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DIALOGUE ON PRIVATE PROPERTY†

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I. THE PRAGMATIC MEANING OF PRIVATE PROPERTY

Session 1

Private Property and Communism

C. Mr. Allen, do you believe in the American form of government?

A. I certainly do.

C. And do you disapprove of communism?

A. I do.

C. Then you must believe that there is an important difference between communism and our American form of government.

A. Yes. I believe there are many important differences. For one thing, we have a democratic form of government in this country, and under communism there is a dictatorship.

C. That is certainly an important difference, but it would be just as applicable to Fascist or feudal dictatorships as to a communist dictatorship. Can you be any more specific as to the important differences between our American form of government and communism which would not apply equally to other types of dictatorship?

A. I suppose that the most important point of difference is that we in the United States recognize rights of private property and communism abolishes private property.

C. You don't mean that communism is incompatible with private property in toothbrushes or other consumer goods?

A. No, I was thinking more of factories and railroads and such things, which are owned by the state under communism.

C. May not the state own factories or railroads or canals under our American form of government?

† At the request of a publisher, Felix Cohen had begun to work on a HANDBOOK IN LEGAL PHILOSOPHY which was to have been a question and answer guide to use of his READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY. The Socratic dialogue on property, published here for the first time, was to have been part of the first chapter in the handbook as well as the first two sessions of his seminar at Yale Law School in October 1953. It is based on his lecture notes, on class discussion, on the READINGS, and on what he learned from his generations of students. The other major fields in law—contracts, torts, etc., were to have been developed in the same manner, and his full notes await editing.

A. Yes, but that is exceptional under our form of government and normal under communism.

C. Would you say then that here in the United States we have a large degree of private property in capital goods, and that this is not generally the case in communist countries?

A. Yes, I think that would be a fair statement.

C. Certainly it would be a fairer statement than the statement we started with, that the United States recognizes and communism abolishes private property. In fact, any difference is clarified when we can reduce it to a question of degree, which is the starting point for measurement. Now it seems to me that we have come to a very important conclusion. We seem to be agreed that one of the significant facts of life today is that here in the United States we have a great deal of private property in capital goods.

C. Is there any dissent from this conclusion? Now, Mr. Black, do you really think that the existence of private property in capital goods is one of the facts of life? Or are you just being polite and agreeable in not objecting to our conclusion? Might it be that the existence of private property is just a matter of theory or words or semantics? Or to be more specific, suppose we took a factory that is owned by the United States Steel Corporation, and took another factory in Russia that is owned by the Soviet Government. Are there some objective facts by which you could determine that one of these factories is private property and the other is not private property?

B. I suppose that in the United States Steel Corporation plant some individual would have the right to dispose of the products of the plant, and in the case of the Russian factory, the government would make these decisions.

C. Well, now, in both cases, some individual or group of individuals will decide what happens to the product, where the raw materials will be secured from, what wages will be paid to what employees, and so on. And in both cases there will be certain general laws or directives limiting these decisions of management. You say in the one case the individuals who make these decisions will be acting as private individuals, and in the other case they will be acting as government officials.

B. Yes, I suppose it comes down to that.

C. Now, suppose we call the board of directors of the United States Steel Corporation a Commissariat for Heavy Industry, and suppose we call the Russian Commissariat for Heavy Industry the board of directors of the Soviet Steel Corporation. Would that mean that Russia would be capitalistic and that the United States would be communistic? Is this difference that we are searching for purely a matter of words or semantics or theory, or is there some underlying objective fact that will persist no matter what words we use to describe the individuals who make these decisions?

B. I think there is more to the distinction than just a matter of words or theories.

C. Let me read to you what Walton Hamilton says about property:

Property is a euphonious collection of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth.

That is what Walton Hamilton says in his article on property in the *Encyclopedia of the Social Sciences*. Mr. Black, would you say that Walton Hamilton is a euphonious collection of letters?

B. No, I think he is a real individual.

C. And you also think that private property, in so far as it distinguishes our American form of government from the Russian form of government, is more than just words, or theories, that it reflects some basic reality, perhaps some basic differences of attitude and social organization and legal structure?

B. Yes, I think it does.

C. And you think there is a real difference between the American factory and the Russian factory even though the difference would not show up in a photograph?

B. Yes, I think there is.

C. Does anyone disagree with that conclusion? If not, it seems to me that we have come to a second important conclusion, namely, that there are some legal facts which are not just matters of words or definitions or theories, but which are objective in the sense that the facts remain no matter what kind of language we use to describe them, and here, of course, while we are talking now about property we might as well be talking about contracts, or crimes, or constitutions, or rules of law. Or we might be talking about mathematics or music. Here we are dealing with realities which have their origin in human institutions, but they are objective facts in the sense that we have to recognize their existence or else bump our heads against them.

Does Private Property Exist?

Now, let us see if we can get a clearer notion of the kind of facts that we are dealing with when we talk about property. We have all agreed that there is such a thing as private property in the United States, but suppose we run into a sceptic who refuses to accept our agreement. What evidence, Mr. Black, can you produce to show that private property really exists?

B. Well, here is a book that is my property. You can see it, feel it, weigh it. What better proof could there be of the existence of private property?

C. I can see the shape and color of the book very well, but I don't see its propertiness. What sort of evidence can you put forward to show that the book is your property?

B. Well, I paid for it.

C. Did you pay for your last haircut?

B. Yes.

C. And did you pay for last year's tuition, and last month's board, and your last railroad trip?

B. Yes.

C. But these things are not your property just because you paid for them, are they?

B. No, I suppose not, but now you are talking about past events and I am talking about a material object, a book, that I bought and paid for, which is something quite different from last year's tuition, or last night's dinner.

C. You could cite in support of that distinction, the definition of property given by Aigler, Bigelow and Powell:

Human beings . . . have various needs and desires. Many of these relate to external objects with which they are in some way associated. . . . The law of property may be looked at as an attempt upon the part of the state, acting through its courts and administrative officers, to give a systematized recognition of and protection of these attitudes and desires on the part of individuals towards things.¹

B. Yes, I think that clarifies our idea of property.

C. But is the copyright to a song a material, external object?

B. No. I suppose not.

C. And what about a mortgage or a patent on a chemical process or a future interest? These things can be property without being material objects, can't they?

B. Yes, I suppose they can.

C. Then what makes something property may be something intangible, invisible, unweighable, without shape or color?

B. I suppose that may be true in some cases, at least with respect to certain forms of intangible property.

C. Well, let's take the simplest case of tangible property, a piece of real estate, an acre of land on the outskirts of New Haven that you, let us assume, own in fee simple absolute. Would you say that the soil and the rock and the trees are tangible?

B. Yes, they certainly are.

C. But if you cut down the trees and sell them for firewood, the real property is still there on the outskirts of New Haven?

B. Yes.

C. And if you cut the sod and sell that, and dig up the top soil and sand and gravel and rock and sell that, the real property is still there on the outskirts of New Haven and you still have your fee simple absolute?

