire to. For example some Japanese gangsters are prepared and proud to have the top of their little finger severed. It shows their courage and discipline. Therefore this sort of mutilation

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112 I was making this point recently when a friend who is a magistrate in London asked me why if what I said were so, did he have so many cases of Arabs, often quite wealthy ones, stealing from shops? I must confess myself at a loss to answer this particular point, unless theft from infidels doesn't count, rather like our exploitation of foreign labour in the past.
would serve no purpose. The removal of a testicle on the other hand is not something anyone is going to want to imitate.

The point I am making is that even with a punishment as severe as mutilation it is not the fact that you cut something off that counts, it is what you cut off that counts! It is important that the psychological point is emphasized as being present even in a horrendous punishment because the same psychological point is present in all punishments. Under these circumstances I hope it is apparent just how stupid it is to limit ourselves virtually to only two punishments, one of which is already showing signs of receiving less and less social sanction.

Before leaving the subject of mutilation we should return to the question of the repeat offender. The ideal example here is that of the child molester, some of whom appear not to be cured by imprisonment. There was one case recently where the offender begged to be castrated because he argued that he knew he would repeat his crime when released, i.e. he couldn't help it. This brings up several questions, the first and most important of which is - Will the proposed operation (mutilation) cure the problem. Only if the answer is yes should the operation proceed. If it was known not to have any real effect it would amount to an unjust punishment. If it provided reasonable prospects it might just be justified if the circumstances of the case warranted it. We shall have to come back to the question of the repeat offender and those who cannot control themselves because here we are beginning to border on sickness rather than wilful crime.

INFLICTION OF PAIN - PHYSICAL.

Here we come to the vexed question of corporal punishment, much supported by its advocates and dismissed by its opponents. Again arguments often rage around the deterrent effect or lack of it. I must repeat that these arguments are just not relevant to the assessment of the punitive aspects of any sanction, particularly as most punishments will have differing deterrent effects on different people or groups. A far more interesting argument is the one that claims that the infliction of physical pain a) degrades and b) brutalizes the recipient.

As to a) one of the prime purposes of punishment is to reduce the standing of the person being punished within the community. If the status is unchanged, or worse still improved, amongst the person's peers then the purpose of the punishment is defeated. This is why it is imperative that no one, particularly a state funded TV station, should be permitted to treat people such as the train robbers as if they were folk heroes. In fact this in itself should be a crime - ‘encouragement of the perpetrators of criminal activities’ It is not until recently that one could ever have imagined the glorification of the criminal. This seems to be
a product of modern entertainment which, failing in natural ability, has tried to substitute by shocking or advocating the bizarre. Unfortunately as it is an easy substitute for real talent it has gained increasing usage, with the perpetrators claiming a ‘right’ to do so under artistic licence. This however leads us into the arguments relating to the extent of freedom and censorship, which unfortunately we cannot pursue here.

As to b) the brutalization of the recipient, the argument is that it makes the vicious more vicious. This tends to be based on the grounds that those brutalized by their parents often turn out to be violent themselves. Without case histories this does rather tend to beg the question as to whether the parent(s) were brutal to the child because it had a naturally vicious disposition and they were at a loss as to what else to do; or whether the brutal characteristic was hereditary; or whether the beatings turned a right little charmer into a monster. In short the claim cannot stand until the alternative explanations are eliminated.

What I do believe however is that the child hit for no reason by a parent soon senses that its treatment is unfair. I would not go so far as to say that an infant has an inherent sense of what is just (indeed this would appear to be a learned sense) but as soon as a child gains any experience of interaction with other people the sense of what is ‘fair’ develops very quickly. It learns to dislike what is unfair (having its lollipop snatched by a bigger child) and this is the rudimentary awakening of a sense of justice. This perception is acquired quickly on the receiving end as most things which are unfair have an unenjoyable association. Unfortunately this does not develop a sense of either justice or sympathy when the shoe is on the other foot. But a just punishment will not be regarded in the same light as an unjust one - it lacks the quality of blatant unfairness and for this reason I suspect that that particular argument of the anti corporal punishment advocates fails insofar as a just punishment, even a corporal punishment, does not brutalize.

Of course it will be argued against me that I have not defined what is a just corporal punishment. Certainly my view of what is just in these circumstances would probably be far less than previous views of corporal punishment. In the first place I would probably argue that it should not be the punishment of first instance. This would emphasize the seriousness with which any such punishment would be associated. Again I would advocate it primarily for cases of repeated violence or intimidation, but I do believe it may be argued that there is a limited place for it in the armoury of punishments.

There is also a point which is never considered by those opposed to corporal punishment, and that is that they seem quite prepared to torture a person suffering from claustrophobia by shutting them up in small spaces for long periods, but consider it wrong to
get the punishment over quickly by means of corporal punishment. This is an approach which has always seemed more emotional than lucid to me. The fact that corporal punishment enables a faster return of the criminal to society may also be argued to be of benefit generally.

Picking up a point which we have yet to discuss in detail - immediacy of punishment - there is an argument which can be made for reasonable corporal punishment of children. Imagine the scene: a small child reaches up to grasp the handle of a saucepan of boiling water on the stove. A quick slap on the wrist and a firm "No" is far more effective than trying to explain the effects of a dowsing of boiling water to a child that has no conception of what a burn is. But it is no good putting off the punishment. Its effectiveness is in its immediacy. However this is a special case but I think one worth mentioning.

Again if we are not too proud to look at other animals we can see that in training their young they do indeed instill discipline. All young animals tend to get over excited and out of control, but in the case of a lion cub a snarl and bearing of teeth by the parent is enough to frighten the cub into obedience. Of course the cub does not know that the threatening behaviour won't be carried through - it can't produce a statute saying "You are not allowed to bite me or I'LL SUE" which effectively destroys the threat. This is more important than one might think, and in effect might mean that while we should train parents not to hit children, we cannot give the children a right not to be smacked. In fact the remedy for wrongful management of children should be a State remedy NOT a right of the child. The reason for this is that the establishment of jural relations directly between parent and child is antipathetic to the basic parent child relationship.

