

FOUNDATIONS OF PRIVATE LAW

Foundations of Private Law

Property, Tort, Contract, Unjust Enrichment

JAMES GORDLEY

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To Barbara

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1

Basic Principles

I. The Aristotelian Tradition

Writers in the Aristotelian tradition believed there is a distinctively human life to which all one's capacities and abilities contribute. Living such a life is the ultimate end to which all well-chosen actions are a means, either instrumentally or as constituent parts of such a life. Actions which contribute to such a life are right. Those that detract from it are wrong. Unlike other animals, a human being can identify the actions that do contribute. In doing so, a person exercises an acquired ability—a virtue—which these writers called 'prudence'. In following the dictates of prudence, he may need other virtues as well, such as the courage to face pain and danger or the temperance to forego pleasure.

The type of prudence a person exercises in seeing that an action contributes to the sort of life he should live (*nous* for Aristotle, *intellectus* for Thomas Aquinas) has been translated as 'understanding' or 'intuition'.¹ To call this ability 'prudence' does not explain how it works. It is merely to say that somehow, we are able to see that some choices are right and others wrong. Without such an ability we would never be able to act rightly. In any event, this ability is not deductive logic. Prudent people understand things that they cannot demonstrate.

To found ethics on deductive logic might suggest that the same choices are always either right or wrong like the conclusions of mathematics. While prudence indicates that some choices are right or wrong, the same choices are not always right or wrong for everyone. People are different and so are their circumstances. Even if they were not, there still might not be just one right or best choice a person should make. Freedom of the will, according to Aquinas, means not merely that one can choose to do right or wrong but that there can be different ways to choose rightly, no one of which is best.² Nevertheless, the choice may matter very much. It matters which of many possible beautiful buildings an architect chooses to build even though one cannot rank order their beauty. For Aquinas, it mattered that God created the universe, but he discussed God's freedom in the same way as that of human beings: there is no best of all possible worlds that God had to create.³

The Aristotelian ethical tradition is out of fashion. William James once said, however, without meaning to be complimentary, that much of it could be described as

¹ Aristotle, *Nicomachean Ethics* IV.xi; Thomas Aquinas, *Summa theologiae* II-II, Q. 49, a. 2.

² Thomas Aquinas, *Summa theologiae* I-II, Q. 10, a. 2; Q. 13, a. 6. ³ *ibid.* I, Q. 19, aa. 3, 10.

‘common sense made pedantic’. Despite the rise of modern philosophy, I suspect that most people, as a matter of common sense, do believe that some ways a person can live are better than others, and that those people who live in a better way more fully realize what it means to be a human being. They recognize that while there are many good ways to be a human being, there are some that are decidedly bad. They believe that while they are fallible, they have some ability to tell the difference, an ability which is not merely deductive logic.

In any event, for writers in the Aristotelian tradition, living a distinctively human life requires, not only virtues such as prudence, temperance and courage, but external things as well. Moreover, because human life is social, a person should not only want such things for himself but want to help others acquire them as well. They distinguished two fundamental concepts of justice on which the law ultimately rests: distributive and commutative justice. The object of distributive justice is to ensure that each person has the resources he requires. The object of commutative justice is to enable him to obtain them without unfairly diminishing others’ ability to do so.

These ideas intertwine. It is good to preserve each person’s share of resources because it is good for each person to have what he needs to live as he should. One can speak about how a person should live because there is a distinctively human life to be lived and a distinctively human capacity to understand and to choose what contributes to such a life.

We will consider the concepts of distributive and commutative justice in detail since much of what follows will turn on them. The Aristotelian tradition provided a plausible account of them. Later philosophers, as we will see, did not.

In the case of distributive justice, while the ultimate objective is to provide people with what they need to live well, it does not follow that resources should be allocated by asking what things each person needs and assigning them to him. Hugo Grotius pointed out that such a system could work only if a society is very small and its members are on quite good terms.⁴ In any event, each person’s own decision about what he most needs would then be subject to the judgment of an allocator rather than left to his own prudence. Most writers in the Aristotelian tradition do not even consider the possibility. For them, distributive justice is concerned with giving each person a proper share of resources.

Ideally, each citizen should receive a share that is proportional to his ‘merit’ or ‘desert’. There is, however, no single principle for appraising merit. Aristotle and Thomas Aquinas mention two different and conflicting ones and hint that there is some truth in both. According to one principle, which would favored in a democracy, every person ideally should have the same amount. To the extent a society is democratic, greater virtue, meaning a greater capacity to make the right choices, does not entitle a person to make more choices. A society in which greater virtue did entitle one to do so would not be a democracy but an aristocracy, or rule of the virtuous (as distinguished from an oligarchy in which the power to govern would come from wealth or inherited status). According to the principle of distributive justice that an

⁴ Hugo Grotius, *De iure belli ac pacis libri tres* (B. J. A. de Kanter-van Hetting Tromp, ed., Leiden, 1939), II.ii.2.

aristocracy would favor, those with superior virtue should ideally have a larger share of resources.⁵

Here, equality (or inequality) of resources should not be confused with equality (or inequality) of welfare as a utilitarian or a modern economist would imagine it. True welfare or happiness, in the Aristotelian tradition, is not defined in terms of utility or preference satisfaction but in terms of leading a good life. To say that resources are distributed equally in a democracy does not mean that people are equally able to lead such a life since, democracy or not, the virtuous are better able to make choices and will be able to live better. Equality means equal power to command resources: what we might roughly call equal purchasing power.⁶ Ronald Dworkin in an important essay called it ‘equality of resources’ as opposed to ‘equality in welfare’. As an illustration, he imagined shipwrecked sailors on an island dividing its resources equally by auctioning them off, all bids to be made in clam shells, and each sailor to start with an equal number of shells.⁷ My image in an earlier article was similar: heirs auctioning the items in an estate among themselves by bidding in poker chips, each starting with an equal number.⁸

Writers in this tradition made it clear that such principles are ideals. A democracy should not confiscate the wealth of rich people, virtuous or otherwise, and divide it up.⁹ We can see one reason why they should not if we consider Aristotle’s objections—which Aquinas shared—to Plato’s proposal to abolish private property. Do so, Aristotle said, and there will be endless quarrels, and people will have no incentive to work or to take care of property.¹⁰

These conclusions became staples of the Aristotelian tradition. They were accepted in the 16th and early 17th centuries, by a group known to historians as the late scholastics or Spanish natural law school, who self-consciously attempted to synthesize Roman law with the ideas of their intellectual heroes, Aristotle and Aquinas. Few people today are familiar even with the names of its leaders: for example, Domingo de Soto (1494–1560), Luis de Molina (1535–1600) and Leonard Lessius (1554–1623), and yet, as I have shown elsewhere,¹¹ they were the first to give Roman law a theory and a systematic doctrinal structure. Their work deeply influenced the 17th century

⁵ Aristotle, *Nicomachean Ethics* V.iv. 1131^b–1132^b; Thomas Aquinas, *Summa theologiae* II-II, Q. 61, a. 2.

⁶ Roughly, because people acquire things that are worth more to them than the amount of purchasing power they represent. A person who loses such a thing, and cannot buy another like it, will have lost more than that amount. Consequently, if someone takes or destroys it, he should pay its value to the owner even if that is more than the amount for which the owner could have sold it. If something identical is not available on the market and someone offers to buy it, the owner can sell it for a price that reflects its value to him. See James Gordley, ‘Contract Law in the Aristotelian Tradition’, in Peter Benson, ed., *The Theory of Contract Law: New Essays* (Cambridge, 2001), 265 at 313.

⁷ Ronald Dworkin, ‘What is Equality? Part 2: Equality of Resources’, *Phil. & Pub. Affairs* 10 (1981), 283–90. ⁸ James Gordley, ‘Equality in Exchange’, *Calif. L. Rev.* 69 (1981), 1587 at 1614–15.

⁹ Aristotle, *Politics* V.5. 1304^b; V.9. 1310^a; VI.3. 1318^a, 25–6; VI.5 1319^b–1320^a.

¹⁰ Aristotle, *Politics* II.v; Thomas Aquinas, *Summa theologiae* II-II, Q. 66, a. 2.

¹¹ James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford, 1991), 69–111; James Gordley, ‘Tort Law in the Aristotelian Tradition’, in David Owen, ed., *Philosophical Foundations of Tort Law: A Collection of Essays* (Oxford, 1995), 131; James Gordley, ‘The Principle against Unjustified Enrichment’, in Klaus Luig, Haimo Schack, and Herbert Wiedemann, eds., *Gedächtnisschrift für Alexander Lüderitz* (Munich, 2000), 213.

founders of the northern natural law school, Hugo Grotius (1583–1645) and Samuel Pufendorf (1632–94) who disseminated many of their conclusions through northern Europe, paradoxically, at the very time that Aristotelian and Thomistic philosophy was falling out of fashion. While these authors developed the ideas just described in different ways, they all said that by nature, or originally, or in principle, all things belong to everyone. They all described private ownership as instituted to overcome the disadvantages of common ownership, usually the ones mentioned by Aristotle and Aquinas.¹²

Subject to these limitations, however, they agreed that one person could not deprive another of his property. The owner may have more than he ideally should since an incentive has to be given to work and to manage. But, by establishing the incentives, the society has recognized that a person is entitled to the larger share that his work and good management brings him. The actual distribution of resources in society can only approximate the ideal.