1. COHEN AND COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 17 (1951).

B. Yes.

C. Then a fee simple absolute is a sector of space in time and no more tangible than a song or a patent?

B. I see no way of avoiding that conclusion.

C. But you are not happy with this conclusion?

B. No, your questions seem to make property vanish into empty space.

C. Perhaps that is because you are assuming that reality always has a position in space. It seems to me that you and Aigler, Bigelow and Powell, are all prisoners of common sense, which is usually the metaphysics of 500 years back. In this case the current common sense is the metaphysical doctrine of Duns Scotus, William of Occam, and other 14th and 15th century scholastics who held that all reality is tangible and exists in space. That idea runs through a great deal of common law doctrine. Take, for example, the ceremony of *livery of seizin*, by which in transferring a possessory estate in land you actually pick up a piece of the sod and soil and hand to the grantee; or take the old common law rule that a mortgage consists of a piece of paper, and if this piece of paper is destroyed, the mortgage disappears. Why should we assume that all reality exists in space? Do our differences of opinion exist in space? Why not recognize that spacial existence is only one of many realms of reality and that in dealing with the law we cannot limit ourselves entirely to the realm of spacial or physical existence?

Property as Social Relations

Can we all agree at this point that essentially this institution of private property that we are trying to identify in outline is not a collection of physical objects, but rather a set of relationships—like our conversation or our differences of opinion? If we can agree on this, at least tentatively, perhaps we can go on to the narrower question, what sort of relationship exactly is this property? Is it a relationship of a man to a thing, or is it a relationship among men? Mr. Delaney, does Hegel have any light to throw on this issue?

D. Hegel seems to think that property involves the relationship of a man to a thing. He says:

A person must translate his freedom into an external sphere, in order that he may achieve his ideal existence.²

And then he says:

A person has the right to direct his will upon any object, as his real and positive end. The object thus becomes his. As it has no end in

2. COHEN AND COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 73 (1951).

itself, it receives its meaning and soul from his will. Mankind has the absolute right of appropriation over all things.³

C. Is that pretty close to Blackstone's definition of property?

D. Yes, Blackstone refers to property as the "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."⁴

And Blackstone also says:

In the beginning of the world, we are informed by Holy Writ, the all-bountiful Creator gave to man "dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth on the earth." This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been stated by fanciful writers upon this subject.⁵

C. And under that view, would you say that Adam, when no other individuals existed, had a property right over all the earth?

D. I think Hegel and Blackstone would have to say that, but I would have some doubts since we have seen that property may not involve external objects at all.

C. Well, now in the world we live in, could you point to any examples of property in Blackstone's sense of "sole and despotic dominion . . . over the external things of the world, in total exclusion of the right of any other individual in the universe?"

D. No, I don't think I could.

C. What does Von Jhering mean when he says, in the passage quoted by Ely (at p. 13 of the *Readings*) that an absolute right of property would result in the dissolution of society?

D. I suppose he means that society could not exist without laws of taxation, eminent domain, public nuisances, etc., and if any property owner could really do anything he pleased with his own property, the rights of all his neighbors would be undermined.

C. Exactly. In fact, private property as we know it is always subject to limitations based on the rights of other individuals in the universe. These limitations make up a large part of the law of taxation, the law of eminent domain, the law of nuisances, the obligations of property owners to use due care in the maintenance and operation of their property, and so on. Property in the Blackstonian sense doesn't actually exist either in communist or in capitalist countries. At any rate, the physical relationship of man to thing that Blackstone and Hegel are talking about is not what distinguishes the privately owned steel plant

3. *Id.* at 74.

4. *Id.* at 7.

5. *Id.* at 76.

in the United States from the government plant in Soviet Russia, is it?

D. No, I suppose not.

C. Can we agree then that this institution of property that we are trying to understand may or may not involve external physical objects, but always does involve relations between people. Unless there is some dissent to that proposition, I suggest that we consider this as our fourth tentative conclusion with respect to the nature of property. Property, at least the kind of institution that we are talking about when we distinguish between a capitalist and communist country, is basically a set of relations among men, which may or may not involve external physical objects. Would you dissent from that conclusion, Mrs. Evans?

E. Well, calling property a set of relations among men is such a vague generality that I'd hardly dare dissent from it.

Property and Wealth

C. Of course you're right, and yet a generality that is true may be more useful than a more specific idea like Blackstone's that is false. But can we make our conception of property more specific without excluding any of the rights we recognize as property rights? Have you any suggestions, Mrs. Evans, to help us clarify this set of relations that we call property? Do you see any point in the suggestion of Hamilton that property is essentially an economic concept?

E. Yes, it seems to me that when we are talking about property we are really talking about economic goods or wealth.

C. Mrs. Evans, I have here some personal papers that are of no possible value to anyone else in the world. If somebody took these papers from me and I brought suit to have them returned, do you think the court would require the return of these papers?

E. Yes, I suppose it would.

C. Would you then say that these papers are my property even though they have no economic value?

E. Yes, I would.

C. Or let us suppose that I have an inalienable life estate in a piece of land for which I have no possible use. Economically, the land is a burden rather than an advantage to me. Still, if somebody trespassed on it I could get at least a nominal judgment. Would you call that estate my private property?

E. Yes, I suppose we would have to call it private property.

C. Then there is such a thing as valueless property, and economic value is not essential to the existence of legal property?

E. Yes, I suppose we would have to accept that conclusion.

C. What about the other side of Hamilton's equation between

wealth and property? Could there be wealth that did not consist of private property? Suppose I discover a new form of exercise that increases the life-span of diabetics. Would that discovery add to the wealth of mankind?

E. Yes, I suppose it would, if put to use.

C. And to the extent that I were willing to communicate that discovery to individuals and charge them for the teaching, the discovery would be of value to me, would it not?

E. Yes, I suppose it would.

C. And yet this bit of knowledge which I could not prevent anyone else from using or discovering would not be property, would it?

E. No, I suppose not.

C. Then it seems to me we have come to the conclusion that not only is there valueless property, but there is also propertyless value.

E. I see no way of avoiding that conclusion.

C. Would you agree that air is extremely valuable to all of us?

E. Yes, of course.

C. Why then is there no property in air?

E. I suppose because there is no scarcity.

C. Suppose there were no scarcity of any material objects.

E. I suppose then there would be no property in material objects.

C. Would you say then that private property is a function of privation?

E. Yes I suppose it is, in the sense that if there is no possibility of privation there cannot be private property.

C. And would you also say that wealth is a function of plenty?

E. Yes, if we think of wealth broadly as covering the whole field of human goods, or utilities, or enjoyments.

C. Then, wealth and property are in some ways opposites rather than identical?

E. I am not sure what that means, practically.

C. Doesn't it mean, practically, that if we could create a situation in which no man lacked for bread, bread would cease to be an object of property; and if conversely, we could create artificial scarcities in air or sunshine, and then relax these scarcities for a consideration, air and sunshine might become objects of property? Or, more generally, a society might increase the sum of its goods and enjoyments by eliminating one scarcity after another and thus reducing the effective scope of private property.

E. Yes, I suppose that is so. At least, I don't see how one can maintain that private property is identical with goods or wealth.

C. Well, that seems to leave us with a further point of general agreement. Property may exist without value; value may exist without property; private property as a function of privation may even have an inverse relation to wealth; in short, property is not wealth. But what

is it? We are still not beyond the vague generality that property is a set of social relations among human beings. We have not yet distinguished between property relations and other human relations. Mr. Fielden, what do you think of the American Law Institute definition of property as including any "rights, privileges, powers and immunities" (*Readings*, pp. 17-18)? Under that definition, would immunity from racial discrimination in the exercise of the franchise be a property right?