Similarly we have seen that a mother dolphin, obviously fed up to the fins with its child's behaviour, will force it to the sea bed and hold it there whilst emitting a threatening note. Afterwards when it is released and swimming obediently there is usually a quick reassuring touch of the fin from mother indicating that all is forgiven.

INFILCTION OF PAIN - MENTAL.

As we have seen scaring children into obedience is one form of control, but should this be a subject for punishment. Certainly the idea of constantly threatening the child with future retribution is bad, primarily because the lack of immediacy tends to separate the act and the punishment. Mental pain or anxiety is a subject about which comparatively little is known. Brain washing, and sensory deprivation are subjects usually associated with torture and thus dismissed as beneath discussion. Yet two of the most serious crimes, Kidnapping and Blackmail are crimes depending for their effectiveness upon inducing mental
distress. Why therefore should there be no parity of punishment? Moreover, looked at
dispassionately, any deterrent has a mental aspect. i.e. the deterred person is scared of the
consequences of doing the act, and therefore desists. This is true of any threat of dire
consequences.

Therefore for example where a person is say sentenced to 6 months, might
there not be a case for putting him in a very distressing (but not dangerous) situation for a
short period e.g. one month, and then releasing him, with the balance of the sentence
suspended for two years dependent on his good behaviour. I do not mean some form of ‘boot
camp’, I mean somewhere where the living conditions are very unpleasant, cold, stark, and
minimal, with no entertainment and no outside communication. The only relief would be
educational classes in the daytime. The effect of this would be to make the education seem
the most appealing part of the sentence. It would also cut the length of time inside and
provide a deterrent foretaste of what is to come if one fails to behave on release. In short, a
milder derivation of the left testicle punishment. Finally by cutting down on the length of
time actually in gaol it would save a great deal of expense.

Immediately there are those who will point out that this would be no good for
a drug addict and of course that is true. It will be seen that the whole force of the arguments
of this section are leading us toward the concept of fitting the punishment to the criminal. It
is the severity of the punishment which is related to the crime, and the type of punishment
which should be related to the criminal. This will require a radical rethink, and possibly even
the establishment of alternative punishments.

Again it may be true that the sort of punishment described above may only
prove to be a deterrent when it is experienced, but again I would argue that it is almost
impossible to produce the omni-deterrent. There is some proof that future prospects can lead
to increased deterrent effect as in the case of the build up of points on one's licence. Where it
fails is with criminals who do not find imprisonment intolerable and who, although they will
obviously try to avoid being caught, are not really deterred by the thought of imprisonment.
Similarly the joy rider, with no licence anyway, is hardly going to be deterred by a points
deterrent. However say there were also a points system applicable to criminals, so that any
conviction would take with it a points value (e.g. purely as an example a previous conviction
1 point, a prison sentence of 6 months up to 3 points; etc., etc.). Then anyone being
convicted of an offence would be sentenced and then any points he had acquired in the last
three years would be revealed and his sentence would automatically be increased on a sliding
scale e.g. 5% for each point. Here there is an incentive to keep out of trouble without being as inflexible as the U.S. 'three strike' rule.

While, as we discussed above it, may be possible to frighten children into obedience it is not the preferred method. Punishments of mature adults by means of, say, sensory deprivation and other forms of quasi mental punishment is very much an unknown field. Nevertheless further progress in understanding the workings of the mind may provide insights for derivation of milder solutions.

Another aspect is the use of aversion therapy. To the best of my knowledge this is not usually successful and there do not seem to be any areas of crime to which this might be the solution. However there are a range of options apart from the drastic deprivation of the senses (where a person is deprived of all sight, sound and sense of smell and touch) which may be of some effect. Again it might be possible simply to find a means of frightening the criminal into compliance with the law. These fields are largely unknown and applications would in most cases have to be very subject-dependant so that their use in punishment seems to be of minimum significance at present.

Certainly medical and psychiatric research in this field should be encouraged as indeed it should be as to the effects of current overcrowding and being forced to live in close quarters as many prisoners are today. It is quite probable that this is currently having a counter productive effect. This is not just because of the opportunity for the criminal to learn more criminal techniques from other inmates but rather because we know that overcrowding produces antisocial reactions (in rats anyway). It is important that we should have reliable information on these aspects. Generally the mental effects of all forms of punishment should be more thoroughly investigated and all prisoners should be subject to detailed examination.

EXILE or BANISHMENT

Here we have an extremely effective punishment which has fallen into disuse but which might well merit revival in some form. Much depends on the desirability of living in one's country but assuming that this is what most people desire, exile could be very effective. Immediately there will be cited the difficulty of enforcement but this is easily solved by reintroducing Outlawry, so that the banished person has a price on his head if caught within the exiled territory. In the U.S.A., although it is not generally known, there are still professional bounty hunters operating today.

Moreover Exile does not have to be a blunt instrument - it can be for varying periods; it can be related to the return of funds; it can even be internal as well as external. The concept of internal exile does require the establishment of an area, say an offshore Island.
to which people can be exiled. In its worst form it could be unregulated so that a person, having rejected the laws of society would be sent to an area where they did not apply. They would simply be provided with a survival kit, there being no buildings or other facilities and collected at the end of their term. The advantage of this would be that the area merely needs to be guarded but not administered.

Normal exile whether internal or external would have to be accompanied by the provision of a worse punishment if the person returned and a price placed on their head to encourage the reporting of any illegal return. Also Banishment would be, where appropriate, accompanied by Forfeiture of property, and such forfeiture would be followed through to beneficiaries.

