

ON LIBERTARIAN JURISPRUDENCE

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Living as we are today in a world that tacitly assumes the omni-competent state, we are somewhat in the position of fish struggling through a sea of Jello, encumbered by but seldom noticing those social institutions that permeate our lives and form the cultural matrix in which we move. It is the aim of this necessarily brief analysis to direct the reader's attention generally toward that institution, law, which more than any other has been employed to shackle us, and by examining the particular areas of criminal and commercial law, to suggest an attitude and approach to the law which may in a happier future help to make of it an instrument of liberation.

I could not describe here — even if I knew — what precise structure a Libertarian society will have. Whether our present governmental institutions will undergo some fundamental and far-reaching reformation, or whether the advent of an anarchic millennium will smash this sorry scheme of things entire, is beyond my ability to predict. Nor, perhaps, will it finally matter. Differences of degree, pushed far enough, become differences of kind, and in a more rational future, free men may will look back upon those exquisite doctrinal disputes that now divide us and wonder what all the fuss was about. But I do know this — that when a more rational future is achieved, then will law be needed, for neither a Libertarian nor any other kind of society can endure without it.

THE PROPENSITY FOR ERROR

This need arises out of the fact that human beings are neither omniscient nor omnipotent. They are capable of error, and no matter what vast changes the future may bring, we can be confident that people will continue to make vague contracts, go bankrupt, smash up their vehicles, and overestimate their capacity for liquor. It is this propensity for error, and more specifically the fact that something must usually be done about the social consequences of such error, that makes law necessary. The blood feud, the wergeld, private vengeance

— these practices that we associate with primitive societies — can serve to some degree to check the more obvious forms of criminal aggression, but only an integrated legal system concerned at least as much with mistake as with malice can hope to lend that stability to men's dealings with each other that is the prerequisite for a commercial civilization.

Jurisprudence in the generic sense, the philosophy of law in the abstract, explains and justifies a legal system in terms of the immanent moral values of the society in which it functions. A Libertarian jurisprudence, then, is primarily concerned with the fundamental value that underlies a Libertarian society — the transcendent sanctity of the individual and his rights. It is the purpose of a Libertarian legal system to protect rights, and every particular law must in the first instance be weighed according to this criterion.

“NO PERSON SHALL ...”

In the most general sense, there is but one way to violate a man's rights — by involving him, directly or indirectly, in some form of social interaction against his will. Whether this violation is deliberate and malicious (the thug who holds you up at gunpoint), negligent (the careless driver who collides with your car), or the result of an error of judgment (the banker who unwisely invests your funds), the principle remains the same — the function of law is to prevent or to rectify any violation of rights. Let us examine this principle and a few of its corollaries as they apply to crime and to trade.

Since no man can have an unchosen obligation toward another, the criminal law must be directed to the prohibition of acts that would violate rights. It is essentially negative, commanding “thou shalt not ...”. For every rule of the criminal law, there must be a corresponding right whose protection is the function of the rule. Since in a Libertarian society all men are held to be equally endowed with rights, and since the law is concerned with the protection of all rights, it must be universal in scope, it must read in effect “No person shall ...”. If the acts forbidden are not clearly spelled out, however, no one could hope to go about his business secure from the danger of committing crime, as later determined by a capricious exegesis of a fuzzy law. The law must be knowable with certainty. Moreover, the law must be knowable before a man acts, and an act that was lawful when done must not later subject the actor to a charge of crime.

In summary, the criminal law of a Libertarian society is (1) right-related, (2) prohibitory in form and effect, (3) universal in its application, (4) certain in its content, and (5) prospective in effect. The reader's response to this analysis might well be “How obvious!” Let us hope that the day will come when this reaction is universal, but let us also note that it is the ignoring of these criteria that has helped to impose the yoke of tyranny upon millions of human beings throughout the world.

There are subtleties unmentioned in this overview of the criminal law, subtleties requiring volumes of careful reasoning. Malice, for example, the *mens rea* of legal terminology, is a vital consideration, since, in Holmes' cogent phrase, “even a dog can distinguish between being stumbled over and being kicked”, and it has ever been a powerful defense to a charge of crime that the act complained of was done without malice. Moreover, there is the question of what consequences the law should visit upon the criminal. Mere

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FOR LIFE, LIBERTY AND PROPERTY



restitution, appropriate to non-criminal violations of right, appears absurd and destructive of the ends of law, since a confirmed thief, for example, need only go unapprehended once in order to show a “profit” from his crimes (the laws of economics apply even to criminal activities). Such issues as these remain topics of debate among Libertarians, but their deeper consideration here would take us beyond purely jurisprudential considerations into the realms of legal procedure and penology.