F. Yes, under that definition I suppose it would.

C. And would the right to kill in self-defense be a property right?

F. Yes, I believe so.

C. In fact, any legal relationship under the definition of the American Law Institute is property, is it not?

F. Yes, I think the definition is comprehensive enough to cover any legal relation.

C. Might such a definition of property be useful to the teachers of property law who agreed on this definition in case they want to stake out jurisdictional claims to cover any legal problem whatsoever in their property courses?

F. Yes, I suppose it might have some utility in that direction.

C. But this definition would not be useful to us in trying to determine whether property exists in a given factory?

F. No.

C. Or suppose we are trying to decide who owns a certain mule. We make a list of various legal privileges which I have with respect to the mule: for example, it is my privilege to look at the mule and even to speak to it. Then we list various immunities that you have with respect to the mule: you are, for instance, let us say, immune from liability for any damage this mule does in an unfenced pasture. Is it possible that you and I might draw up a long list of such rights, privileges, powers and immunities, which according to the American Law Institute, constitute ownership, and still you and I might not really own the mule or even know who owns the mule?

F. That's quite possible, in fact highly probable, I think.

The Case of the Montana Mule

C. Mr. F., there's a big cottonwood tree at the southeast corner of Wright Hagerty's ranch, about 30 miles north of Browning, Montana, and under that tree this morning a mule was born. Who owns the mule?

F. I don't know.

C. Do you own the mule?

F. No.

C. How do you know you don't own the mule? You just said you didn't know who owns the mule. Might it not be you?

F. Well, I suppose that it is possible that I might own a mule I never saw, but I don't think I do.

C. You don't plan to declare this mule on your personal property tax returns?

F. No.

C. Why not, if you really don't know whether you own it? Or do you know?

F. Well, I never had any relation to any mules in Montana.

C. Suppose you did have a relation to this mule. Suppose it turns out that the mule's father was your jackass. Would that make you the owner of the mule?

F. I don't think it would.

C. Suppose you owned the land on which the mule was born. Would that make you the owner of the mule?

F. No.

C. Suppose you owned a piece of unfenced prairie in Montana and the mule's mother during her pregnancy ate some of your grass. Would that make you the owner of the mule?

F. No, I don't think it would.

C. Well, then you seem to know more about the ownership of this Montana mule than you admitted a few moments ago. Now tell us who really owns the mule.

F. I suppose the owner of the mare owns the mule.

C. Exactly. But tell us how you come to that conclusion.

F. Well, I think that is the law of Montana.

C. Yes, and of all other states and countries, as far as I know. For example, the Laws of Manu, which are supposed to be the oldest legal code in the world, declare:

50. Should a bull beget a hundred calves on cows not owned by his master, those calves belong solely to the proprietors of the cows; and the strength of the bull was wasted. (Institutes of Hindu Law or the Ordinances of Manu [translated and edited by S. G. Grady, c. 10].)

Now how does it happen, do you suppose, that the law of Montana in the twentieth century A.D. corresponds to the law of India of 4000 years or so ago? Is this an example of what Aristotle calls natural justice,⁶ which is everywhere the same, as distinguished from conventional justice which varies from place to place and from time to time?

F. Well, it does seem to be in accordance with the laws of nature that the progeny of the mother belong to the owner of the mother.

C. Wouldn't it be just as much in accordance with the laws of nature to say that the progeny of the father belong to the owner of the father?

6. COHEN AND COHEN, READINGS at 371.

F. I suppose that might be so, as a matter of simple biology, but as a practical matter it might be pretty hard to determine just which jackass was the mule's father.

C. Then, as a practical matter we are dealing with something more than biology. We are dealing with the human need for certainty in property distribution. If you plant seed in your neighbor's field the biological connection between your seed and the resulting plants is perfectly natural, but under the laws of Montana and all other states the crop belong to the landowner. And the Laws of Manu say the same thing:

49. They, who have no property in the field, but having grain in their possession, sow it in soil owned by another, can receive no advantage whatever from the corn, which may be produced. (Institutes of Hindu Law or the Ordinances of Manu [translated and edited by S. G. Grady, c. 10].)

Would you say here that as a matter of certainty it is generally easier to say who owns a field than to say who owned the seeds that were planted in it?

F. Yes, as a general rule I think that would be the case.

C. Then whether we call our rule of property in livestock an example of natural law or not, its naturalness has some relation to the social need for certainty, which seems to exist in 48 different states and 48 different centuries. Do you think that property law reflects some such human demand for certainty?

F. I think it does in the cases we have been discussing

C. Couldn't we have some other equally certain and definite rule, say that the mule belongs to the owner of the land where it was born.

F. It might be a hard thing to do to locate the mule's birth-place, but the young mule will show us its own mother when it's hungry.

C. Suppose we decided that the mule should belong to the first roper. Wouldn't that be a simple and definite rule?

F. Yes, but it wouldn't be fair to the owner of the mare who was responsible for its care during pregnancy if a perfect stranger could come along and pick up the offspring.

C. Now, you are assuming that something more than certainty is involved in rules of property law, and that somehow such rules have something to do with ideas of fairness, and you could make out a good case for that proposition in this case. But suppose you are trying to explain this to a cowboy who has just roped this mule and doesn't see the fairness of this rule that makes it the property of the mare owner. Are there any more objective standards that you could point to in support of this rule? What would be the economic consequences of a rule that made the mule the property of the first roper instead of the mare-owner?

F. I think that livestock owners wouldn't be so likely to breed their mares or cows if anybody else could come along and take title to the offspring.

C. You think then that the rule that the owner of the mare owns the mule contributes to economic productivity?

F. Yes.

C. But tell me, is there any reason to suppose that the owner of the mare will be able to raise the mule more economically than, say, the first roper or the owner of the ground on which the mule was born?

F. Well, so long as the mule depends upon its mother's milk, it will be less expensive to raise it if the owner of the mother owns the offspring. And presumably the owner of the mother has physical control over his animals, and no extra effort is involved in his controlling the offspring as long as they are dependent upon their mother.

C. So, in effect, the rule we are talking about takes advantage of the natural dependency of the offspring on the mother animal. By enlisting the force of habit or inertia, this rule economizes on the human efforts that might otherwise be expended in establishing control over the new animal. The owner of the mare has achieved the object of all military strategy—he has gotten there “fustest with the mostest.” We don't need to pay a troop of Texas Rangers to seize the mule and deliver it to the owner of the jackass father who may be many miles away. But why should we have a simple definite rule in all these cases? Wouldn't it be better to have a more flexible standard so that we might consider in each case what the owner of the mare contributed, what the owner of the jackass contributed, what was contributed by the grass owner who paid for the mare's dinners, and then on the basis of all the facts we might reach a result that would do justice to all the circumstances of each individual case?

F. The trouble with that is that the expense of holding such investigations might exceed the value of the mule.

C. And would it be easier or harder to borrow from the bank to run a livestock business if the owner of a mare or a cow didn't know in advance that it would own the offspring?