These writers also accepted the Roman rule, *res pereat domino*—the accidental loss of a thing is borne by its owner. The late scholastics recognized that not only physical destruction but fluctuations in prices could change the distribution of purchasing power. They acknowledged that prices fluctuate, and must do so to reflect what they called the need, the scarcity and the cost of goods.¹³ Modern writers such as Stephen Perry and Ernest Weinrib have thought it strange that if there is such a thing as a just distribution, accidents should be allowed to change it.¹⁴ Writers in the Aristotelian tradition acknowledged that accidents could do so, but still believed, as I think most people do today, that some distributions of resources are in principle more fair than others.

While they are not explicit, I doubt if they could imagine a workable society which did not allow random events and price changes to change the distribution of wealth anymore than one which did not allow incentives to care for property or to labor. Indeed, to eliminate chance gains and losses, a society would have to distinguish them from gains and losses that are the result of labor and care. That may not be possible. Even if it were, the attempt might lead to so many charges of arbitrariness as to cause the quarrels that a system of private property is supposed to prevent.

Moreover, some resources are more vulnerable to chance destruction or to price fluctuation than others. Some decisions about what to produce or consume are more prone to error. If everyone were fully compensated when his property was destroyed or his decisions were thwarted by bad luck, those who had chosen to hold more vulnerable

¹² Domenicus Soto, *De iustitia et iure libri decem* (Salamanca, 1551), lib. 4, q. 3, a. 1; Ludovicus Molina, *De iustitia et iure tractatus* (Venice, 1614), disp. 20; Leonardus Lessius, *De iustitia et iure, ceterisque virtutibus cardinalis libri quatuor* (Paris, 1628), lib. 2, cap. 5, dubs. 1–2; Grotius, *De iure belli ac pacis*, II.ii.2; Samuel Pufendorf, *De iure naturae et gentium libri octo* (Amsterdam, 1688), II.vi.5; IV.iv.4–7.

¹³ Gordley, *Philosophical Origins*, 94–102; Soto, *De iustitia et iure libri*, lib. 6, q. 2, a. 3; Molina, *De iustitia et iure* II, disp. 348; All of these factors had been mentioned, albeit cryptically, by Thomas Aquinas. *In decem libros ethicorum expositio* (Angeli Pirota, ed., Matriti, 1934), lib. 5, lec. 9; *Summa theologiae* II-II, Q. 77, a. 3 ad 4. They were discussed by medieval commentators on Aristotle. Odd Langholm, *Price and Value in the Aristotelian Tradition* (Bergen, 1979), 61–143.

¹⁴ Stephen Perry, 'The Moral Foundations of Tort Law', *Iowa L. Rev.* 77 (1992), 449 at 451; Ernest Weinrib, 'Corrective Justice', *Iowa L. Rev.* 77 (1992), 403 at 420.

property or to embark on riskier projects would consume more resources than those who did not. A person who chose to live in a glass house, to pick an extreme example, might use up five or ten houses in the same time another person would use up one. If he were compensated, the system would not be conserving a given distribution of wealth but transferring wealth to persons whose property is more vulnerable and whose projects are more adventurous.

Writers in the Aristotelian tradition do not make these arguments expressly. But they may have had an understandable difficulty in seeing how one could eliminate the rule *res pereat domino*. Thus, although they recognized that even commutative justice depended upon distributive justice, they recognized then, that the principle that should ideally govern the distribution of wealth could only be approximated.

If this perspective is correct, the social controversies of modern times can be better understood. While these controversies will not go away, they should turn on questions of feasibility and fairness. It is not helpful to consider property rights without considering fairness and distributive justice. Conversely, it is not helpful to be concerned about justice while failing to look carefully at questions of feasibility.

In any event, in this study, this account of distributive justice will figure in two ways. First, when the question of how property rights should be acquired or defined arises, we will continually return to the reasons why such rights should exist in the first place. Often, the reason may be that there are pragmatic constraints on how they ideally should be. We must identify these constraints and see how they should be limited. That approach is different than one which regards property rights as sacrosanct and unlimited. It is also different than one which identifies pragmatic constraints with 'utility' as a modern economist understands the term. Economists tend to define utility in terms of the ability to satisfy a preference—whatever the preference may be—given the resources one happens to possess—however that distribution may help or hinder others in their pursuit of a good life. The difficulties with this approach will be considered later. Here, we need only note that many writers have seen only these two alternatives: either rights must be sacrosanct or they must depend on utilitarian considerations and so be defeasible when those considerations so dictate.

In contrast, by the older approach, respect for rights and considerations of pragmatism walk hand in hand. Ideally, a person should have a certain share of wealth. Unfortunately, he often cannot if we are to provide others with an incentive to labor and conserve resources. That is a pragmatic consideration which long predated modern economists' notions of utility. If, however, for pragmatic reasons, the law provides such an incentive, then the person who labors and conserves resources thereby acquires a right. The extent of his right is limited by the pragmatic reasons for providing the incentive. But one cannot deprive him of his right without renegeing on the commitments which such a system entails. There is no contradiction then, between defining a right in terms of the pragmatic considerations that lead to its recognition, and recognizing that it is a right nonetheless. As we will see, if we overlook that point, we cannot explain most of private law.

One of my critics has claimed that because my approach offers an integral account of both rights and pragmatic considerations, it cannot form an intellectually coherent whole. It must 'disaggregate into a mixture of utilitarian and rights-based

justifications'.¹⁵ This critic may be influenced by modern philosophers, who, as we will see, have based their theories either on promoting 'utility' or on preserving rights. But there is no logical inconsistency. Indeed, 'disaggregation' defies common sense. Surely, the law can care both about getting people what they deserve and about the practical difficulties of doing so. Surely, on account of practical difficulties, the law can recognize and delimit certain rights, which are rights even though they owe their origin to practical considerations.

There is a second reason for being concerned about distributive justice when we consider private law. Private law, by the older approach, largely concerns commutative justice. Aristotle distinguished two kinds of commutative justice. In involuntary transactions, where one person took another's resources against his will, commutative justice required that he give them back or their monetary equivalent. In voluntary transactions—what we would call contracts of exchange—each party willed to give up some of his own resources in return for those of another. Commutative justice required that he do so at a price that enriched neither party at the other's expense. As we will see, these distinctions not only resemble the ones we draw between contract and tort but maybe their linear ancestors.¹⁶ As we will see, the late scholastics grounded the law of unjust enrichment on the same principle: that no one should be enriched at another's expense.¹⁷ If this approach is correct, the basic concepts of private law are rooted in the concept of commutative justice, a concept which cannot be divorced from distributive justice.

Two consequences follow. One—which will be pursued throughout this book—is that one cannot define the rules of contract or tort or unjust enrichment without regard to commutative justice, or in other words, without regard to the effect of these rules on the distribution of resources between the parties. The point of contracts of exchange is to allow the parties to exchange resources so that neither party enriches himself at the other's expense. The point of tort is that a party who has enriched himself at another's expense owes compensation. The point of unjust enrichment law is that no one party should be enriched at another's expense without some good reason. In each case fairness—in the sense of commutative justice—shapes the transaction and its rules. One can no more explain contract, tort or unjust enrichment without regard to commutative justice than one could explain the digestive system without regard to the fact that it digests. Fairness, in the sense of commutative justice, is not a sort of limitation on these bodies of law but belongs to their definition.

The other consequence is that concern for justice in private transactions—largely a matter of commutative justice—cannot be divorced from concern for distributive justice. The relation of the two was explained by Thomas Aquinas. Distributive justice governs 'the order of the whole toward the parts, which concerns the order of that which belongs to the community in relation to each single person'. Commutative justice governs 'the order of one part to another, to which corresponds the order of one private individual to another'.¹⁸ It is not the case, then, that at some point, possibly

¹⁵ Stephen A. Smith, *Contract Theory* (Oxford, 2004), 52 n. 16 (speaking of my work on contract theory but his point is more general).

¹⁷ Chapter 19.

¹⁸ *Summa theologiae* II-II, Q. 61, a. 1.

¹⁶ Chapter 9 I.

long ago, citizens or their ancestors were given a fair share of societal resources, and everything since has depended on their transactions with each other. Instead, we have to view society as an ongoing enterprise, concerned at the social level with ensuring, so far as possible, that each person has a fair share, and in individual transactions, that no one increases his share by depriving another of his resources.