This sort of punishment is not for minor criminals but rather major criminals of the Maxwell type. One really cannot assume that the wife, husband, partner, or children of a major criminal have not benefited. Criminals engage in their activities, unless extremely politically motivated, for the benefits they bring. Therefore unless a related party can show where and how they acquired their property, everything should be forfeit in the manner of a bankruptcy.

BRANDING

Unless it is possible to come up with a bio-degradable form of branding it suggests that the person is irreversibly condemned. This seems to be against the whole purpose of the concept of punishment, which, if it is to be just, should allow, where possible, for the reinstatement of the criminal in society. There are presumably those who would deny this but there seems to my mind no beneficial purpose in creating a body of either permanently branded or visibly mutilated people in a society. There are those who, equally unreasonably in my opinion, would brand say child molesters on the excuse that they would be easier to keep track of. Quite apart from the fact that other ways of tagging people are being developed it is arguable that our present forms of punishment are inappropriate for criminals who are driven by a compulsion.

Even if a biodegradable means of branding were established it would probably be easily overcome and I would expect its benefits to be minimal. In short I can see no way of even deriving any other form of punishment from this approach. This is one old form of punishment that appears to warrant no argument for resurrection.

INCARCERATION - GAOL.

This subject has, because of its general use, been the subject of innumerable commentaries. Suffice it to say that it is widely regarded as inappropriate for a great many
criminals. Additionally it is extremely expensive. The object therefore must be to find alternatives which might achieve a similar objective.

It would be generally desirable if alternative punishments could be found for less serious offenses, punishments which would obviate the necessity for keeping people in gaol and thus reserving gaol for those offenses which cannot be otherwise dealt with or those which are so serious that it is necessary to safeguard the public from the criminal. There is one group where a start could be made, and that is amongst those remanded in custody awaiting trial. There are three basic categories/problems here:-

1) is that the accused is basically assumed to be innocent until proven guilty and so the presumption is that they should be free pending trial. This is accomplished by release on bail.
2) Where the crime is sufficiently serious or the accused considered to be dangerous, the accused may be detained, and there seems no real answer to this.
3) The third category is of those who while they might be released on bail either don't have sufficient security or even if they did they would probably disappear before trial. For this last group what is really needed is not so much locking up but a means of ensuring that they won't ‘disappear’. The problem is exacerbated by the fact that the time waiting for the case to come to trial is currently far too long. Tagging when it is perfected may be of considerable help particularly if the tag can be contrived which sets off a radio alarm if it is interfered with. Where it is really needed to slow the person down the ankle tag could be connect via a 30" steel hawser to a cylinder of steel with a handle at the top. A 4" diameter bar of steel 10" long weighs quite enough to slow most people down. It can be carried and is an inconvenience (but not half as much as being in a cell), clothes can be removed and the wearer could take a bath, albeit somewhat awkwardly. As it costs hundreds of pounds a week to imprison someone, who is thereby also prevented from engaging in any normal activities, it may not be as bizarre a suggestion as might be thought. To those who would say how demeaning to have to carry this object about, the answer must surely be - perhaps so, but a lot less demeaning than being locked up and unable to go anywhere.

Prison may therefore be awarded its place in the scale best when we have determined what alternatives we might adopt for both the more serious and the less serious offenses. Its place will also be determined by the sort of institution it is. i.e. soft and comfortable with television, sports facilities and easy access to drugs, or spartan and harsh. Again it must be emphasized that the estimation of the harshness of a prison is really subjective. Being forced to watch the banalities of television might by some be considered a form of mentally destructive torture whereas other prisoners confronted by the works of
Aristotle as the only means of filling their spare time might be similarly appalled, even though the latter would at least be constructive. Perhaps a step forward could be taken by providing only educative reading material in prisons.

There is no doubt that the place imprisonment has in the system may be adjusted quite considerably. It may well pay to have both a harsh, and also a less severe but educative form, occupying two different positions on the scale.

FORFEITURE OF PROPERTY.

This is a very old form of punishment and one that should be employed far more than it is. There is nothing that annoys the law abiding citizen more, or which reduces his respect and trust in the State more, than a failure by the State to punish wrongdoers properly. This is simply because it devalues the status of being law abiding. Failure to punish properly and even more so, allowing the crook to put one over on the State is especially reviled. Thus the idea that the criminal, even if sentenced, walks out of prison to enjoy the benefits of the crime is anathema.

As mentioned above this is not the sort of punishment that is effective against the small time criminal who is probably living a fairly hand to mouth existence, but to a degree it is bound to be effective wherever an overall profit has occurred. The better the lifestyle of the criminal the more effective this punishment will be. To reduce the criminally avaricious to penury will be far more effective than a gaol sentence spent, often in an open prison, contemplating the benefits accruing on release. This could be a very effective punishment particularly if combined with Banishment or imprisonment of a very uncomfortable nature, the duration of which is linked to the return of the money.

Again as mentioned before the funds must be followed through to the extent of complete bankruptcy, and punishment in the case of non repayment should be correspondingly much harsher.

FORCED LABOUR

It seems perfectly reasonable that anyone imprisoned should be required to work. Moreover it would seem sensible that they should be paid the regulation wage for their work and that at least a contribution towards their upkeep, equivalent to board and lodging should be deducted. Any surplus would be banked and made available to them on release. As a principle this would appear just. Unfortunately I know of many practical objections that could be raised, e.g. many prisoners are unskilled or worse still incapable of work, the facilities are not available etc., etc. There is also the problem that other workers may feel that their jobs are being taken by prisoners.
Nevertheless the principle is a sound one and where it can be invoked it should. At the very least the cost of the trial and the cost of carrying out the sentence should be made known in every case, and wherever possible recovered.