F. If I were a banker I'd certainly hesitate to make a livestock loan to a herd owner without such a simple definite rule.

C. Could we sum up this situation, then, by saying that this particular rule of property law that the owner of the mare owns the offspring has appealed to many different societies across hundred of generations because this rule contributes to the economy by attaching a reward to planned production; is simple, certain, and economical to administer; fits in with existing human and animal habits and forces; and appeals to the sense of fairness of human beings in many places and generations?

F. I think that summarizes the relevant factors.

C. And would you expect that similar social considerations might

lead to the development of other rules of property law, and that where these various considerations of productivity, certainty, enforceability, and fairness point in divergent directions instead of converging on a single solution, we might find more controversial problems of private ownership?

F. That would seem to be a reasonable reference.

Ownership, Use and Sale

C. Suppose we pass, then, to a slightly more difficult problem. Mrs. Farnsworth, do you own any songs?

F. No.

C. How do you know that you don't own any songs? What does it mean to say that somebody owns a song?

F. Well, I suppose it means that the owner has a right to sing the song himself, and has a right to charge others for the privilege of singing the song, or at least for making commercial use of the song.

C. You and I have the right to sing "Auld Lang Syne" without paying anyone for the privilege, don't we?

F. Yes. I suppose so.

C. Then, the right to sing can exist even where there is no property right?

F. Yes.

C. Can a corporation sing?

F. No. I don't suppose so.

C. But a corporation can own the copyright to a song, can't it?

F. Yes.

C. Then ownership can exist without the possibility of the owner's enjoying or using what he owns.

F. Yes, I suppose so.

C. Then the criterion of use as a mark of ownership breaks down at both ends. We can have use without ownership and ownership without use. What about the other half of your criterion, the possibility of charging others for the use of something. Suppose you secure a lease on an apartment with the condition that you can't assign the lease, can't sublease the apartment, can't have pets or babies on the premises and can't take in boarders. Might you not still have a property interest even though you couldn't sell it?

F. Yes, I suppose there is such a thing as non-saleable property.

C. And what about the other side of that equation. Is it possible that you can buy or sell what is not property at all, services, for example?

F. Yes, I suppose I have to retreat from the position that the right to sell is a distinctive characteristic of private property.

C. But wait, now, before you retreat too far. When you say that an owner can charge somebody else for the use of what he owns you mean,

don't you, that he can charge somebody else if that person is willing to pay?

F. Yes, of course that is understood.

C. But I could charge you for walking across Brooklyn Bridge if you were willing to pay for it and that would not be proof that I had a property right in Brooklyn Bridge, would it?

F. No, but in that case I could walk across Brooklyn Bridge without paying you, and in the case of the song, if you owned the song, you could exclude me from the use of the song unless I made the payment.

Exclusion and Exclusiveness

C. Well, then, we are really talking about a right of exclusion, aren't we? What you are really saying is that ownership is a particular kind of legal relation in which the owner has a right to exclude the non-owner from something or other. That is really the point that Ely and Morris Cohen both make, isn't it?

F. Yes, I think that is where they find a difference between property and other rights.

C. Do you agree, then, with Ely's statement: "By property we mean an exclusive right to control an economic good"?

F. Yes, I think that is a fair statement, except that what is controlled may be an economic evil rather than a good, or even a worthless thing, as we agreed a while ago.

C. Suppose I have acquired a non-exclusive easement to cross a piece of land. That might be a very valuable right to me, might it not, if that were the only way of reaching my house from the public streets?

F. Yes.

C. But by definition this would not be exclusive and would not be property in Ely's sense.

F. No, I suppose not.

C. And if I own a beach in common with 600 other people, I would not have an exclusive right to control the beach, would I?

F. No.

C. But aren't these non-exclusive rights property in the fundamental sense that I can exclude third parties from certain types of interference with my activities?

F. Yes, I suppose even a non-exclusive right of way wouldn't amount to anything if you couldn't exclude others from fencing off the right of way.

C. Can we agree, then, that the essential factor that we are reaching for here is the power to exclude, whether that power is exclusive or shared with others?

F. Yes, I think that is an essential factor. There may be others.

C. Is there any dissent from that proposition? If not, let us put this down as one more point of agreement in our analysis of the meaning

of private property. Private property may or may not involve a right to use something oneself. It may or may not involve a right to sell, but whatever else it involves, it must at least involve a right to exclude others from doing something.

Now, Mr. Galub, if you agree that a property right always involves a power to exclude, would you also agree that a power to exclude always involves a property right?

G. No, not necessarily.

C. The Yale football team might have the power to exclude the Princeton team from the goal line, but that would not make the goal line Yale property, would it?

G. No, I think we would have to agree more precisely on just what we mean by a power to exclude.

Property and Law

C. Does Bentham offer any help in clarifying this idea of power?

G. Yes, I think he does. He draws a distinction between physical power and the power that is derived from government. He says:

Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.⁷

C. Then can you say that the kind of power to exclude that is essential to the institution of property is the power that exists when we can count upon agencies of the state to help us to exclude others from some activity?

G. Yes, I think that would help to clarify the idea of property.

C. Would you say, then, that there is no property without sovereignty and that property relationships always involve government,—in other words, that property is a function of government or sovereignty?

G. Yes, that is what Morris R. Cohen, Ely, Hamilton, and Bentham all say, and I think they are right as far as they go.

C. Could you conceive of a government without property?

G. Yes, I suppose you might have a purely communistic state with no private property.

C. Suppose you had not a communistic state but a state governed by the Mad Duchess of Alice in Wonderland. Suppose you never could tell whether she would dispose of any problem by the command "off with his head", or some other command. Would you then be able to count on the support of the state in excluding third parties from the use of a patent or anything else?

G. No, by hypothesis, you have made private property impossible.

C. In other words, the existence of private property presupposes not only sovereignty but some predictable course of sovereign action,

7. COHEN AND COHEN, READINGS at 9.

so that the so-called property owner can count on state help in certain situations?

G. Yes, I suppose that is part of what Bentham means when he says that property involves established expectations of being able to derive certain advantages from what one possesses, that expectation based on physical strength is very tenuous, because others can gang up and take away the goods of the strong man, but "a strong and permanent expectation can result only from law."⁸

C. Well, now, if we can agree that in order to have private property we must be able to count on governmental help in excluding others from certain activities, that tells us something important about property. But we still don't have a definition of property unless we can say that wherever there is a power to exclude others with governmental help of some activity there we have private property. Would such a statement be correct in your opinion?

G. I am not sure.

C. Suppose I live on a street where commercial vehicles are not permitted. If I see a truck coming down the street I can call a policeman and get the aid of the state in excluding the truck from the street. Does that mean that I have a property right in the street?

G. No, you might have a right to call upon the aid of the state in stopping all kinds of criminal activities, but that would not give you a property right in those activities.

C. Exactly. But if I could not only stop a truck from using the street in front of my house and secure the help of the state in enforcing that prohibition, but could also, on my own responsibility, grant permission to somebody to drive a truck on the street and charge him for the privilege and have the assistance of the state in enforcing such decisions, then would you say that I had a property right in the use of the street?