If distributive justice did not matter to private law, we would have to ask why it should matter, in private law, if one person enriches himself by depriving another of his resources. Some theorists do not think it matters at all. Some believe that the point of law is to preserve public order. Others, whose views we will consider in detail, think that the desire to preserve one's own resources matters only because the law can handle the matter more efficiently than people can themselves. People will not buy guns if they are sure the law will protect them. Thus the law can prevent an inefficient overproduction of guns. I'm not sure I understand that explanation. In the first place, some people buy guns not only to protect their own resources but take those of others. If law cured the problem, there would be no crime. Moreover, law and economics theories aside, most people think it is wrong for A to take B's resources, and not simply to avoid an economically inefficient overproduction of guns. But then we must consider why. At the moment, it is enough to say that there must be some reason B should have these resources instead of A which is not purely arbitrary. That is simply another way of saying that there is a system for distributing resources in society which A should respect. It need not work perfectly. Perhaps B cannot put the resources to a better use than A, and in that sense, is less deserving of them. But if the system deviates from the ideal, there should be a pragmatic reason why it must. A must be asked to accept that it is better that B keep his resources than that every A, who thinks he can put them to better use, can redistribute wealth in his own favor at the point of a gun. Perhaps B acquired these resources by chance, or by placing his own greed ahead of the needs of his family. Still, without worse results, it is hard to see how to construct a system that rewards hard work and fortunate investments. If the system is so corrupt that it cannot give A any reason to respect what B considers to be his rights, I would not be unsympathetic to A. Robin Hood would not be a bad man if wealth were as arbitrarily distributed as those who praise him imagine. Absent that degree of corruption, however, it is hard to say how A could rip off B if he had to admit that the end result, if everyone followed his policy, would be that fewer people would have the resources they need, granted all the pragmatic compromises that must be made to secure them.

If I am right, Stephen Smith wrongly objects that by this view of distributive and commutative justice, a transaction could be fair 'only in societies—unlike any we know of—which are already distributively just'.¹⁹ The question is one not only of fairness but of pragmatism.

In the chapters to come, we will argue that commutative justice is one of the key concepts needed to explain private law. While rooted in the Aristotelian tradition, the ideas just described again commend themselves to common sense. Most people think that external things can contribute to living a better life, and most, I believe, think it is

¹⁹ Stephen A. Smith, 'In Defence of Substantive Fairness', 112 *L. Quar. Rev.* 138, 147 (1996); Smith, *Contract Theory*, 355.

possible for people to have more or less than a fair share of them. Most think that it is impracticable to ensure everyone has a truly fair share since there must be incentives to conserve property and to labor, and society cannot reimburse everyone for any random loss. Nevertheless, while the distribution may fall short of the ideal, most people would agree that the law should protect a person's right to his own resources. If the distribution of resources can be improved, it should be done by a social decision, and not by individuals who go about redistributing wealth on their own. Thus the common sense views of most people may be better reflected in the Aristotelian tradition than in the more modern writers they are likely to encounter in school. Is that idea bizarre? And if not, how did we lose track of it?

II. The Break with the Aristotelian Tradition

A. The Jurists

As mentioned earlier, the late scholastics of the 16th and 17th centuries self-consciously reduced Roman law to a coherent system of doctrines and principles by drawing on the ethical theory of Aristotle and Thomas Aquinas. Many of their conclusions were accepted by the founders of the northern natural law school, Grotius and Pufendorf, although it is not clear how much of their original Aristotelian foundations these later writers understood. Many of the late scholastics' conclusions drifted through the late 17th and 18th centuries as their original philosophical foundations were forgotten. What did not happen, among the jurists, was the formation of some new synthesis explaining legal doctrine coherently in terms of one of the new philosophies of the 'Enlightenment'. Instead, jurists went on using concepts such as just price or equitable contract terms which had a meaning in the older philosophical synthesis but were now becoming incoherent.

The break came in the 19th century. Both civil and common lawyers tried to preserve a systematic legal doctrine while purging it of concepts of commutative and distributive justice which they had inherited from an earlier era and which no longer made sense to them. The key concept around which they tried to build private law was will. Will had figured in the earlier Aristotelian theories. According to Aristotle, in involuntary transactions, where one person took another's resources against his will, commutative justice required that he give them back or their monetary equivalent. In voluntary transactions—what we would call contracts of exchange—each party willed to give up some of his own resources in return for those of another. Commutative justice required that he do so at a price that enriched neither party at the other's expense. The innovation, for the 19th century will theorists, was that commutative and distributive justice no longer mattered. Contract simply meant that the law would enforce what the parties willed. Tort meant that one who invaded another's rights against his will had to pay. Property meant the right of the owner to do as he willed with his own.

Since the concept of will figured prominently in the philosophies present in their day—even though will was understood quite differently by utilitarians in England

and Kantians and Hegelians in Germany—it is tempting to imagine that the jurists, again, were borrowing from the philosophers. I think this is true only in a limited sense. The rise of modern philosophy had discredited almost any concept the jurists could build upon except that of will.²⁰ The jurists of the 19th century had little interest in trying to synthesize the philosophers' conceptions of law or will with their own work. That was not a task for which they were trained, and perhaps one in which they were not interested. They distanced themselves from the disputes of the philosophers and clung to the concept of will, chiefly, because, whatever it meant, it seemed to be the only concept that the 19th century philosophers regarded as sound. But that did not mean they took over the concept of will of the philosophers. The philosophers discussed the meaning of the will at length and in different ways. The jurists defined contract, tort and property in terms of will without explaining what the will is or why it matters.²¹

In England and the United States, it is hard to see the influence of any fashionable 19th century philosophical school of thought. Sir Frederick Pollock, who built the most elaborate will theory, explained that jurists should leave alone 'topics which . . . may be philosophical, or ethical, or political, but are distinctly outside the province of jurisprudence'.²² The 'business' of jurists is simply 'to learn and know . . . what rules the State does undertake to enforce and administer, whatever the real or professed reasons for those rules may be'.²³

Similarly, Ranouil observes in her study of the French will theorists that they seem hostile to philosophy, that they never cite Kant, and that, until the end of the 19th century, they never even speak of the autonomy of the will.²⁴ She concludes, nevertheless, that the will theorists must have been using the concept of autonomy of the will 'as Monsieur Jourdan used prose—without perceiving it'.²⁵ It would be more reasonable to conclude that the will theorists were not drawing on the ideas of Kant or any other philosophical, economic or political explanation of why the will was important.

In Germany, Savigny, who was one of the principal architects of the will theories, was also one of the most philosophical of German jurists. He gave an account of law that owed a good deal to Kant and Hegel. Law existed to protect freedom,²⁶ and its source was the *Volksgeist*—the unconscious mind or spirit of a particular people.²⁷ But neither he nor his followers rested their theories on a specifically Kantian or Hegelian conception of will. Indeed, Savigny sharply distinguished the legal concept of will from any philosophical conception: 'We in the area of law are not at all occupied with the speculative difficulties of the concept of freedom. For us, freedom is based

²⁰ Gordley, *Philosophical Origins*, 161–213. ²¹ *ibid.* 214–29.

²² Sir Frederick Pollock, 'The Nature of Jurisprudence Considered in Relation to some Recent Contributions to Legal Science', in Sir Frederick Pollock, *Essays in Jurisprudence and Ethics* (London, 1882), 19–20.

²³ Sir Frederick Pollock, *A First Book of Jurisprudence for Students of the Common Law* (London, 1896), 26–7.

²⁴ Valérie Ranouil, *L'Autonomie de la volonté: naissance et évolution d'un concept* (Paris, 1980), 9, 53–5, 79.

²⁵ *ibid.* 70.

²⁶ Friedrich Carl von Savigny, *System des heutigen Römischen Rechts* 1 (Berlin, 1840–8), 331–2.

²⁷ *ibid.* 1.19; Friedrich Carl von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg, 1840), 8.

simply on the appearance, that is, on the capacity, of making a choice among several alternatives.²⁸

This approach set them up for the critiques of the 20th century. Contract cannot mean just what the parties will, for sometimes they are bound to terms they never considered, and at other times they are not bound to supposedly unfair terms to which they did agree. Tort cannot mean intentionally invading the rights of another, for there must be some other standard, other than the will of the parties or the 'will' of the law, that explains how those rights should be bounded. Property cannot mean that the owner has the right to do what he will with his own since his rights to do so are limited by the effect on his neighbor. And it is hard to explain the law of unjust enrichment in terms of anything the parties willed. Consequently, in the 20th century, among jurists, there has been a revolt against the systems built by the 19th century jurists. But it would be a mistake to think of it as a revolt against 19th century philosophy. The only point at which the 19th century jurists trusted the 19th century philosophers was they thought they could build on the concept of will, and they even thought they could do so without any philosophical commitment as to what the will might be.