FINES

Fines are one of the oldest forms of punishment, and, when one comes to think of it, the preferred form whenever they can properly be used. This is because

1. They adversely affect the wrongdoer without physically harming him.
2. They can usually be applied with greater speed and the effect is instant.
3. The State benefits from the money received.

This last point is of great significance. As societies become more complex the cost of administering their laws escalates. Any punishment which reduces that cost, instead of increasing it, as does prison, must be favoured. Where fines can run into trouble is when the offender has little or no money. Even this may not be as frequent as it seems, for a magistrate of great experience and capable of judging character rather well, would when met with a plea of poverty after imposing a fine, reply ‘You realize, of course that I have the authority to have you searched’. Almost invariably, he said, this produced a sudden recall that they did actually have some money on them, which of course ‘they owed to a friend’. Equally invariably the sum proved to be far in excess of the fine, which was promptly recovered. “You see” my friend pointed out “that type usually do all their transactions in cash, and being of an untrusting disposition they feel that the safest place is to carry it on their person”.

Obviously not all problems are that easily resolved and, as was pointed out earlier, there is no point in forcing money from someone who is then going to recoup it from the state in the form of assistance. However if a day in the stocks were assessed as being equivalent to, say, £100, we have a viable alternative. The stocks are used as an example because they are cheap to maintain, and no doubt once experienced they would be quite a deterrent. It is absolutely uneconomic putting a relatively small defaulter in prison even for a week. Therefore some cheap alternative has to be found, whether it be labour, the stocks, corporal punishment or whatever.

OPEN LABOUR.

The only thing one must emphasize is that even a little light labour has to be supervised, is not sufficiently unpleasant, and will almost invariably result in a loss of money to the state. Finally it has virtually no deterrent effect. There are not enough cesspits left to be cleared out and the supply of bodies to be cleared from motorways is intermittent. And on
top of that the unions will complain that their jobs are being taken. It does seem that the idea of labouring as a punishment is slightly flawed. Most people labour in one way or another and therefore one has to devise something that is unpleasant, capable of being done by the majority of the offenders convicted, and which is profitable.

For certain minor offenses where the person involved is not a hardened criminal, the idea of weekend labour camps has been used in some countries. However what form of labour is suitable for intermittent application? How much will it cost to oversee etc.?

There does however seem to be one area where work might prove beneficial and profitable and that is for the young. I am particularly thinking of a punishment for Vandalism, where clearing up the mess, constructing something useful such as a bus shelter, and running errands for or helping the elderly could be beneficial, educational and help to re-motivate someone who has not yet become a hardened criminal.

Much depends on what caused the offence in the first place, but it seems that a great deal of trouble is in fact incited by the very nature of modern society. A youngster with apparently no future, under educated, and with nothing to do will almost certainly get into trouble. They may well be dissatisfied with their lot, and object to authority but still not be basically bad. Part of the fault lies with a society where they are constantly brainwashed to buy things they don't need but must possess, at prices they can't afford.

Here there is an opportunity, for example, to send mature youngsters as part of, or to join, an aid team to a very poor country where we are providing aid. The opportunity of being in a remote area where they can see real poverty, not the poverty of not being able to afford the latest trainers or other pop icon, but the poverty of not getting enough to eat, plus the opportunity of helping relieve suffering is a very powerful force. No one returns from the remoter areas of a backward country the same as they were before. Even the helper's limited education may be greater than that of those they are helping and the act of helping may restore their self esteem in a manner which is vital to the making of a good citizen. This may appear contradictory but criminals are not all the same and with some, particularly those not fully matured, it may be necessary to raise their self esteem. With others, such as the thug, it may be necessary to do the opposite.

The above is not so much a form of punishment but rather a serious opportunity for re-education. It must not be confused with the form of supervised jolly in which some youngsters were taken on foreign holidays as a 'cure'. (Fortunately this appears to have created such an uproar when the public found out, that it has been dropped). The suggestion above would involve hard work in fairly primitive conditions - but no worse and
possibly slightly better than those being aided. Moreover supervision from escape would not be needed, there being nowhere to go. The cost would be absorbed as part of the aid we were providing, they would provide really worthwhile help and their wages, less a deduction for living expenses, could be given to them on their return, so that they would not face society and immediately have to resume life as a supplicant for aid themselves.

**FORFEITURE OF RIGHTS**

Now this would appear to present many opportunities for further investigation. Nowadays we receive so many benefits of membership of our society, and they cost us all so much, that it does not seem unreasonable to ask why a person who refuses to obey the rules of a society should continue to be able to take advantages of the benefits. At the most drastic end, Citizenship could be revoked and the person deported. Alternatively they could, as discussed above, suffer banishment (Internal or External) for a period. At a lesser level other privileges could be forfeited. Again much depends on the status and lifestyle of the offender.

We already withhold passports and withdraw driving licences so there is no reason why these cannot be extended. A prosperous swindler with a nice lifestyle, but not a criminal of the major rank warranting the expense of prison, could well be punished by having his driving licence revoked and having to walk about with a large ball and chain attached! Bizarre!, but perhaps it might be very effective in getting the money back, particularly if accompanied by a warrant of forfeiture of property. One has to look at the psychology of the criminal. The swindler has done what he has to support his lifestyle and a false position in society. In prison he merely costs us more money. With a ball and chain he doesn't, and his standing, which is what he sought, is destroyed. Moreover depending on the necessity he could be tagged for a number of years.

Criminals who prey on the weak and elderly or defraud people of their savings are particularly objectionable but though the effect may be the same, their method of operation may be quite different. The crime of intimidation is particularly pernicious because the victim is often too frightened to speak out. Perhaps here is a case where corporal punishment may be justified, whereas the confidence man may be more easily dealt with by humiliation. Again the point which needs to be made is that it is not the form of punishment but the appropriateness with respect to the criminal which is going to affect the efficacy of the punishment. In this regard a great deal more psychological insight is going to be required.