G. Yes, I think you would. That would be the kind of property that the owner of a toll road would have.

C. Private property, then presupposes a realm of private freedom. Without freedom to bar one man from a certain activity and to allow another man to engage in that activity we would have no property. If all activities were permitted or prohibited by general laws there would be no private property. Does that make sense to you, Mr. Galub?

G. Yes, I suppose we could say that the existence of private property represents in some ways a middle ground between the absence of government and the complete determination of human activities by government. I suppose that is really what Morris Cohen is driving at in the article on "Property and Sovereignty" when he talks about private property as a delegation of sovereign power in certain limited areas.

8. COHEN AND COHEN, READINGS at 9.

In those areas the government doesn't make a final decision but agrees to back up whatever decision the so-called owner of property makes.

C. Very clearly put, I think. Now suppose we put together all the conclusions we have been able to agree upon so far in our discussion: Private property is a relationship among human beings such that the so-called owner can exclude others from certain activities or permit others to engage in those activities and in either case secure the assistance of the law in carrying out his decision. Would that be a sound definition of private property?

G. I'm not sure what it means to say that a definition is sound or not.

C. Good. The same word may mean different things to different people. Therefore, asking whether a definition is true or false is a meaningless question. But we can ask whether a definition is useful or useless. And that may depend upon whether the definition can be used in a self-consistent manner and whether it can help to clarify the problems with which we want to deal. Now, with that explanation what do you think of our definition of private property?

G. Well, I'd rather postpone any judgment as to the utility of a definition until we see how it is to be used and what help it may give us. But at least I don't see any self-contradiction in this definition.

C. Would you go further and say that a definition which distinguishes between private property and other legal relationships is more useful than a definition like that of the A.L.I. which applies in effect to all legal relations, and is also more useful than the Blackstonian definition which applies to nothing at all in the real world?

G. Yes.

C. And would you say that our definition of private property in so far as it includes copyrights and patents and fee simples and is not limited to external objects is more useful than the definitions of Hegel, Aigler, Bigelow, and Powell in terms of external objects?

G. Agreed.

C. Do you find any ambiguities in our definition that might be cleared up by a more precise use of language?

G. I'm not sure.

Property and Contract

C. Isn't there a basic ambiguity in our use of the word "exclusion"? May that not cover two quite different things, a right against the world and a right against a specific individual based perhaps upon his own agreement? Suppose I am operating a string of 50 laundry machines in Washington, and I enter into a contract with you by which I sell you the machines and agree that I will stay out of the laundry business in Washington during the next ten years. Do you see any important difference between the rights that you would acquire over

the machines and the rights that you would acquire with respect to my entering the laundry business?

G. I suppose that one important difference would be that so far as your entering the laundry business is concerned, I have a right to exclude you, but that right applies only to the person who made the contract, whereas with respect to the machines themselves, my right to exclude applies to the whole world.

C. Exactly. And while both these rights are derived from contract and might be called contractual rights, we may find it useful to distinguish those rights that apply only against the contracting party and those rights that apply against the world at large and call rights of the latter kind property rights. I don't say that this strict definition of property is universally followed, but I think generally we will find it more useful than any broader definition of property.

Now, at this point, it may be useful to summarize our analysis of property in terms of a simple label. Suppose we say, that is property to which the following label can be attached:

To the world:

Keep off X unless you have my permission, which I may grant or withhold.

Signed: Private citizen

Endorsed: The state

Let me offer the caution that such a label does not remove the penumbra of ambiguity that attaches to every word that we use in any definition. As William James says, "The word 'and' trails along after every sentence." No definition can be more precise than the subject permits. Aristotle remarks that it is a mark of immaturity to expect the same degree of precision in human affairs as in mathematics. All of the terms of our definition shade off imperceptibly into other things. Private citizen: consider how many imperceptible shadings there are in the range from private citizen through corporate official, public utility employee, and government corporation and the state itself. Or consider the shadings between the state and various other types of organization. Consider the initial words, "To the world", and the large middle ground between a direction to the whole world and a direction to a specific individual.

Any definition of property, to be useful, must reflect the fact that property merges by imperceptible degrees into government, contract, force, and value.

If we were to put these relations in the form of a diagram, we can certainly draw the boundary lines of property at many different points just as we can fix arbitrary points between day and night and yet understand each other when we draw these lines at different points.

Session 2

Reflections on Confusion

C. Apparently some of the questions I asked last week left residues of puzzlement or irritation, judging from after-class discussions. And so before putting any more questions I'd like to offer a few words of comfort: In the first place, if some of my questions make little sense, please remember an ancient Eastern proverb which tells us that a fool can ask more questions in an hour than a wise man can answer in a lifetime. In the second place, let me remind you of John Dewey's observation that irritation is the starting-point of thought as well as the first sign of life.

At any rate the question that several students asked after class—"What have we been driving at?"—is a reasonable question and for a few minutes at least, instead of asking further questions of my own, I shall do my best to answer that one.

What we were really doing at our last session was to explore some prevailing confusions about philosophy, jurisprudence, and property.

Two Views of Philosophy

So far as philosophy is concerned, there is an important tradition that regards the philosopher, in the words of William James, as a blind man in a dark room searching for a black cat that isn't there. From that standpoint I think the distinction between the philosopher and the lunatic is a rather narrow one. Both admire extraordinary wisdom. The lunatic thinks he has it. The lunatic always finds the black cat that isn't there. The philosopher is still looking for it. Philosophy thus even in its most esoteric form involves some recognition of our own ignorance which is, for the most people, intensely irritating.

There is a second conception of philosophy, also pungently expressed by William James, as nothing but the stubborn effort to think clearly. It is that conception of philosophy that I propose to explore in these discussions. What does it mean to think clearly? The best answer that I know to that question is the answer given by C. S. Peirce in his essay, *How to Make Our Ideas Clear*, in which he points out that the meaning of a general idea like law or property is to be found in all the examples or consequences of these general ideas in specific situations. The ambiguities or inconsistencies of our general ideas will be reflected in these specific applications. You can call this pragmatism or pragmaticism or operationalism or various other things, but essentially what we have here is not a school of philosophy, but an insight common to many schools. All great philosophers have had one thing in common. They have all pointed to the confusions of common

thought. We all go along using general terms as if we knew what they really meant. But when we are pressed we find vast reaches of ignorance and confusion. We all think we know what a man is. But when the Psalmist asks, "What is man that thou art mindful of him?", we begin to recognize the depths of our ignorance. That is the beginning, I think, of philosophy and jurisprudence.