B. The Philosophers

Today, however, contemporary jurists are taking on a task the 19th century jurists, perhaps wisely, avoided. They are trying to understand private law in philosophical terms. What is extraordinary is that the terms are those of the philosophers of 19th century. The law and economics movement descends lineally from utilitarianism. Jurists such as Weinrib and Benson are building on the rights-based theories of Kant and Hegel. Jurists such as Stephen Smith think our only alternatives are 'utilitarian' or 'rights based'.²⁹

It would be out of place here to write a general critique of modern philosophy, but something should be said about the assumptions on which these attempts are based. Underlying them all are conceptions of will or choice and why it matters, although these conceptions are different from one other and from that of the Aristotelian tradition. According to one conception, which can be traced to the utilitarians, the task of the law is to see that people's preferences are satisfied to the greatest extent possible. Choices matter because they reveal the parties' preferences. According to the other conception, derived from Kant and Hegel, law is obligatory because it is rooted in human freedom or autonomy. Choices matter because they express freedom or autonomy. In both cases, will or choice is central. As we have seen, the conceptions of these contemporary jurists or the 19th century philosophers should not be confused with those of the 19th century will theorists. The will theorists had little to say about the philosophical meaning of will. They simply adopted a simplistic idea of what the will meant and impressed it into service.

These alternatives to the Aristotelian tradition arose from the crisis through which philosophy passed in the 17th and 18th centuries. Descartes founded modern critical philosophy on a new method in which the only permissible starting points were

²⁸ Savigny, *System*, 3: 102.

²⁹ Stephen A. Smith, *Contract Theory* (Oxford, 2004), 46–8.

matters that could not be doubted, and the only legitimate conclusions were those reached from them by deductive logic. Reason was equated with deductive logic. As we have seen, writers in the Aristotelian tradition thought that moral decisions were made, not by deductive logic, but by a human capacity for rational decision which they called prudence. If they had been asked why they believed there was such a capacity—why they believed some choices were right and others wrong, and that people had the capacity to discern the difference—they would have answered that if one denied these principles, human choice would no longer be meaningful. Therefore, these were first principles. They believed that one established a first principle dialectically: by showing that to deny it led to an absurdity. That was not the idea of the new critical philosophers. They were willing to entertain the possibility that human choice was not meaningful; indeed, that the entire world around them did not exist. The only indubitable starting points they would permit were propositions the denial of which would entail a logical contradiction, such as *cogito ergo sum*, or for the empiricists, immediate sense experience.

Applying the new method, philosophers soon discovered that there was no way to prove deductively that some choices were normatively better than others. John Locke and David Hume concluded that one could only say that the person choosing felt a desire or inclination for something, an inclination that could not be rooted in reason. According to Locke, ‘the philosophers of old did in vain inquire whether the *summum bonum* consisted in riches, or bodily delights, or virtue or contemplation; they might have as reasonably disputed, whether the best relish were to be found in apples, plums or nuts’.³⁰ According to Hume, ‘’Tis not contrary to reason to prefer the destruction of the whole world to the scratching of my finger’.³¹

Hume concluded that normative statements are merely statements about one’s inclinations. One cannot say that these inclinations are better or worse. The new method of doubting whatever cannot be shown by deduction had led exactly where an Aristotelian would have expected: there is no reason to believe that human choice has normative value. For an Aristotelian, the very fact that the method led to that conclusion would show that the method is wrong.

After Hume, it might have seemed that philosophers must either reject modern critical philosophy or stop theorizing about ethics. Instead, some of them tried to construct an ethical theory while agreeing with Hume that one cannot say that some choices are normatively better than others. There were two ways to try to do so. One was to claim that choosing in accord with one’s inclinations or desires is normatively good whatever the objects of one’s choice may be. The other was to claim that choosing according to inclination is not normatively good, and then to find some normative foundation for making a choice other than desire or inclination. Utilitarians such as Jeremy Bentham went the first way. They claimed that what matters normatively is to maximize satisfaction or pleasure, which can, in principle, be measured in units of pleasure and pain called utility. Kant and Hegel went the second way. They claimed that what matters normatively is that a choice be made freely or autonomously. They

³⁰ John Locke, *Essay on Human Understanding* II.xxi.55, in *The Works of John Locke*, 1 (1823), 273.

³¹ David Hume, *A Treatise of Human Nature* (L. A. Selby-Bigge, ed., London, 1888), 416.

defined freedom as choice without regard to the choice-maker's inclinations or purposes.

Now, two centuries later, contemporary jurists are looking in the same two directions. What has changed, I believe, is that few of them are really willing to take seriously the intellectual premises that their philosophical predecessors recognized were crucial to the enterprise in which they were engaged. The founders of utilitarianism believed there were units of 'utility' or pleasure or satisfaction to be maximized. Kant and Hegel believed in freedom as a capacity to choose without regard to one's own inclination or purposes. For the most part, the modern jurists who are their heirs do not regard those concepts as central and perhaps not even as defensible. They fail to see that, without them, one cannot make sense of the traditions on which they attempt to build.

1. Utilitarianism and law and economics

a. Choice

According to Bentham, what matters is satisfaction or pleasure. It can, in principle, be measured in units of pleasure and pain called 'utility'.³² More pleasure is better than less. Bentham claimed that, in general, 'utility is maximized by allowing people to choose for themselves' since 'no man can be so good a judge as the man himself, what gives him pleasure or displeasure'.³³ Hence the importance of will or choice.

One notorious problem with the theory is that to turn pleasure or satisfaction into a normative principle seems to violate our deepest feelings about morality. It is true that pleasure or satisfaction, for Bentham, is not the same as physical gratification. A dedicated scholar or a martyr for a noble cause supposedly finds study or martyrdom more satisfying than their other alternatives or they would do something else instead. Nevertheless, it is strange to think that what ultimately matters is satisfaction, whatever its source, whether it comes from study or serving a noble cause or idleness or drinking or drugs. No one would think the horror of a rape accompanied by torture is lessened to the extent the perpetrator enjoyed himself. Anyone would be appalled to find his child took pleasure in tearing the wings off flies.

John Stuart Mill tried to escape by claiming that pleasures differed not only in quantity but in quality. 'Human beings have faculties more elevated than the animal appetites.' One could 'assign to the pleasures of the intellect, of the feelings and imagination, and of the moral sentiments a much higher value as pleasures than to those of mere sensation'.³⁴ Critics have pointed out that this answer hardly solves the problem. If the activities of higher value are preferable simply because they are more pleasurable, then pleasure still determines the value of an activity. If they are preferable because they are higher, and higher because they engage our more elevated and distinctively human faculties, then we are back in an Aristotelian world in which some ways of living are more worthwhile than others whether or not they happen to be more pleasurable.

³² Jeremy Bentham, *Principles of Morals and Legislation* (J. H. Burns and H. L. A. Hart, eds., London, 1970), I.i-iv. 11-12; IV.i-vi. 38-40.

³³ *ibid.* XIII.iv. 159.

³⁴ John Stuart Mill, *Utilitarianism* (O. Priest, ed., New York, 1957), 11.

Moreover, for Bentham's utilitarianism to work, 'pleasure' or 'satisfaction' must be something that accompanies all choices and for the sake of which all choices are made. But why should one think so? It is true that if one person drinks beer on a hot day, another studies, and a third suffers martyrdom because his convictions require it, all three did what they preferred to do under the circumstances. But why should one think that these choices are made to obtain some single thing called 'pleasure' or 'satisfaction' that accompanies every choice? It is like saying that because people regard what they choose as choice-worthy, their choices are accompanied by 'choice-worthiness', and they choose in order to get as much of it as they can.

Fifty years ago, Paul Samuelson noted that many economists 'have ceased to believe in the existence of any introspective magnitude or quantity of a cardinal, numerical kind'.³⁵ They had also discovered that they did not need traditional utilitarianism to build their descriptive models. To draw supply and demand curves, they merely needed to assume that people do prefer some courses of action to others. One could speak of preferences and preference satisfaction without imagining there is some quantity that people are maximizing when they choose what they prefer.

J. R. Hicks claimed that this approach had liberated economists from philosophical commitments. They no longer needed to be utilitarians.³⁶ That is true. Economists themselves sometimes fail to realize how completely the new approach has emancipated them. Some seem to think that when people make choices, they must be maximizing something, even if it is not utility.³⁷ Under the new approach, however, people need not be maximizing anything at all. Suppose that this morning, in order of preference, I would like to wear my blue, my brown and my green sports jackets. Suppose that this afternoon, I will go to a committee meeting, because it needs to be done; if there were no meeting, I would shop for groceries, because that needs to be done, too; and if neither needed to be done, I would read a book. The new approach, in effect, assigns numbers to each of these possible choices which indicate the order in which I prefer them. Assigning the numbers says nothing about how or why I make these choices. The new approach assumes no more than that people have preferences, which, by the new approach, is merely to assume that people make choices.