**RIDICULE & HUMILIATION**

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One of the most effective ways of discouraging crime is for the activity to be held in low esteem by the general public. If it is possible to indicate this to the criminal without permanently damaging his image, this is prima facie desirable. It seems highly likely to me that in many instances a week in the stocks could prove far more effective than a month in prison.

As we have seen from the previous section there are various ways of inconveniencing, ridiculing and humiliating a criminal. The manner in which he is treated should accord with the view that society takes of the crime. Today we are faced with a very powerful public opinion-former in the guise of Television and the press. While censorship leads to all sorts of difficulties, the creation of crimes such as ‘The encouragement of Criminal Activities’ or ‘popularization of convicted criminals’ could be framed, together with massive fines.

Certainly there is a great deal to be done to re-establish criminal behaviour as unacceptable. It is not only media glorification of the wrongdoer, but the failure of influences such as the Church. The latter was perhaps inevitable once the public woke up to the fact that the Christian church historically had displayed an avarice which would have made Croesus envious and, with the Inquisition, a disposition to commit crimes which could make Hitler look comparatively docile. Not really the best of role models. And that is a real part of our problem. We live in an increasingly hedonistic society in which materialism is idolized, and education undervalued. The re-establishment of the idea that criminal behaviour is to be despised is a major task in most western civilizations but not one that can be developed in this book. Nevertheless it is vital to a properly organized society, and its importance cannot be over emphasized. Of course there are those who will claim that any attempt to alter things will involve a restriction on freedom. However we have already noted that Freedom cannot exist without its concomitant effects. Perhaps it is time we woke up to the fact that the knock on effect of some of our freedoms is too high a price to pay. There are always those who will abuse a freedom and it should be possible to maintain a freedom whilst punishing the abuse of the freedom. This would require dextrous framing of laws but it should not be beyond us.

TREATMENT

The concept of treatment, except insofar as it can be incorporated as part of any punishment, is a subject more fit for medical research. However there are certain crimes which may be the result of a compulsion, e.g. the child molester, where punishment (currently in the form of imprisonment) is proving ineffective. Although whilst in prison the person is prevented
from doing harm, as soon as they are released they will return to their old habits. Therefore it seems that the only hope is to detain them while attempts are made to cure them. To this end they would probably need to be held in a secure medical establishment rather than a prison. Fortunately it seems that the uncontrollably criminal are fairly few in number.

**IMMEDIACY:** One of the great features of effective punishment, especially with the young or immature is the immediacy of the punishment. This is where the light chastisement of children may occasionally be appropriate. In the case of adults there is a similar need. The argument that waiting for the thought of impending proceedings is a punishment, is a bad one. In the case of those subsequently found to be innocent it is a gratuitous mental punishment. Where people have been locked up without bail it is expensive and wrong. No case should take more than a month before coming to trial and every effort should be made to streamline legal procedures to effect this. The adoption of an inquisitorial approach to determining the truth should certainly form part of this, because, besides its other advantages, it has the merit of both parties knowing what is happening.

Having reviewed various forms of punishment it does seem obvious that one of our problems lies in the complete inflexibility of our system. Punishments, at present, are geared solely to the severity of the offence, and this is quite right when dealing with proportionality as to the severity of the punishment. However when it comes to the type of punishment it is arguable that this should depend on the criminal. To some extent this is recognized when dealing with the insane, but it is my argument that it should go very much further. To be effective, the punishment must seriously affect the criminal concerned. It is no good arguing about the dignity of the criminal who has just slashed your face open. He surrendered his right to dignity with his act.

**SUMMARY**

If we look back to points I - IV, in the light of the discussion of the various Forms of punishment, we see:-

I. **PUNISHMENTS SHOULD BE PROPORTIONATE.** This proportionality is established by the state in establishing both those acts which are to be punishable, and the maximum sentences.

II. **PUNISHMENTS SHOULD BE APPROPRIATE with respect to THE TYPE OF CRIMINAL.** Here a great deal of work needs to be done both from a psychological research point of view, and a complete revision of available punishments so as to incorporate the whole range of those discussed with the exception of mutilation and branding.

III. **THE ABILITY TO DETER.** Here again the nature and effect of the punishment has to
be related to the criminal and his background. It is no good putting the criminal into a more pleasant ambience than his natural one. To deter it has to be nasty and there is no point in being squeamish about admitting this. The alternative is not to deter!

IV. THE JUSTNESS OF PUNISHMENT. This is a vital factor in all punishments. The punishment must not be over harsh or the state merely becomes brutal. Equally importantly the punishment must not be too light, for the sake of the victim and, by inference, the whole of the society.

    The punishment must encompass the additional factors reviewed in the last chapter. These include the retribution factor which may be dealt with by variations within the severity of the punishment. The rectification factor, which is that amount of punishment still required even if full compensation has been made. Finally the much neglected compensation of the victims by the criminal must be included. This part of the punishment should be set out separately.

STATUTORY LIABILITY OFFENSES.

Punishment as a Regulator. (e.g. Driving on the left). There remains that groups offenses which result from regulation of the society. There are all sorts of them and they relate to a vast range of subjects from weights and measures, and health and safety regulations, to which side of the road one should drive on, the speed at which one should drive, requirements for insurance etc., etc.

    There is no reason why a society should not, and a number of reasons why a society should, be regulated. Usually all the situations regulated are ones where, if they are broken, there is a potential danger of harm being done. The real question is whether the breach should be automatically punishable, whether or not harm was done. The justification may well be that the potential harm is so great that it is necessary to train the society not to break these particular rules. In these cases it may be possible to argue for Statutory Liability.