The Meaning of Jurisprudence

Jurisprudence may mean a good many different things. Medical jurisprudence, for example, is a high-falutin' phrase for medical law,—what Wigmore calls the "Quadrusyllabular honorific". Or jurisprudence may mean the classification or taxonomy of other people's legal theories. (Perhaps that is a redundancy: theories are always other people's; what we ourselves believe is always fact or insight or experience or the law). Or jurisprudence may be viewed as a special branch of the science of transcendental nonsense,—the search for the black cat that is not there, which is so brilliantly described in Von Jhering's account of his journey to the "heaven of legal concepts".⁹ Or, finally, we may think of jurisprudence as nothing but the stubborn effort to think clearly about the practical issues of the law, recognizing that clear and precise thinking is something that we do not often have time for in the course of our legal arguments, either in classrooms or in courtrooms. In fact, precise definition of terms may be as inappropriate on some occasions as the use of a slide rule to measure one's portion of steak at a dinner party. And yet there are times when hard serious thinking is our only path of relief from the swamps of inertia and superstition. Jurisprudence is not a magical source of answers to the difficulties that arise in the fields of property, contract, tort, or criminal law, or in other fields to which talented scholars have devoted lifetimes of research and study, and yet jurisprudence is nothing if it is not relevant to these fields. Florence Nightingale revolutionized hospital practice by insisting: Whatever else hospitals do they should not spread disease. And so, the idea which I should like to pursue in our discussions here is that whatever else jurisprudence does it should not spread confusion. We have plenty of confusion to start with in every field of law. Jurisprudence should make it possible for us to use sterilized instruments in dealing with these common confusions. The abstract ideas which we use in our jurisprudential analysis should be solvent, should be able to pay cash on demand in social fact. A term like property should tell us something about a mule in Montana, a song, an easement, something about the difference between life in Russia and life in the United States. When I use a word like law or

9. COHEN AND COHEN, READINGS at 678.

property you have a right to know exactly what I mean by the term, and vice versa.

The Uses of Jurisprudence

Now some of you will ask: Does the pursuit of jurisprudence, in this sense of the term, have any practical utility? I think it does.

In the first place, it may give us a chance to deal with problems that are not dealt with thoroughly in any particular law course because they are not peculiar to any particular course, the problems, for instance, of precedent, of ambiguity, of whether a defendant could or could not help doing what he did. And by providing us with over-all ideas of order and system that link our various law school courses with each other and with our studies in history, economics, government, and philosophy, it may save our minds from becoming junkshops.

Again, jurisprudence may be of special value when we are dealing with long-range prediction involving a forecast of trends of social control. So, too, jurisprudence may be an essential part of long-range legislative planning.

Jurisprudence may even provide us with avenues to sympathy with our legal opponents. And here it is worth observing, I think, that there is an important difference between a lawyer and a soldier. A soldier may be a poorer soldier if he sympathizes too much with his opponent. But a lawyer must be able to sympathize with his adversary because otherwise he will have no feeling for the reactions of judges, juries, and legislators, and because, in the long run, understanding one's opponent's views is the only way to peace, and society hires lawyers to make peace; people get into plenty of fights without lawyers, but ending fights generally requires a lawyer's talents, and especially the talents of a lawyer who can see both sides of an argument.

It is even possible that jurisprudence in our sense may have something to do with earning a living. Most law students are naturally worried about finding clients. But the great lawyers of American history never found clients. They made clients. The great American lawyers of the 18th century made the governmental institutions that they later served. The great American lawyers of the 19th century made the corporations that employed them, fitting together opportunities and resources, putting together one man's wealth, another man's influence, and a third man's managerial ability. So the great American lawyers of the 20th century may very well be creators of those institutions, whatever they may be, labor organizations, international agencies, new agencies of public service, that will put their distinctive mark on this century. And these are problems which cut across all the pigeon-holes of law-school curricula, and need to be faced in terms of the broad concepts of jurisprudence.

Finally, jurisprudence, as we view it, may provide us with an insurance against the inconsistency and futility that so many of us are apt to encounter when we are pushed in one direction by one client, and in another direction by another client.

But apart from any practical utility which the general ideas of jurisprudence may have, there is the basic fact that law is a narrowing trade unless one sees it, as Holmes put it, as a window upon life, and seeing law as a window upon life is the essence of jurisprudence.

The Meaning of Property

These are the things that were implicit in our last discussion. What was explicit was the effort to eliminate a host of confusions that have come, through the years, to cluster about the word "property".

First, we tried to get rid of the confusion of nominalism, the idea, as expressed by Walton Hamilton, that "property is a euphonious collection of letters." We considered the hypothesis that the difference between communism and capitalism is merely one of language, and we found that this hypothesis could not be maintained. Private property is a fact, and not simply a word.

We then tried to clear away the confusion of materialism which we have inherited from 14th century scholastic metaphysics, which regards property as things in space.

Then we tried to dispose of a third major confusion, what may be called semi-materialism, the idea of property as a dyadic or two-termed relation between a person and a thing. We found that this conception breaks down at two points. In the first place, there may be no thing in a property relationship. In the second place, there is no property so long as there is only one person. Property essentially involves relations between people.

In the fourth place, we tried to clear up the confusion between the legal concept of property and the economic or ethical concept of value, and we found that valueless property and propertyless value are among the facts of life. We then considered various confusions as to the type of legal relationship that makes up property, canvassing definitions offered by Blackstone, by the American Law Institute, and by others, and finding all of these traditional definitions too broad or too narrow to be useful in analyzing the problems of Montana mules, the ownership of songs, or the difference between capitalism and communism. We then went on to analyze the relation between private property and public law and between property and contract.

What we ended up with was a realistic definition of private property in terms of exclusions which individuals can impose or withdraw with state backing against the rest of society. Such a definition is not the only possible definition of property, and in our reading of Locke

and Kant and other legal philosophers we shall find quite different views of property put forward, but our realistic definition does offer certain clearcut advantages in legal analysis.

In the first place, such a definition helps us to avoid emotional entanglements. These emotional entanglements are probably more serious in discussions of property than in any other field of social controversy. Property, after all, is the essence of all that is proper. How, then, can any reasonable man oppose property? If we define property as value, who will oppose value? If we define property as equities, who is against equities? If the essence of property is enjoyment, who will oppose enjoyment? But if we can distinguish property from all these related terms and achieve an unemotional conception in terms of exclusions and state power, we may have some chance of reaching an objective analysis in trying to determine whether any given type of private property should be socialized, or whether any given type of social relationship should be turned into private property.

A second advantage of our realistic definition is that it helps us to avoid absolutisms in arguments for and against private property. Our definition makes it clear that the real problems we have to deal with are problems of degree, problems too infinitely intricate for simple panacea solutions.

A third advantage of our definition is that, unlike Blackstone's definition, it does apply to some of the facts of life, and a fourth advantage is that, unlike the American Law Institute definition, it does not apply to all the facts of our legal life and therefore makes it possible for us to distinguish between ownership and non-ownership.

I think it may be possible also to show that our realistic definition of property will eliminate question-begging arguments, will expose meaningless questions, will make possible a self-consistent technique of legal analysis and will help us to understand the world we live in. But these are hypotheses which we can best test when we put our definition to work in concrete cases. Now, let us try to see what happens when we apply our formula of private property to some current problems.

What Courts Say and What Courts Do

C. Mr. Morris, you have heard many times, I am sure, the statement of former Chief Justice Hughes, that the Constitution is what the judges say it is. Suppose the judges say over and over again that all doubts as to legislative power are resolved in favor of the validity of legislation. If that is what the judges say, does that make it the constitutional law of our land?

M. No, I think what the judges do is more important than what they say, and if they actually resolve various doubts against legislation,

then that is the constitutional law we are governed by, regardless of what the judges say.

C. In other words, Mr. Hughes was giving us a partial truth. What the judges say may be more important, for certain purposes, than the words of the Constitution. But what the judges do is more important than what they say.

M. Exactly.

C. Now, would you apply the same analysis to the statement that Walton Hamilton makes in his very stimulating article on property in the Encyclopedia of the Social Sciences:

It is incorrect to say that the judiciary protected property; rather they called that property to which they accorded protection.