PERFECT JUSTICE IS IMPOSSIBLE

Being primarily concerned with wilful and malicious violations of rights, the criminal law is conceptually simpler than the civil law. The latter is concerned with the more complex tasks of restitution for non-criminal wrongs and the fixing or apportioning of the incidence of harm when restitution is impossible. Consider the famous hypothetical case which, if the metaphor can be forgiven, Libertarians have ridden into the ground — the stolen horse, bought in good faith by B, who did not know that it was stolen. A, the original owner and victim of the horse thief, sees it in B’s possession and naturally enough demands the return of “his” property. B, an honest fellow, naturally enough declines to give up “his” horse. The disputants appeal to a judge, arbitrator, or some other appropriate tribunal, each demanding justice. Now the jurisprudential point I am here concerned with is *not* that of to whom the horse should belong under some theoretically perfect concept of civil justice.

Perfect justice is in most instances impossible, if only because of the fallibility of even the most learned and honest human beings who would have to determine and apply it. In any event, a legal system of “perfect” justice would be subject to re-evaluation every day, as ever abler legal philosophers achieved ever deeper insights, introducing such uncertainty into men’s everyday dealings with each other as to render commerce impossible. Rational men do not demand an impractical perfection from the civil law, but they do demand what they must have in order to live in an advanced society — the utmost certainty that any social institution is capable of. With regard to its substantive rules, the civil law may contain a considerable degree of apparent injustice, yet serve its purposes. Those who depend upon it will grumble, but, within limits, they will adjust their dealings to the law rather than destroy it, and with it the stability that even imperfect law provides. But if the law is uncertain, if men can never know what new and unprecedented rule may be applied to their normal activities, if predictability is undermined by daily revelations as to the “perfectly just” rule to be applied in any of the potentially infinite disputes that may arise - civilization crumbles. In the area of civil law, it is generally more important that the law be settled than that it be settled “right”. (Such a proposition, of course, is utterly unacceptable in criminal law. There we demand the closest possible approach to perfect justice, and convenience be damned. This is one of the major distinctions between the civil and criminal law.)

How does all this apply to the stolen horse case? I do not know — and I doubt that anyone else knows — what is perfect justice here. The thief having long since disappeared, *some* innocent person, either the thief’s original victim or the buyer of the horse, is going to suffer an unrectifiable injustice. Under the Angloamerican-Commonwealth legal system’s traditions, it will no doubt be the unwary buyer who suffers the loss, while under the Roman-Contin-

ental system, it is more likely the original owner who is out of luck. In legal terminology, the question is whether the thief “can pass good title”, and the two systems give opposed answers. I do not know which rule a Libertarian society would adopt, nor do I think that it matters very much. If the former rule, then title insurance companies will continue to grow rich insuring their customers against buying stolen property, while if the latter is adopted, theft insurance companies are going to expand their business. What is vital, however, is that one rule be firmly established and adhered to.

CHANGE

Societies change, however. New technologies, new ways of doing business evolve constantly, and a rule of once debatable justice may under changed circumstances be universally condemned, or an acknowledged injustice that was once a mere annoyance may at a later time become intolerable. If the primary consideration of the civil law is that the rules must not be changed in the middle of the game, how is the law ever to be adapted to a changing world?

Consider the fact that most consumer goods are purchases not from individuals in their individual capacities, but rather from merchant firms. Today, one would most likely buy a horse for personal use from an established dealer, regularly engaged in such business. While it might be possible for the prospective buyer to investigate a dealer’s rights in a particular horse, it would be commercially unfeasible. Suppose then that an ever-increasing proportion of the members of our society become convinced that it is intolerably unjust to continue the rule that the good-faith buyer of a stolen horse gets stuck. Is there any cure that would not be worse than the disease? *Could* the rule be changed? It could be and has been changed.

In the United States, the Uniform Commercial Code provides that he who buys an article of commerce — like a horse — for his own use, in the regular course of trade, from a dealer in articles of the type bought is able to get a good title even if it later is found that the article was stolen. This change came about without hardship because the U.C.C. was widely publicized prior to its adoption and is applied only to those dealings entered into after its effective date. It has proved very effective in resolving the stolen horse type of difficulty insofar as retail trade is concerned, and has obviated the problems that would have disrupted our commercial life by retaining the “buyer beware” rule in an age for which it was no longer appropriate. Today, it is the dealer in horses who must watch out, who must take steps to protect himself against buying stolen goods, but, of course, he is in a much better position to do so.

The U.C.C., of course, was enacted by the legislatures of the several states, and it is very unlikely that legislatures, at least as we know them, will exist in a Libertarian society. But adapting the law by promulgating new rules *with prospective effect*, in response to new problems, can be done by any tribunal, and even in the present context, such institutions of voluntary justice as the American Arbitration Society have done so.

While the particulars of an analysis such as this are subject to revision and improvement by those having a greater wisdom and more space at their disposal, it is nevertheless submitted that the attitude and approach implicit in it represent the only path to a legal system consonant with the principles of a Libertarian society.