    In the cases where there is no potential of great harm, or where the harm is non existent there is no justification for statutory liability. The use of this devise when it is not necessary brings the law into disrepute and is thus potentially more harmful than might be thought.

    Moreover it could be argued that a great many of these regulations could have been encompassed by the case law - For example much of the Trade Descriptions Act could have actually been covered by the concept of fraud. However it can be argued that this would have been a cumbersome way of going about things and that it is necessary that people have
the regulations set out so that it is clear what they are, and that additionally it is comparatively easy to check them.

The caveats that should be sounded are, first that unnecessary regulation encourages breach and this encourages disrespect for the law. This is made even worse if there is an aspect of injustice in the regulations. Secondly, burgeoning regulation breeds bureaucracy with its attendant corruption. Over regulation also leads to fierce resentment.

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CHAPTER 9. CONCLUSIONS.

I started by showing the necessity of re-establishing the concept of justice as standing in its own right, not of trying to isolate applications of justice and then trying to work backwards to establish its principles. The concept of justice, once restored to its pre-eminent position may then be used to help us solve both moral and legal problems. Once it is appreciated that justice is not merely a virtue but a critical foundation of a civilised society we are freed to re-examine problems in a different light.

Rather than trying to establish rights to this, and rights to that, such as rights to various freedoms, we can regard freedom in its correct light i.e. as a non jural state. The resolution of our problems as to what is and is not permissible then comes from the resolution of the question ‘Is this restriction on my freedom Just?’ It entirely eliminates the problem and emotive inconsistencies of trying to establish a rights based society. It enables us to define rights properly within their jural relations and thus to define our whole legal system more accurately along the path first pointed out by both Hohfeld and Kocourek.

The correct understanding of Justice and its separation from law permits us to examine more clearly our responses to Conscientious Objection and Civil Disobedience.

Again the understanding of justice is vital in its applications to law, particularly in the correct interpretations of foreseeability and intentionality and the establishment of legal rules of intention in criminal cases.

In propounding a system of inter-relationship between Law, Punishment, Freedom and Rights, based on the concept of Justice, one may not solve every conceivable problem. One does however provide a logical foundation for the solution of a great many important problems. Moreover we find that we do not have to introduce artificial factors to arrive at the conclusions we would seek in accordance with today's political and social attitudes. But the principal advantage of this system of approach is that it works, not just for our society but for one with a constitution such as the U.S.A. Also it is irrelevant whether the laws are derived under our system or any other such as the code Napoleon.

By accepting that Justice itself is involved in the Prime Inherent Law one literally remoulds the system so as to allow confluence of certain Natural Law theories with Legal Positivism. In the new system both have to give up something but both gain by the result. In such a system Principles of Justice are potentially more likely (depending on the courage of judges) to become converted to rules of Law by adoption by the courts. But this is not a necessary consequence (albeit in my opinion a desirable one), for it will depend on the courage and conviction of the judges and the freedom they are permitted under their
system of law. Finally the whole system of law is more easily assessable as to its efficacy and also its general acceptability to the public. Again, while acceptability in the eyes of the general public is not a necessary requirement or even a feature of the law, it has been noted that if, particularly in a free society, the law comes to be widely regarded as failing to accomplish its ends this will be reflected in a general dissatisfaction with the government, with all the consequences that flow from that.

We are also able, under this system, to examine issues such as ‘rights’ or so called ‘human rights’ from a different and less emotional viewpoint, and thus the system becomes more logical. We find also that we no longer need complicated constitutions which can become out of date within a few years, yet, because of their monolithic structure, proceed to stand in the way of progress once their immediate purpose is served. It is indeed simpler, and in my view preferable, to have normal laws which are respected and enforced in order to preserve certain rights, rather than to enshrine certain wording with a special status. That merely makes those generalities (and they are almost always in the form of generalities) more difficult to change in any way. This can have a counter productive effect. It is far better to allow a society's most important laws to evolve with changes in circumstances. Look at the problems the U.S.A. has with its gun laws because of the ‘right to carry arms’ contained in the constitution. Imagine if the constitution had been set out a few years earlier and had enshrined a slave culture - it could have happened, slavery was only finally abolished in 1888 - years after the drafting of the U.S. constitution! However as I have pointed out, the system I have set out does not exclude societies with a constitution (it just won't solve the problems they bring on their own heads).

At this point it may be as well to take note of the many things that I have not sought to do. I have not set out a general theory of law, yet in some ways I have indicated things which would have to be incorporated in any such theory. In treating the law in a positivist manner I have only gone so far. I do not reject the idea that legislation can, in some senses, reflect a general or collective will of the people, but, and let us be very clear about this, this is not a necessary objective of the law. The collective current concept of what is just, will, in a free society, feed back to its legislators. But this is not to say that the legislators will or even should automatically enact it. Thus the law may eventually tend towards the will of the people but it is not necessarily the will of the people (not least of all because different segments of a multicultural society may have different views). The law is still governed by the will of the State (i.e. those in power) and for a variety of reasons it may differ from the apparent collective or majority viewpoint. In fact as societies grow larger
there are always more and more disparate views amongst substantial minorities of the people and it will not be possible to satisfy them all.

The duty of the State or government is towards providing for the overall robustness of the society as a whole and it is not there to try to satisfy the private whims of every citizen. Nor is it primarily there to provide for the citizens' happiness or even to provide facilities for them to attempt to attain happiness themselves. If it can do so without prejudicing other objectives, so much the better, but to have this as a primary object can be very counter productive. A society of content couch potatoes plugged in to the latest placebo or soporific is so much easier to control. Unfortunately when danger strikes they are utterly useless.