M. I would say that certain relationships become property as a result of court decisions, whether or not the court calls them property. I think Hamilton's statement, like Hughes' statement, is illuminating in that it calls attention to the fact that property, like the Constitution, is a resultant of court activity, but not quite accurate because it fails to recognize the possible differences between what courts do and what they say they are doing.

C. Suppose we consider the case of *International News Service v. Associated Press* (Readings, p. 18) in that connection. What was the actual decision reached in that case?

M. The decision was that International News Service could not publish certain material which it was copying from Associated Press newspapers.

C. Was that decision applicable, do you suppose, only to the International News Service, or did it lay down a rule equally applicable to other parties?

M. I think the same rule laid down in this case would apply equally to other parties.

C. Did this decision then establish a property right in the realistic sense in which we have used the term, that is to say, a government-supported power in the Associated Press to prohibit the rest of the world from making commercial use of its news stories, or to permit such use?

M. Yes, I think it did.

C. Was this a property right that Congress itself had declined to create?

M. Yes, as Justice Brandeis points out in his dissent, Congress had considered this problem and had declined to establish property rights in uncopyrighted news as such.

C. Why, then, did the court say in its majority opinion: "We need spend no time . . . upon the general question of property in news matter at common law"?

M. I think the court did not want to admit that it was usurping a function of Congress and legislating property into existence where property had not existed before.

C. Let me direct your attention to the way the court phrases the question as to whether "defendant may lawfully be restrained from appropriating news" (*Readings*, p. 18). And note that the reference to the defendant "appropriating" news is repeated at p. 20. Now according to my dictionary to "appropriate" something means "to take to one's self in exclusion of others" or "to claim or use by an exclusive or preeminent right." Was the defendant in this case seeking to establish the exclusiveness of its right to reprint these news items? Was it trying to prevent the Associated Press or anybody else from using these news items?

M. No. The defendant merely wanted to make non-exclusive use of them on its own account.

C. Then, the suggestion of the court that the defendant was trying to establish a property right of its own was really a begging of the question, wasn't it?

M. Yes. As Holmes points out in his dissent, the majority opinion fails to distinguish between property and value. As Holmes says: "Property, a creation of law, does not arise from value, although exchangeable—a matter of fact . . . Property depends upon exclusion by law from interference. . . ." (*Readings*, p. 21). The defendant was seeking to exercise a valuable privilege but was not seeking to exclude anybody else. Therefore, the defendant was not seeking to establish a property right or to appropriate anything as its own, but the decision of the majority of the court did establish a property right in the plaintiff.

C. Now, whether or not any of us agree or disagree with the majority decision, the fact is clear that this decision did establish property rights, even though the court refused to phrase its decision in those terms. What were the policy grounds, in your opinion, Mr. Morris, that led the majority of the court to this decision?

M. I think roughly they were the same type of consideration that came up in our discussion of the case of the Montana mule. I think the Supreme Court considered that its decision would encourage enterprise by guaranteeing a connection between expenditure of effort and pecuniary reward. I think the court considered it unfair for an agency that spent no money in gathering the news to pick up the news from another agency and reap the benefits, just as we would consider it unfair for a cowboy who did not own the mule's mother or father to acquire legal ownership merely by roping the animal.

C. Why doesn't the court say, then, that it is establishing property rights on grounds of ethics or policy?

M. I think courts generally try to make noises like slot-machines

and to give the impression that they are not legislating. People don't swear at slot machines the way they do at other human beings.

C. Then perhaps we shall find it easier to face the considerations that justify or do not justify private property if we look upon these problems as a legislature might look at them instead of taking a purely judicial view. Let me suggest, therefore, at this point that we put off our judicial robes and constitute ourselves a committee of Congress trying to determine whether private property should exist in a given situation. We might be considering legislation to prohibit the copying of dress designs, or giving the users of certain wave lengths a perpetual right to exclude others from these channels. For the time being, however, I propose that we consider proposed legislation to dispose of salmon fishing rights in the ocean waters of Alaska. Now, Mr. Grodin, suppose you consider yourself chairman of the House Committee on Fisheries and Merchant Marine, considering proposed legislation which would give to the companies that now have salmon traps in Alaskan ocean waters a perpetual right to put such traps in the same places in future years, and to exclude all other persons from these areas. In passing upon such legislation you would, in effect, be establishing or refusing to establish private property in the ocean waters of Alaska, would you not?

G. Yes.

C. And that would be the issue even though we refrained from using the word "property" in our discussion.

G. Exactly.

C. Now, what sort of information would you try to obtain from witnesses in trying to determine whether such legislation is justifiable?

G. I would want to know how many trapsites there were, how many operators now use them, how many other operators would like to use them, whether we have a situation approaching a monopoly, how the control of these trapsites might affect the price of salmon, how our arrangements would affect the local economy of Alaska, and how the people who now have the trapsites got them in the first place.

C. Well now, suppose I were to testify on each of these questions. I might say that there are between 500 and 600 of these strategic fishing sites, that they pretty much control the salmon packing industry, that about half of the sites are now held by five companies, including Pacific American Fisheries, Libby, MacNeill & Libby, and an affiliate of the A & P Company, that these companies acquired control of these sites in a variety of ways, including the bribery of government officials, the buying out of small operators, the defrauding of native fishermen, and various other more honorable methods. I might go on to testify that while competition for these sites is still possible, it is becoming increasingly difficult and that the large companies that control the key sites have come pretty close to a monopoly position

of being able to fix prices. I would say that the people of Alaska have voted overwhelmingly to abolish all salmon traps in order to get rid of what they consider an unwarranted absentee control over the chief industry of the territory. Now, suppose I were to testify along these lines, and suppose various other witnesses representing the Alaskan salmon industry and other interested parties were to testify on these same issues, possibly expressing very different views. Once you were satisfied, Mr. Grodin, that you had all the objective measurable facts, would that settle the problem of whether this proposed legislation should be passed?

G. No, there would still be a question of values to consider, a question of weighing conflicting social policies against each other.

C. Would you say, Mr. Grodin, that just as there may be experts on the economics of the Alaskan salmon industry that your committee would want to hear, there may be some individuals with special knowledge on the subject of ethics or social policy, whose views on these subjects you would consider more valuable than the views of other people?

G. Yes, I would say that people like Justinian, Victoria, Locke, Hegel, Kant, and Bentham would all have something to contribute to our understanding of this problem.

C. Well, now let us suppose that your committee can subpoena the experts you have mentioned or their legal representatives. Let us see what they can contribute to our understanding of this problem. Mr. Moscov, will you represent Justinian before this committee?

M. I'll do my best.

C. Will you identify your client for the committee?

M. My client's name is Caesar Flavius Justinianus. His last-known post office address: Constantinople.

C. Was your client ever a communist?

M. No, sir.

C. Was he a Slav, a Bulgarian?

M. I believe he was a Slav, probably Bulgarian.

C. Aren't most Slavs or Bulgarians communists or communist sympathizers or fellow-travelers?

M. Possibly they are today. I'm not sure. I don't think they were in the 6th century.

C. Did your client ever hold a government job?

M. Yes, he did. He was an Army general and became Emperor of the Roman Empire.

C. What did he do?

M. He ran the Roman Empire. In fact, he had to more or less put the Empire together to make it run, since it had broken into various pieces.