To make normative claims, however, one cannot get away with saying so little. Those who make such claims have attached normative value to 'efficiency' or 'wealth maximization', which they define in terms of preference satisfaction. For Pareto, 'efficiency' is improved if one can increase one person's ability to satisfy his preferences without decreasing that of others. To make normative claims for efficiency, one must assume that it is good for people to satisfy more of their preferences. Why should that be?

One possible answer is that satisfaction is good, whatever a person happens to find satisfying. But that answer is really a return to the utilitarian assumptions that economists have rejected. It treats 'satisfaction' as something that accompanies every choice and for the sake of which every choice is made.

³⁵ Paul Anthony Samuelson, *Foundations of Economic Analysis* (Cambridge, Mass. 1976), 91.

³⁶ J.R. Hicks, *Value and Capital* (Oxford, 1939).

³⁷ e.g., Michael Trebilcock, *The Limits of Freedom of Contract* (Cambridge, Mass., 1993), 2–3 ('[E]conomics assumes that individuals . . . attempt to maximize their desired ends (which may be of infinite variety)').

Another possible answer is that it is good for people to get what they prefer as long as what they prefer is good. To say so is to go in the same direction as John Stuart Mill. As before, we must then assume that some choices are better and worse, and that people have some capacity to choose for the better. We will have returned to something like the Aristotelian idea of a normatively good life and capacities or virtues that enable one to live it.

A third possible answer is to claim that it is good for people to satisfy more of their preferences without regard to whether they thereby live a normatively better life or a more pleasurable or satisfying one. Preference satisfaction means that one gets what one chooses, and a person who does so is *ipso facto* better off.

Sometimes economists seem to give that answer. They define a 'preference' as that which a person actually chooses. 'Thus,' Samuelson observed, 'the consumer's market behavior is explained in terms of preferences, which are in turn defined only by behavior. The result can very easily be circular . . .'.³⁸ Circular or not, this procedure is unacceptable for one who claims that preference satisfaction is normatively good. The idea that preference satisfaction is good in itself is hardly a self-evident premise.

Indeed, it contradicts common sense. An example I have used more than once is a hypothetical case I put to seven well-known economists and members of the law and economics movement, one of whom won the Nobel prize. A man whose yacht was sinking radioed his position to the coastguard and was told that, for whatever reason, it could not reach him for six days. He got into a lifeboat with a six-pack of beer, which is all that he had on the yacht to drink. He knew (never mind how) that if he drank one can each day, he would survive. Instead, he drank four cans the first day, two the second, and was found dead on the sixth. Is this efficient? Six economists said yes. The seventh (as it happens, the Nobel prize winner), said that it couldn't happen.

Economists who take this position are making a much more radical claim than Aristotle. He merely said that sometimes we choose rightly. They are saying that *ipso facto* all choices are right.

We should not conclude that economics is a false science or that its conclusions do not have normative value. We should conclude that efficiency or wealth maximization are of normative value precisely to the extent that people practice Aristotelian virtues of prudence, courage, and temperance that the economists never mention.

Amartya Sen is something of an exception. In his seminal work *On Ethics and Economics*, he claimed that 'the distancing of economics from ethics has impoverished welfare economics, and also weakened the basis of a good deal of descriptive and predictive economics'.³⁹ As part of his program for a rapprochement, Sen distinguishes a person's 'well-being' from what makes a person feel happy or what he desires or happens to value. 'Well-being' is truly valuable. We need not suppose that 'whatever

³⁸ Samuelson, *Foundations of Economic Analysis*, 91. Similarly, Leff objects that it is 'definitionally circular' to say 'what people do is good, and its goodness can be determined by what they do'. Arthur Allen Leff, 'Economic Analysis of Law: Some Realism about Nominalism', *Va. L. Rev.* 60 (1974), 451 at 458.

³⁹ Amartya Sen, *On Ethics and Economics* (Oxford, 1987), 78.

a person happens to value [is] valuable (i) unconditionally, and (ii) as intensely as it is valued by the person'.⁴⁰

Well-being is ultimately a matter of valuation, and while happiness and the fulfilment of desire may well be valuable for the person's well-being, they cannot—on their own or even together—adequately reflect the value of well-being. 'Being happy' is not even a valuational activity, and 'desiring' is at best a consequence of valuation. The need for valuation in assessing well-being demands a more direct recognition.⁴¹

It would seem, then, that there is a life to be lived which is truly of value, and an ability to see what that life entails, although we can be mistaken. It is not an accident that Sen began his book by quoting Aristotle to the effect that there is an 'end of man' which politics must serve, and that it serves that end by making use of 'the rest of the sciences,' including economics'.⁴² He is closer to the Aristotelian tradition than the small circle of modern ideas which he wishes to escape.

b. Distributive and commutative justice

For a utilitarian, the point of acquiring things is not to live a good life but to obtain pleasure or satisfaction. Consequently, the optimal distribution of resources is the one that will maximize pleasure. Some utilitarians said that ideally, this distribution would be equal since spending an extra dollar presumably gives less satisfaction to a rich man than a poor one. Others said that some pleasures, such as the appreciation of art or music, are of a higher nature and therefore more satisfying than others such as drinking beer. Those capable of the higher pleasures should have more resources.

As before, however, the test of a utilitarian theory is not that, when a sufficient number of background conditions are satisfied, it can produce results which non-utilitarians have regarded as fair for thousands of years. One who believed the theory only then, and would reject it otherwise, is really not committed to the theory. And, indeed, if we change the background conditions, the theory produces results that few would regard as normatively sound. Few would think a person who takes intense pleasure in watching movies about chainsaw massacres, or in defacing or destroying works of art, or in causing pain to others, is, for that very reason, entitled to more resources than another person who takes moderate pleasure in good music or art or in relieving pain.

In any event, few people who subscribe to theories based on preference satisfaction still believe that there is something called satisfaction that accompanies all objects of choice, and that choices are made to obtain as much of it as possible. They do not claim one can compare the importance of one individual's preferences with those of another. Consequently, most of them have stopped making normative claims as to how resources should be initially distributed. The claim instead is that, given any initial distribution, one can explain why, normatively, one person cannot take another's things, and that a person who is willing to pay the most for them should get them. Only then can we arrive at a state in which it is impossible to make anyone better off, in terms of his own preferences, without making someone else worse off. Such a state is said to be 'Pareto efficient'.

⁴⁰ *ibid.* 42.

⁴¹ *ibid.* 46.

⁴² *ibid.* 3.

To illustrate, suppose Ann has something she does not want for which Bob will pay \$65 and Cara only \$60. If Cara were to get it, it would still be possible to move to a state in which she and Bob will both be better off: she could resell to Bob. Only if Bob buys the object in question is a further improvement no longer possible.

This argument assumes that the mere fact that Bob has certain preferences doesn't make anyone else worse off. It may. As Michael Trebilcock and Richard Posner have noted, his preferences may drive up the price of something that others want.⁴³ In the example just given, if Ann sells directly to Bob, Cara will be worse off than if Bob hadn't wanted the object in question since she could then have bought it for \$60. Moreover, the mere fact that a person gratifies his own preferences may distress others.⁴⁴ Even if Cara didn't want the object herself, she might not want Bob to have it because she hates or envies Bob or because the object is a rooster that Bob wants for cockfighting, which she thinks is immoral.

These problems arise because the objective is to maximize preference satisfaction. From an Aristotelian standpoint, the objective is different. It is to enable each person to have the resources he needs to live a good life. As already explained, ideally, each person should have a share of purchasing power that reflects what he needs for such a life. To the extent that this ideal is realized, and that each person chooses rightly how to spend his share, goods and services move to their normatively best uses. That is so even though the particular goods and services each person can buy are affected by the choices of others.⁴⁵

Moreover, from an Aristotelian standpoint, not all preferences should be gratified. It is quite possible that if Cara hates or envies Bob, her preference that he suffer, or not prosper, is wrong. So may be Bob's preference for cockfighting. If so, his preference harms himself because he leads a less worthwhile life. Cara should be distressed if she cares about Bob. The difficulty is resolved to the extent that Bob and Cara prefer what they should. Because virtue is its own reward it is also what an economist might call a free lunch.

A further difficulty is that Bob may discover he really is worse off paying \$65 for the object. Benson and Trebilcock have called this problem the 'Paretian dilemma': a contract only makes both parties better off *ex ante*, and nothing in the theory explains why that is better than to make them better off *ex post*.⁴⁶ From an Aristotelian standpoint, one could ask whether the risk Bob runs of being worse off *ex post* is one which, for the reasons described earlier, a person should be allowed to take, and whether Bob was prudent to do so. To ask those questions, one needs to talk about prudence and distributive justice. As Guido Calabresi has noted, as long as there are *ex post* losers, 'we

⁴³ Trebilcock, *Freedom of Contract*, 58; Richard Posner, 'Utilitarianism, Economics and Legal Theory', *J. Leg. Stud.* 9 (1979), 103 at 114. A similar point is made by Dworkin, Ronald Dworkin, 'What is Equality? Part 2: Equality of Resources', *Phil. & Pub. Affairs* 10 (1981), 283 at 307–8.