Most societies, particularly highly mobile western societies, comprise many disparate parts and views, yet the parts should interact to provide a collective whole. Law is for the governance of, and directed to the benefit of, that whole and not the vacillating whim of the individual. It should however do this with as much justice as it can muster so as to provide regulation for the interaction of the citizens with a degree of certainty in the conduct of affairs. \[113\]

However before this leads one to conclude that I would maintains that no legislation can be objected to except on the grounds that it adversely affects the welfare of the group (as opposed to the individual) it follows from my theory that legislation might be objected to on the grounds of its injustice. The individual as against the state has the right of the Prime Inherent Law behind him.

On the other hand to claim, as some do, that one has other inherent rights is to claim that because I hold a certain moral view I have a right to claim that view as being superior to the legislation. Moreover that I then have a right to try to force that view on the State by any means at my disposal. As I hope I have shown, this private view may well be superior, and it may one day prove to be right, in that it becomes the accepted view, but nevertheless the individual view (however superior) does not create a jural relationship giving rise to any right properly so called. What the individual does have is the right of the Prime Inherent Law to Justice. This may spawn individual rights in different circumstances. For

\[113\] The fly in the ointment politically is that societies such as ours, who appoint their leaders, almost invariably seem (no doubt out of a desire to identify with them) to elect those who are amongst the intellectually inferior and who usually otherwise seem to have achieved nothing in life. This is of course compounded by the fact that these leaders are chosen from amongst those who want to lead us rather than those who ought to lead us. However at this point we are straying into the field of philosophy of governance.
example Dworkin refers to individual rights as political trumps held by individuals and that individuals have rights when for some reason a collective goal is not a sufficient reason for denying them what they wish to have or to do. But is that not very similar to saying that if the collective goal in this case is not sufficient reason for denying the individual, then to deny him would amount to an injustice. That is against the Prime Inherent Law. Looked at in this light the original stand off between Dworkin's viewpoint and mine tends to dissolve. Although we have come by a different path, I really cannot see that our conclusions with respect to any particular case would vary any more than the decisions of two different judges might vary in the same case.

Moreover, Justice being the criterion of my argument, it will usually turn out to be similar, by and large, to the collective viewpoint (with due allowance for the naturally conservative nature of most judges). Obviously there will be minorities whose view of what is right or just will not be acceptable because, either it is a view that will never catch on, or it is a view which is ahead of its time, but this does not invalidate the theory.

My argument with Dworkin appears to boil down to an "s". He feels that legal rights can pre-exist legislation. But to be a legal right there has to be a law, and if it is not brought about by legislation it can only be a "natural Law". So there would have to be a plurality of natural laws each of which would have to have its existence justified. I have propounded what I believe to be the only natural law - The Prime Inherent Law. From its application by virtue of the introduction of the Principles of Justice various decisions will arise, but they in fact will all stem from the Prime Inherent Law - the right to Justice. If there were to be other pre-existing natural rights they would of necessity have to spring from other natural laws and I cannot think of any which are readily sustainable, or for that matter necessary. If anyone seeks to claim a pre-existing right they will have to show a pre-existing natural law, and justify its existence and its right to preference.

Furthermore, as Power is prior to rights we are entitled to ask from what Power are these claimed rights of Natural Law derived? There is none that I can see to support any individual right over and above that of the law, save Justice whose very existence is recognised by the law. It is the one thing the law cannot credibly deny and the power of justice has pervaded the history of man. Statute Law can of course put a gloss on justice. It can and does, in the name of expediency, deny some applications of justice. (For example there are the cases of Statutory guilt on the grounds of expediency or necessity - Weights and measures, Hygiene regulations, Traffic regulations etc.). It is interesting to note that in most cases these relate to comparatively minor offenses.
I have not attempted to deal with Distributive Justice because this is not, in my opinion, a strict application of justice. Views on the distribution of goods vary from the concept of each according to their needs, through each according to their ability, merit, effort, desert, etc. At the present time in a free market society wealth is the determining factor in most cases. As to the claim as to which is ‘just’ much will depend on one's political views, and these can be quite subjective. The only non subjective solution would be to effect distribution in accordance with whatever manner would be best for the overall ‘robustness’ of the State.

Many people have tried to define society as either rights based or duty based. Dworkin points out that there is a difference between:

1. you have a duty not to lie to me because I have a right not to be lied to - and
2. I have a right not to be lied to because you have a duty not to tell lies.

This is because in the first case it is the right which has to be justified and in the second it is the duty which has to be justified. But at this point one must get things clear - If we are talking about rights and duties in the Hohfeldian sense the relationship between the two is the same. As Heraclitus would say the way up is the same as the way down. The path is the same, and the top does not cause the bottom any more than the bottom causes the top. In the case of the law, Rights and Duties are specified as the lawmakers think fit. In the case of moral claims and moral obligations the argument is irrelevant because they do not create a jural relationship and therefore they are totally unenforceable.

To argue about the difference in the relationships between a rights based or a duty based society is therefore rather like arguing about whether eggs are chicken based or chickens are egg based. Whichever is established first the relationship thereby caused is the same. However to argue whether these relationships should be established by virtue of deciding which have priority, i.e a citizen's rights or a citizen's duties, is an absolutely vital political question, and the choice will vastly affect the society that results. Of course it is always possible to strike a reasonable mean, and one does not simply have to have one thing or the other.

The confusion is brought about by the fact that when we talk of human rights, as we have the habit of doing, we are in fact talking of moral claims (until established by law). Even so we are talking of moral claims and obligations which are matters founded in the concept of justice. So if we get away once and for all from the jural legal tie up the whole thing becomes clearer because in the case of morals and ethics there are no rights involving duties and no duties involving rights. - What is left is moral responsibility (the
result of a moral claim and a moral obligation - not being governed by a jural relation but by the principles of Justice).