C. What nations did he vanquish?

M. According to his own account, he conquered the Alamani, Goths, Francs, Germans, Antes, Alani, Vandals, and Africans.¹⁰

C. Your client must have had a pretty tough job vanquishing the French, Germans, Spaniards, Africans, etc.? And keeping them vanquished? And remaining pious, happy and ever august? He didn't have must spare time hanging around on his hands, did he?

M. No, he didn't have very much leisure.

C. What was your client doing on December 11, 533?

M. I'm afraid I don't know. That was before he employed me as his lawyer.

C. Suppose you look at the end of Justinian's Preamble to his Institutes (*Readings*, p. 103). Does that refresh your recollection?

M. Yes, it does. On December 11, 533, my client was publishing a law book, known as the Institutes.

C. Why did he go into the law book publishing business? Didn't he have anything more practical than that to spend his time on?

M. I don't know.

C. Did the vanquished Spaniards, French, Germans, Africans, etc. stay vanquished?

M. Not very long.

C. Did they hold on to your client's code?

M. Yes, they are still using most of Justinian's law code, I believe. At least that's the basis of European civil law.

C. Was there ever anything more practical your client did?

M. Probably not. Certainly nothing with more lasting effects.

C. Then teaching law students was the most practical thing that this Bulgarian general ever did?

M. Law teaching can be very practical.

C. Did your client promise government jobs to law students who read his legal textbooks with cheerful diligence?

M. I suppose you might so construe the language of section 7 of Justinian's Preamble telling students that diligent study would make it possible some day for them to govern different portions of the Empire.

C. Was that the only way he could get people to read his books?

M. No, but it probably helped.

C. Wouldn't it have been cheaper to pay them to read them?

M. That might depend upon how qualified they were for government service.

C. Did the material of these lawbooks have anything to do with the practical job of running an empire?

M. Yes, it probably did. Here were a lot of more or less barbarian tribes pulled together into an empire having to do business with each

10. COHEN AND COHEN, READINGS at 102.

other, and a uniform code of law might help in holding the empire together and making it tick.

C. What does your client have to say about first occupancy as a basis of ownership?

M. "Natural reason gives to the first occupant that which had no previous owner."¹¹

C. Do you see any connection between laying down rules of natural reason and running a Roman Empire?

M. Well, if you can persuade people to act in accordance with a code of natural reason you can certainly economize on expenditures for defense.

C. Suppose you were not an emperor but just an underworld king—or say general counsel to Mr. Costello—and suppose your vice-president in charge of jewelry stickups complained that while some of his trusted assistants were carrying through a delicate operation one evening, some of your gorillas assigned to the slot-machine racket broke open a rival machine across the street, so that the cops came and that ruined the jewelry operation. That would be a serious situation, wouldn't it?

M. Yes, it would be serious.

C. Your mob couldn't last long if your boys kept getting in each other's way. What would you do?

M. I'm afraid I don't have an expert and informed opinion on that problem.

C. Suppose you called in your vice-presidents and lieutenants and said: Boys, it ain't reasonable for us to be getting into each other's way on these jobs. Let's see that our slot-machine mob keeps away from jewelry store operations after this. And your boys might answer: "Natch, boss." And would that be short for "natural reason?"

M. I guess that would be about the sense of it.

C. And is that what Justinian was doing?

M. I suppose it was.

C. Suppose you were a reasonable monkey and you could choose between picking your own bananas and taking them out of the hands of other monkeys. What would you do?

M. I think it would be safer and more comfortable to pick my own bananas, so long as there were plenty of bananas that other monkeys hadn't picked.

C. And that decision might rest on purely practical considerations of comfort and safety having no connection with ethics or morality?

M. I think so.

C. Suppose you were a reasonable wolf in a society consisting of wolves and sheep. You would, I suppose, eat sheep.

M. That's a reasonable supposition.

C. Now, suppose you had to decide whether to kill a sheep yourself

11. COHEN AND COHEN, READINGS at 51.

or to take mutton out of the jaws of other wolves who had made a kill. Let's assume, in spite of Kipling, that wolves are not concerned about law or ethics. What considerations might lead you to respect the first occupancy of your fellow wolves and to go out after your own mutton?

M. Taking mutton out of the jaws of hungry fellow wolves might be a difficult and dangerous operation.

C. Exactly. You might end up as the dessert to a mutton dinner. And so in order to economize on the use of force you would be likely to respect prior occupancy and hunt down some unoccupied sheep for yourself. Is there any practical reason, now, why you and your fellow wolves shouldn't kill as many sheep as you like?

M. One very practical consideration would be the probability that if we ate up all the sheep we would then starve to death.

C. But if you limited the number of sheep that could be killed in any year so as to operate on a sustained yield basis, then you and your fellow-wolves could continue to eat sheep indefinitely as long as sheep eat grass?

M. That's clear.

C. And if you found that Congress had passed a law guaranteeing Alaskan salmon the right to swim every week-end between Saturday night and Monday morning without being caught, that would not necessarily mean that the salmon had beaten the salmon-packers in the halls of Congress, would it?

M. No, it might mean that the salmon packers were reasonable enough to see that unless they curbed their fishing the supply would give out.

C. And if you found that a capitalist society had on its statute books all sorts of laws protecting workers against low wages, excessive hours, or other industrial hazards, would that mean the defeat of capital by labor?

M. No, it might mean that capital had acquired the intelligence and know-how to keep its labor supply and its market from giving out.

C. Perhaps, then, I can summarize the drift of this discussion by pointing out that wolves, monkeys, fishermen, gangsters, emperors, capitalists, or other wielders of power frequently find themselves in a position where the maintenance of power requires its rational limitation and orderly exercise. One very simple formula of reasonable restraint that appeals alike to reasonable monkeys, wolves, gangsters, salmon packers, and Roman emperors is the rule of first occupancy.

The rule of first occupancy tends to reduce areas of dispute, since ordinarily there is only one first occupant. The rule tends to reduce areas of conflict since it preserves the status quo and encourages others to reduce other sheep or bananas or oysters to possession instead of taking them from the first occupant. By reducing areas of dispute or conflict, such a rule maintains or strengthens the power of the possessing

group. There may be many other considerations of economic productivity or justice in favor of the rule of first occupancy. But our examination of the situation in terms of power indicates that the rule of first occupancy may appeal very much to a law-giver who is interested only in strengthening the power of his government or its ruling class.

Justinian puts the rule in the language of natural reason—following Aristotle's distinction between the natural, which is everywhere the same, and the artificial or conventional, which varies from place to place and from time to time. Perhaps the word "natural" is especially applicable here to a rule that is applied by monkeys, wolves, or dogs as well as by humans. But even though we don't use the language of Justinian today, I wonder if we don't say the same thing in other terms.*

* Lectures on Property usually occupied three sessions, with the fourth devoted to Property and Contract. In the third session, according to Felix Cohen's full notes, there would have been a further presentation of the ideas on property of Victoria, Locke, Hegel, Kant, Bentham, etc., as revealed by cross-examination of counsel; then a summing up and transition to Property and Contract.