⁴⁴ Trebilcock, *Freedom of Contract*, 62–3, 243. See Guido Calabresi, 'The Pointlessness of Pareto: Carrying Coase Further', *Yale L.J.* 100 (1991), 1211, 1216–17.

⁴⁵ Consequently, a single rare stamp should command a high price if several people wanted it, although Trebilcock seems to think such a price would violate the theory of justice I am defending. Trebilcock, *Freedom of Contract*, 90.

⁴⁶ Peter Benson, 'The Idea of a Public Basis of Justification for Contract', *Osgoode Hall L.J.* 33 (1995), 273 at 284–87; Trebilcock, *Freedom of Contract*, 244.

will not be achieving an improvement according to the strict Pareto standard . . . [W]e could say that we do not *care* about these losers, . . . but that lack of care implies a distributional theory that has all too conveniently been kept out of sight.⁴⁷

A still more fundamental objection to attaching normative significance to Pareto efficiency is that the normative claim is circular. The claim is that it is normatively better that goods go to whomever will pay the most for them. Supposedly, the answer is that unless they are sold to that person, it will still be possible for a further transaction to make everyone better off and no one worse off. That transaction is possible, however, only if the rule of law is in force that a person can sell what he owns to whomever will pay most for it. To make a normative claim, one must not only assume this rule is in force but that it should be. But that is, in effect, to assume that goods should go to whomever will pay the most for them—which was the conclusion to be proven.

To illustrate, suppose we are in a society in which nearly everything is owned by a small group who live in decadence while the rest go hungry. Suppose Bob is one of the rich and will pay Ann \$65 for a side of beef for which Cara, who is starving, cannot pay more than \$1. Why would it be an ‘improvement’ for Bob to have it? Many people might think it a definite improvement if someone like Robin Hood stole the meat and gave it to Cara. If Bob then offered to buy it back from her for \$65, many people might think it a still further improvement if someone stole the \$65 from Bob as well. These ‘improvements’, of course, can only be made by violating the rule that Ann, who owns the beef, is free to sell it to Bob if he offers to pay more than anyone else. If we assume that rule will be followed, then, even if Cara owned the beef, both Cara and Bob will prefer for Bob to acquire it at a price that Cara will accept. But to conclude that it is normatively better for Bob to end up with the beef, we need to assume, not only that this rule will be followed but that, normatively, it should be. That is to assume the conclusion: people who are willing to pay the most for things ought to have them.

Moreover, the proposition assumed is far from obvious. As we have seen, in the Aristotelian tradition, that proposition about commutative justice rests on certain premises about distributive justice. The distribution of wealth may be imperfect, but it must still be worth protecting if one is to insist that people do not steal and pay for what they take. As will be described later, writers in the Aristotelian tradition claimed that in extreme circumstances, when a person was starving, the normal rules of commutative justice did not apply, and he had the right to take what he needed to live without the owner’s permission. In time of war or famine most governments ration goods rather than leave their allocation to the market. Economists might object that necessity, war, famine and the extremely unfair distribution of wealth are aberrational circumstances to which their theory does not apply. But whether a situation counts as aberrational depends upon one’s theory of distributive justice. An economist who claims to be agnostic about the justice of the initial distribution of resources cannot claim that a move to Pareto efficiency is an improvement.

⁴⁷ Guido Calabresi, ‘The New Economic Analysis of Law: Scholarship, Sophistry or Self-Indulgence?’ *Proceedings of the British Academy* 1982 68 (1983), 85 at 96.

Some writers make normative claims for what is called ‘Kaldor–Hicks’ efficiency or for ‘wealth maximization’, which Richard Posner admits is formally identical.⁴⁸ Goods are supposed to go to whomever would pay the most for them whether he actually has to pay or not. Since those who lose out are not compensated, the usual objection is that one cannot assume that the change is normatively for the better.⁴⁹ Suppose, Ronald Dworkin argues, that Derek’s book is worth \$2 to him and \$3 to Amartya. Wealth would be maximized if somebody (an imaginary tyrant) forcibly transferred the book to Amartya, who then does not need to pay for it. But there is no reason to think the transfer is an improvement unless we assume, gratuitously, that the book will provide more satisfaction to Amartya than to Derek.⁵⁰

Posner answered Dworkin by saying that the figures chosen are deceptive. The transfer ‘probably will increase the amount of happiness’, meaning satisfaction, if the book were ‘worth \$3000 to Amartya and \$2 to Derek’.⁵¹ He also said that wealth maximization is conducive, not only to satisfaction, but to freedom, self-expression and other uncontroversial goods.⁵² That answer raises one of the graver problems with utilitarianism: we have to imagine that satisfaction or happiness is a quantity or ‘amount’. In addition, it seems, we have to imagine that there are amounts of freedom and self-expression. Then we must assume that these amounts are maximized (at least probably) when goods and services go to a person who will pay much more for them than others. And that assumption supposedly does not depend on any assumptions about the nature of his preferences or about how purchasing power is distributed.

In one essay, however, Posner defended wealth maximization, not on these grounds, but by claiming the results will be consistent with our moral intuitions. When wealth is maximized, people must benefit others to secure benefits for themselves, they will have ‘economic liberty’, and they are likely to practice ‘traditional (“Calvinist” or “Protestant”) virtues’.⁵³ According to Posner, the principle of wealth maximization also suggests that resources should be initially distributed in a way that answers to our moral intuitions. People should have the right to their own labor or to determine their own sex partners. Wealth will be maximized if they do by avoiding the transactions costs people would incur buying these rights back if they initially belonged to others.⁵⁴ Posner acknowledges that very poor people will not be entitled to support, and that those whose ‘net social product is negative’ through no fault of their own may starve. That ‘grates on modern sensibilities’ yet he ‘see[s] no escape from it’ that is consistent with any major modern ethical theory.⁵⁵

With that line of argument, we have come full circle. Centuries ago, philosophers decided that our moral intuitions should not be the test of what is normatively good.

⁴⁸ Richard A. Posner, ‘The Value of Wealth: A Comment on Dworkin and Kronman’, *J. Leg. Stud.* 9 (1980), 243 at 244.

⁴⁹ Calabresi, ‘The New Economic Analysis’, 89 (‘who ever believed that wealth maximization without regard to its distribution could qualify as the goal of law in a just society?’); Hugh Collins, ‘Distributive Justice through Contracts’, *Current Legal Prob.* 45 (1992), 49 at 51 (‘what is important is the ability of each individual to pursue a meaningful life, and the fulfilment of that aim involve some sacrifice of collective prosperity’).

⁵⁰ Ronald M. Dworkin, ‘Is Wealth a Value?’ *J. Leg. Stud.* 9 (1980), 191 at 197, 199.

⁵¹ Posner, ‘The Value of Wealth’, 245.

⁵² *ibid.* 344.

⁵³ Posner, ‘Utilitarianism, Economics and Legal Theory’, 122–4.

⁵⁴ *ibid.* 126.

⁵⁵ *ibid.* 128.

That presumption started them down the path to utilitarianism, and then to efficiency and wealth maximization. In his fidelity to that tradition, Posner does not build his theory on our intuition that some preferences are normatively better than others. Yet in the end he wants our moral intuitions to vindicate the enterprise. Moreover, it seems that the point of the enterprise is to find amoral reasons, such as minimizing transactions costs, for conclusions that correspond to certain moral intuitions, for example, that we should not rape or enslave others, and that we should live by some traditional but selectively chosen platitudes. Why, one wonders, do we need amoral reasons for trusting our moral intuitions if, in the end, we have to trust them anyway? And if we are supposed to trust them, why should we ignore them, for example, by letting a person starve, when we cannot find an amoral reason in support? If this is journey's end, we ought to reconsider why we embarked on the journey.

My conclusion, again, is not that economics is false science or that its conclusions have no normative significance. On the contrary, its conclusions are valid provided the members of society actually practice virtues of prudence, temperance, fortitude and justice that economists never discuss.

2. *The Kantian and Hegelian tradition*

a. Choice

The other approach, which traces back to Kant and Hegel, values choice because it values autonomy or freedom. In one respect, the starting point is like that of Bentham. Kant and Hegel described one's choices as based on desire or inclination. According to Kant, to pursue happiness (*Glückseligkeit*) or act on the principle of self-love (*Selbstliebe*) means to seek pleasure (*Lust*) and avoid displeasure (*Unlust*).⁵⁶ As with Bentham, the terms 'pleasure' and 'pain' are not used to describe physical sensations. Supposedly, a person can perform even the most altruistic acts out of desire or inclination. According to Kant, some people are so constituted that 'without any other motive of vanity or self-interest, they find a pleasure in spreading joy around them, and can take delight in the satisfaction of others . . .'.⁵⁷ They are nevertheless acting out of a desire to get what they happen to want.