It is the principles of justice which determine whether a moral claim lies or a moral obligation exists in any given circumstances and what is more even if one or the other exists THERE IS NO RIGHT TO THE ENFORCEMENT OF EITHER. The problem is how to effect the transposition of the moral decision to the legal where the judges think it is appropriate. Dworkin is aided by the fact that the U.S. has a constitution. The constitution is not law (some of the signatories who happily owned slaves, like Jefferson who had 200, would have been in trouble if it had been law!). Moreover American judges are political animals and that enables Dworkin to use the ingenious method of allowing Hercules (his model judge) to interpret the political intentions of the legislature.

Sir Herbert Grindit-Fineleigh on the other hand would stoutly deny in any way being a political creature, very much the reverse, and would refuse even to try to interpret the intentions of ‘that misbegotten bunch of idiots who spend their time yelling ya-boo at each other.’ (Sir Herbert, when not sitting, having a reputation for expressing himself somewhat forcefully). At that point the door would be slammed firmly against that approach. What I believe I have done though, is to produce a means whereby both can reach the desired result. Moreover the principle can be applied to other forms of law as well, and opens a proper means for the assimilation of the Natural law position. It also does not prevent Hercules' interpretation from being coloured by the inclusion of a consideration of legal intention. In practice that means simply that Hercules' law may change a little more quickly, which again is arguably no bad thing (despite a muffled snort in the background from Sir Herbert).

As I have said the confusion has grown up through general misuse of language plus the fact that writers of constitutions have always played it loud on the Rights and soft pedalled wildly when it came to duties (the latter being a far less politically saleable commodity than the former). Empedocles was certainly not confused:-

“Particular law is the law which each community lays down and applies to its own members: this is partly written and partly unwritten. Universal law is law by nature. For there really is as everyone to some extent divines, a natural justice and injustice that is common to all, even to those who have no association or covenant with each other. It is this that Sophocles' Antigone evidently means when she says that the burial of Polyneices was a just act even though it was forbidden: she means that it was just by nature.” (emphasis mine)
Empedocles related Universal law, as he described it, to Justice, so, in a sense, what I am doing has a very distinguished foundation. Of course, as I have pointed out, views of Justice change and mature, and the moral duties and responsibilities derived from justice become rights and duties as they become incorporated into the law.

So far we have seen that where in our society there is a jural relation we may use the rights and duties thereby imposed to resolve the matter. In anomic situations we look to the Power / responsibility relation to determine the moral obligations in accordance with our concept of justice. This moral obligation establishes the duty of care the powerful owe to the weak in the just conduct of their affairs.

Apart from the Individual responsibility which may best be expressed as a duty of care brought about by exercises of paucital power (Individual action between people) there is a duty of care which lies as a result of multital acts of power (State Action or legislation). This comes about by virtue of the necessity for the State to act justly in order to merit being civilized. Thus the citizen member of that State is entitled to invoke the principles of justice in relation to the State.

This still leaves us to consider whether there is such a thing as a duty of care by the community towards its individual members. This is quite different from the question of the requirements of justice so far considered. It is a further anomic situation and relates to the question as to how far I should be my brother's keeper. We have seen that where there is a power relationship responsibility flows, e.g. parent / child; animal / keeper etc. However if my neighbour falls and breaks his leg, to what extent am I obligated to help? And this is where the difference between a rights based society and a duty based and a justice based society will show up.

Those basing their concepts on rights may say ‘Those who are ill have a right to help’. At this stage they promptly avoid the duty themselves by virtually saying as it is a general right, it is up to the State to assume the duty. In a duty based society it would be our duty to help those who are ill. We may discharge the duty by paying for a national health care service, but there is a very distinct change of emphasis. The first is regarded as a natural right and because of its universality it ceases to be an individual responsibility. In the second case it is very much because of an individually felt duty of care that we may construct a generalized solution. However, What establishes that duty of care in the first place? In France, if there is a situation in which one can render aid (one is a passing doctor) one is legally required to do so. In England one may cheerfully walk by on the other side.

The answers to these questions should be found by resolving what is thought
to be morally right (just) in each case. So the question becomes is it right (just) that someone who could help should pass by? Looked at in this way the French seem to be more civilized than we. We may be stopped because of our fear that the other person will claim, in the event that we are not successful in our help, that we have impaired their right to be properly treated and sue us for negligence. Our rights approach has reached the point, particularly in the U.S.A., that there is now such a litigious society that there is, for example, a dearth of gynaecologists because if the slightest thing goes wrong they get sued. Medical and legal insurance premiums have reached the point where they actually force people out of practice.

The difference comes about because rights claimed are regarded as absolute and involve legal enforceability. Duties on the other hand, unless they are a specific duty (flowing from the correlative of a right) are generally regarded as anomic or moral. Now, however strong a moral duty may be it can never be performed other than to the best of our ability. It is this difference that makes the concept of starting with rights pernicious. It is also the excuse for lumping the duties resulting from rights off onto the State. It is thus far better, and ultimately less contentious, to determine to what extent it is just to impose a duty, and, having done this, to derive any necessary right from this. In short I am saying that a duty based society will inevitably be superior to a rights based society.

In the old days of small units, the community was virtually the State, and the two were thus synonymous. As the size of populations and the State grew larger and larger into millions it began to have discernable differences caused purely by its size. Moreover it had additional differences between communities within the same state. This leads us to a number of problems. For example the large state may not be able to care for every stray dog or even know about them, whereas the small community did, and would decide either to drive them off or care for them.

Similarly where the state becomes so large that it includes a plurality of communities some of which may have opposing views on a variety of matters, it may be impossible to cater equitably for all of them. In a rights based society the citizens tend to foist their responsibility onto the state. I believe that a state can only be expected to have a duty of care in those areas for which it has assumed power. Therefore there will be areas for which a community conscience will have to provide the answers, as indeed it does by the provision of so many charities. These charities are motivated by a moral duty of care not a jural duty of care.

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