In contrast to Bentham, however, Kant and Hegel denied that choices prompted by desire or inclinations are morally significant. A person who follows his desires or inclinations is not acting morally. Indeed, he is not acting freely because his choice depends on something he does not choose: namely, what his desires and inclinations happen to be.⁵⁸ They embarked on what an Aristotelian would regard as a doomed enterprise: to explain how a choice can be free and morally significant without regard to the value of what one seeks to have or to do by choosing.

This enterprise required them to define 'freedom' in an odd way. To be free, to most people, means to decide for oneself such matters as for whom to vote, whether to marry, whether to buy a new car, or whether to study law rather than medicine. For

⁵⁶ Immanuel Kant, *Kritik der praktischen Vernunft*, 129, in Immanuel Kant, *Werke in sechs Bänden* 4 (W. Weischedel, ed., Darmstadt, 1956), 107.

⁵⁷ Immanuel Kant, *Grundlegung zur Metaphysik der Sitten* 24, in 4 *Werke* 7.

⁵⁸ Kant, *Grundlegung der Metaphysik der Sitten*, 79–80.

Kant and Hegel, these choices are not free if they are made in order to have the president or spouse or car or career that one wants. Although people do make such choices to have what they want, freedom means that a person acts, not because he wants something, but because he is a free and rational being. To be free, an action must have its source in one's self rather than one's inclinations.⁵⁹

The question thus becomes: what would a free and rational being choose, not because it is good for himself or others, but simply because he is free and rational? Kant said that a rational being would choose according to the ultimate principle of rationality: the law of non-contradiction. Such a choice is free because it has its source in one's rational nature and not in one's inclinations. Since the law of non-contradiction means that contradictory propositions cannot both be true, Kant concluded that a rational being would act according to a maxim that at the same time he could will to be universal law.⁶⁰ Otherwise, he would be willing a contradiction.

Few people today, even those committed to the Kantian tradition, really think it is possible to get from the law of non-contradiction to rules of conduct. Most would credit Kant with a basic moral insight: that one should not expect other people to abide by rules which one will not abide by oneself simply because they are not to one's own advantage. But that is a different proposition than claiming that one can base morality or law on deductions from the law of non-contradiction. It is a different proposition than claiming that an action is moral precisely because it does not reflect what one wishes to accomplish but rather one's allegiance to universal law.

Hegel realized that some other way had to be found to get from the concept of a free and rational being to institutions such as promise or contract. To do so, he invented a strange method which was neither deductive logic nor a functional analysis but seems to have the properties of both. According to Hegel, the free will, in order to be self-determining, must embody itself in something that is other than the will itself and nevertheless is not determined by inclination. Therefore, a person must have the capacity to own 'things', 'things' being whatever is not free.⁶¹ But the will does not achieve its full determination merely by owning things since it is then related merely to that which is other than itself. It becomes fully actualized only through relation to another will, and does so through contract where the will of one party, with respect to something owned, becomes identical to the will of the other, so that ownership is transferred.⁶²

My problem is that I don't see why this explanation counts as an explanation. Like deductive logic, this method tries to show there is a necessary relationship among concepts: the will is free, an external thing is not free and therefore other than the will. But it is not deductive logic of the sort a mathematician uses. Like a functional analysis, it concerns how a free being would solve some sort of a problem: such a being needs to be actualized or determined or embodied. But it is not a functional analysis. Nothing is said about why a free being encounters such a problem or the constraints under which he must solve it. If the explanation is neither logical nor functional, it is hard to see what it explains.

⁵⁹ Kant, *Grundlegung der Metaphysik der Sitten*, 79–80.

⁶⁰ *ibid.* 51.

⁶¹ Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts* (G. Lasson, ed., Leipzig, 1911), §§ 41–6.

⁶² *ibid.*, §§ 71–5.

Few legal theorists today are Hegelians. Peter Benson and Alan Brudner are notable exceptions.⁶³ It is to their credit that they see clearly what Hegel saw: that if one wishes to get from the idea of a free and rational being to law, one cannot do so as Kant did, by way of the categorical imperative. One cannot do so at all unless Hegel's method is valid. If it is not, then the entire Kantian–Hegelian enterprise was impossible from the start.

Most contemporary theorists who write in the Kantian tradition are no longer engaged in this enterprise. They do not try to show that a free and rational being would regard certain rules as binding without regard to any purpose that such a being wants to pursue. They are Kantians only in the sense that they place freedom or reason at the apex of their theories. But then, how is one to get from such empty concepts to any definite conclusions about law? The difficulties are illustrated by the work of Charles Fried and Ernest Weinrib.

Fried places freedom at the apex. 'In order that I be as free as possible, that my will have the greatest possible range consistent with the similar will of others, it is necessary that there be a way in which I can commit myself.'⁶⁴ But as Benson notes, to think of freedom as a range of choice which should be the largest possible is to imagine that a quantity of freedom can be larger or smaller.⁶⁵ But what would make one range of choices larger or smaller than another?⁶⁶ It cannot be the number of alternatives among which a person might choose, whether he wants them or not.⁶⁷ It cannot be the extent to which a person can choose what he wants since, then, the scope of each person's freedom would depend on the extent of his desires.

In contrast, although Weinrib speaks of freedom, he places rationality or coherence at the apex of his theory. He tries to show that there is a rational structure immanent in law as we know it. This structure, he believes, is captured by the Aristotelian concept of commutative (or corrective) justice. For example, a contract of exchange is a single transaction in which each party transfers something equivalent in value to what he receives.⁶⁸ While his conclusion sounds Aristotelian, Weinrib claims that his approach is Kantian because it values rationality without regard to the purposes of the parties or society.⁶⁹ He links his position to Kant's by pointing out that for Kant, a free choice is one made with regard to its rational form but not with regard to any particular purpose.⁷⁰

⁶³ Peter Benson, 'Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory', *Cardozo L. Rev.* 10 (1989), 1077; Alan Brudner, 'Reconstructing Contracts', *Toronto L.J.* 43 (1993), 1.

⁶⁴ Charles Fried, *Contract as Promise* (Cambridge, Mass., 1981), 13. As Benson notes, in doing so, he breaks with Kant. Kant wanted to conceive of duty, not in terms of purpose, but 'in complete abstraction from our wants and needs'. Benson, 'Abstract Right', 1109. ⁶⁵ Benson, 'Abstract Right', 1109.

⁶⁶ As Johnson notes in his criticism of Fried, 'individual autonomy can be maximized and distributed in many different ways . . .'. Conrad D. Johnson, 'The Idea of Autonomy and the Foundations of Contractual Liberty', *Law and Philosophy* 2 (1983), 271 at 283.

⁶⁷ As noted by F. H. Buckley, 'Paradox Lost', 72 *Minn. L. Rev.* (1988), 775 at 816, 824; Trebilcock, *Freedom of Contract*, 165.

⁶⁸ Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass., 1995), 73, 83.

⁶⁹ *ibid.* 212–13.

⁷⁰ *ibid.* 83, 90, 97; Ernest J. Weinrib, 'Law as a Kantian Idea of Reason', *Colum. L. Rev.* 87 (1987) 472 at 483; Ernest J. Weinrib, 'The Jurisprudence of Legal Formalism', *Harv. J. of Law & Pub. Policy* 16 (1993), 583 at 590.

Nevertheless, his real reason for wanting to abstract from purpose seems to be that, otherwise, private law as we know it would not be coherent. That is what his arguments against a purposive account are designed to prove. Unlike Kant, he does not try to show that any free and rational being must respect the rules of commutative justice.⁷¹

Consequently, the question that Ken Kress and others have asked Weinrib is: why, then, does coherence matter?⁷² His answer to Kress was that any justification of anything must be coherent.⁷³ That is true, but one cannot ask people to obey rules or a society to enforce them merely because they are coherent. It is perfectly coherent, from a certain point of view, to drive at 60 miles per hour on a freeway regardless of curves, the presence of other vehicles, or whether one will go off a cliff. To be sensible as a guide for action, coherence must enable one coherently to achieve what is worth achieving. Moreover, even if coherence were a value in itself, Weinrib doesn't claim the rules of law as we know them are the only coherent ones possible.

The problem here is like the one encountered by contemporary theories of preference satisfaction. Once one rejects the original utilitarian claim that choices are made for the sake of pleasure or satisfaction, 'preference satisfaction' means little more than 'choosing'. Similarly, once one rejects the Kantian and Hegelian claim that a free and rational being would be bound by certain rules without regard to his purposes, 'freedom' and 'rationality' mean little more than 'choosing' and 'thinking coherently'. While those ideas might figure in a theory of law, one cannot build a theory on them alone.

b. Distributive and commutative justice

As noted earlier, the starting point for Kant and Hegel was in one way like that of the utilitarians. They agreed that one cannot say that the purposes that people pursue are better or worse. All one can say is that people seek what they desire. Kant called the ability to satisfy one's desires without interference 'external freedom'. He contrasted it sharply with 'internal freedom', which meant choosing without regard to what one desired.⁷⁴

For Kant, as for the utilitarians, the satisfaction of one person's desires often means that those of another person cannot be satisfied. Given his principles, he had to find a normative solution that did not depend on the importance of the desires themselves. The importance of desires could not depend on the normative value of what is desired without returning to the Aristotelian idea that some purposes are normatively of greater value than others. It could not depend on the pleasure or satisfaction of gratifying them because, as we have seen, Kant did not ascribe normative significance to the gratification of a desire.

⁷¹ As noted by Stephen R. Perry, 'Professor Weinrib's Formalism: The Not-so-empty Sepulchre', *Harv. J. of Law & Pub. Policy* 16 (1993), 597 at 603.

⁷² Ken Kress, 'Coherence and Formalism', *Harv. J. of L. & Pub. Policy* 16 (1993), 639 at 682; Luidger Röckrath, 'Umverteilung durch Privatrecht?' *Archiv für Rechts- und Sozialphilosophie* 83 (1997), 506 at 513.

⁷³ Ernest J. Weinrib, 'Formalism and Practical Reason, or How to Avoid Seeing Ghosts in the Empty Sepulchre', *Harv. J. of L. & Pub. Policy* 16 (1993), 683 at 695.

⁷⁴ Kant, *Metaphysik der Sitten*, 318.

The answer, Kant claimed, is that each person should act so that his freedom can coexist with every other person's freedom according to a universal law.⁷⁵ The freedom he is speaking about here is 'external freedom': gratifying one's desires without impediment. The 'universal law', by Kant's principles, cannot depend on the importance of the desires gratified. Therefore, such a law must assign resources to people without regard to the importance of their desires, and then allow each to gratify his own desires only from his own resources.

Kant tried to derive rules for assigning resources from the idea of the will itself. He thought he could show that one had a right to one's body, to one's labor and to appropriate anything that was not previously owned by someone else. People could alter these entitlements by consent, through exchange, gift or inheritance, but not without consent through force or fraud.

The attempt is not convincing. For example, according to Kant, the will would pointlessly lose some of its freedom if a person could not appropriate something that no one else owned or was using. Kant concluded that each person invariably has an unlimited right to do so. But the argument proves, at most, that the prior possessor should have some right to appropriate such a thing under some circumstances.⁷⁶ According to Kant, I have exclusive rights over my body, my labor and the exploitation of my own abilities because otherwise I would be treated as a thing rather than a person.⁷⁷ But unless a person is completely deprived of all external freedom, why is he a 'thing' rather than a person whose entitlements are minimal?

Hegel realized that more was necessary. As described earlier, he said that property exists because the free will, in order to be self-determining, must embody itself in something that is other than the will itself. Slavery rose and fell, he thought, because of some ultimately self-frustrating effort of the will to determine itself in relation to something that must be conceived as a thing and yet is not a thing.⁷⁸ As noted earlier, my problem is that while these arguments claim to be deductions, they are not deductive, and while they describe the will in terms of purposes, they are not functional in any ordinary sense.

With the exception of Peter Benson and Alan Brudner, few people who write in the Kantian and Hegelian tradition today try to get from the concept of will to rules for assigning resources. One reason is that they doubt it is possible to do so. But another is that, if the rules are derived in this way, people can have very different amounts of resources for reasons that seem arbitrary. People may have more than others if they are lucky enough to inherit more or to be the first to appropriate a gold mine, a valley or possibly a continent. John Rawls thinks it objectionable even to allow people to become wealthier because they have superior abilities since their superiority is a matter of chance.⁷⁹ Admittedly, any normative theory of the distribution of resources must recognize that, as a practical matter, chance is going to affect the distribution. In Kant's theory, however, the chance events are not random deviations from the ideal. They are the very operation of the rules that are said to assign resources justly.

⁷⁵ *ibid.* 337. ⁷⁶ *ibid.* 354. ⁷⁷ *ibid.* 345–6.

⁷⁸ Hegel, *Grundlinien der Philosophie des Rechts*, §§ 57, 356.

⁷⁹ John Rawls, *A Theory of Justice* (Cambridge, Mass., 1971), 101–2.

We cannot escape from these difficulties unless we recognize that the purposes people pursue are normatively important and that, in relation to these purposes, one person may have more and another less than he should. Ernest Weinrib, who writes in the Kantian tradition, agrees that a theory of distributive justice must take the well-being of people into account.⁸⁰ But it is hard to see how to take account of well-being without considering the importance of the purposes people pursue, and then we have left the Kantian and Hegelian tradition behind. The difficulties are illustrated by the theory of John Rawls which Weinrib believes to be compatible with his own ideas.⁸¹

According to Rawls, ideally, each person should have an equal share of resources. The reason is that people would agree on this principle if we imagine them deciding how to distribute resources without knowing the role they will occupy in society or the particular purposes they will choose to pursue. According to Rawls, if a person does not yet know whether he will be A pursuing A's purposes or B pursuing B's, he will want them each to have an equal share. He will not give B a greater share at A's expense lest he turn out to be A.⁸²

The conclusion sounds like the principle of distributive justice that Aristotle said would be favored in a democracy. For Aristotle, however, the point of distributing resources is that people can use them rightly. The reason for distributing them equally is that in a democracy, as distinguished from an aristocracy, a greater capacity to make the right choices does not entitle a person to make more choices. When differences in capacity are set aside, each citizen counts merely as a person who needs resources to live well. He receives the same power to obtain them as anyone else.

In contrast, for Rawls, the distribution cannot proceed on the assumption that there are normatively better choices. The criterion is whether the distributor would equally prefer to be any of the persons to whom he has distributed resources, whatever the goals of each may be. That is really a criterion of preference satisfaction: what matters is what sort of life the distributor would prefer to have. But then, what is the criterion for preferring one life to another?

Suppose, first, that the distributor actually knew what goals A and B would pursue with their resources. He would have to distribute resources so that he would equally prefer to be A or to be B without passing a normative judgment on their goals. But then he would implicitly apply some standard of what makes a life preferable that does not call for a normative judgment. Rawls would not want that standard to be satisfaction, pleasure or something similar. If that were the standard, we would be back to a form of utilitarianism. Like Bentham, we would then have to imagine satisfaction or pleasure as a homogeneous something which people obtain in varying but comparable quantities whatever goals they pursue. Moreover, if we wanted A and B to be equally satisfied, we would violate both the spirit of Rawls's project and our common sense notions of justice. The spoiled and arrogant person who can scarcely be made happy with a kingdom should have more than a kingdom just because he is so hard to please.

Suppose, then, that the distributor is not allowed to know what A's and B's goals will actually be. He might then give them an equal share of purchasing power because

⁸⁰ Weinrib, 'Formalism and Practical Reason', 684, 686.

⁸¹ *ibid.* 688–90.

⁸² Rawls, *Theory of Justice*, 12, 18–19, 136–7.

there is an equal chance that A's life will be as preferable as B's. That procedure merely dodges the question just raised. What does it mean for two lives to be equally preferable? It means nothing unless there is some standard by which two lives can be compared. This standard cannot depend on a normative judgment of what goals are worth pursuing. As before, all that seems to be left is some notion of satisfaction or pleasure. But then again we are back to a form of utilitarianism with all its problems. Again, in principle, A should have more resources than B if they would make his life equally satisfying. That seems unfair. Strangest of all, if our objective is make A's and B's life equally preferable, why is the distributor not allowed to know what their goals are?

IV. Conclusion

As noted earlier, William James, without meaning to be complimentary, once called scholasticism 'common sense made pedantic'. The basic principles on which the late scholastics explained private law sound like matters of common sense even centuries later. While there is no one right way to live one's life, there are better and worse ways to live it, and each person has some capacity to discern the better from the worse. External things can contribute to living a better life, and of these it is possible to have more or less than a fair share. While it is impracticable to secure an ideally fair share for each citizen, the distribution of resources should be improved, when feasible, by social decisions, and it should be protected against those who deprive others of the share they currently possess. I think anyone who had not been educated out of these positions by the work of modern philosophers would accept them as common sense. And once one does accept them, one is speaking of 'prudence', 'distributive justice', and 'commutative justice' whether one uses that terminology or not.

Much more, admittedly, needs to be explained. As said earlier, while Aristotelian philosophy was grounded in common sense, it was linked to a larger metaphysical view of the world. Though it may appeal to our common sense, we would like to know how that matches the common sense of other cultures. Still, if what are ultimately Aristotelian concepts explain our own law, which is rapidly becoming the law of the world, we should ask why these concepts work so well. If they do, anthropologists and metaphysicians should consider why.