ON THE DISTINCTION BETWEEN REAL AND PERSONAL PROPERTY

*E. P. Krauss**

INTRODUCTION

Recently the peculiarly American juristic philosophy based upon anticonceptualism[1] quietly entered its second half-century of preeminence.[2] Holmes' admonition at the dedication of the new Boston University Law School building in 1897[3] has borne itself out in the

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* Assistant Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University.

[1] In 1934 Professor Franklin remarked:

> The most conspicuous juristic theoreticians of the last half decade have been telling of the futility of the use of language, of words, and of sophisticated groups of sounds called concepts. Sometimes the attack is built about a base of behaviorism, sometimes about a base of psychoanalysis. In either event, subjective elements are supposedly introduced into language with the result that language cannot be regarded as authoritative, responsible, or definitive. The jurists who have maintained this position have given an account of a system of law that has been collapsing in their view. Yet at the same time, because of their middle-class presuppositions, these jurists have not appreciated or overtly acknowledged what has been happening. Instead, they give theories as to the inefficacy of conceptualism. Occasionally, as in the case of Mr. Llewellyn, there is joy in the vista of the juristic wasteland, as he echoes Mr. T. S. Eliot: "Always the night of words will close again in beauty over the wild, streaked disturbance." Occasionally, as in the case of Mr. Frank, there is stark fear that the decay in his society is going on so rapidly that new and authoritative forces will not assert themselves before the general security is impaired generally. But in no case has the malady been described as a disease of the middle class. Instead, theories of universal application as to the lack of utility of conceptualism are asserted, and thus defiantly the individualism of the last two centuries logically asserts itself in the most extreme form it ever has taken—in the form of a theory that language lacks social significance. . . .

Franklin, *The Historic Function of the American Law Institute: Restatement as Transitional to Codification*, 47 HARV. L. REV. 1367, 1367-68 (1934) (footnotes omitted).

[2] An exception to the general lack of notoriety accorded anticonceptualism's golden anniversary is Professor Schlegel's chronicle of its early years at Yale Law School. Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459 (1979).

[3] Justice Holmes said:

> The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, toward a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to

fashionable legal discourse of our time.[4] Ironically, even purportedly critical legal scholars have hailed 1885 as the high water mark of American "legal consciousness."[5] The eager student of American legal

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> tame him and make him a useful animal. For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. . . .

Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

[4] Indeed, statistics, the unmistakable hallmark of technical expertise, have deeply penetrated the authoritative pronouncements of the United States Supreme Court. Whereas in the not too distant past statistical reconstructions of legally significant facts were consigned to the footnotes in Supreme Court opinions, the text being reserved for the law (i.e., recapitulations of general principles and references to authoritative precedents) increasingly the reverse has become the case. *See, e.g.*, Ballew v. Georgia, 435 U.S. 482 (1978).

[5] Professor Mensch rather inelegantly describes early 19th century legal thought as "conceptual mush" and a "loose hodge-podge of conflicting premises." Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 22-23 (D. Kairys ed. 1982). She continues:

> [T]he great thrust of nineteenth-century legal thought was toward higher and higher levels of rationalization and generalization. Eventually, that process produced a grandly integrated conceptual scheme that seemed, for a fleeting moment in history, to bring coherence to the whole structure of American law, and to liberal political theory in general.

Id. at 23.

But, alas, this magnificent creation of the late 19th century was irredeemably profaned by the American legal realists: "The best of the realist critique . . . cut so deeply into the premises of American legal thought that no amount of enlightened policy making and informed situtation sense could ever really put Humpty Dumpty together again." *Id.* at 27. All that is left is a "hodge-podge of policy, situation-sense, and leftover doctrine." *Id.* at 34. Evidently "mainstream" legal theorists are mired in their own delusions, condemned to perpetually muck about among the ruins of a structure of forgotten meanings.

Regrettably, Professor Mensch and her colleagues have failed to deliver on their promise of a theoretical breakthrough. Kairys, *Introduction* to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982). One commentator has advanced the following hypothesis to explain this failure:

> From their perspective within a profession immersed in doctrine, they declaim as a central theoretical insight the belief that doctrinal boundaries are indeterminate, that they are only *ad hoc* justifications for a contingent state of affairs, and hence that doctrinal boundaries can be undermined simply by demonstrating that they are not logically necessary, that law is what you can get away with. But this intuition that doctrinal boundaries are indeterminate may just be the cryptic manifestation of a repressed understanding that is much more difficult to voice within legal institutions: that the boundaries of law itself, and the forms of rule dependent in large part on rational, discursive justification that it represents, are disintegrating, giving way in most areas of social life to forms of domination that involve both more force and more direct manipulation of consciousness. The concept of "contingency" itself, combined with a commitment to a life within institutions where law must be deemed eternally preeminent, makes it impossible for the idealists to come to grips with the changing status of legal reason in a world where reason has become synonymous with science, and where the forces affecting the development of science largely escape the grasp of conventional legal reason.

Litchterman, *Social Movements and Legal Elites: Some Notes from the Margin on* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 33-34 (unpublished 1983) (forthcoming in 1984 WIS. L. REV.) (footnote omitted).

ideology is offered a Hobson's choice between an omnipotent metaphysic of "efficiency" and an almost Pentacostal attitude toward "process."[6] From the theory advanced a half-century ago that language has no social significance, we have been propelled toward the conclusion that law has no meaning. This is unacceptable.

So long as the Gargantuan enforcement powers of the State are brought to bear on the actual relationships of persons and groups in society in accordance with a pervasive legal ideology, the meanings contained in that ideology, whether expressed or concealed, must be vigorously pursued lest the freedom of the human spirit be forgotten and displaced by planned chaos.[7] Before we can approach an adequate understanding of the function of law in society, we would be well advised first to examine what the law says and reflect upon what the words and phrases comprising authoritative texts might possibly mean.[8] If we do not, blissful ignorance will before long be shattered by the dialectical reassertion with a vengeance of those very same hobgoblins we tried to wish away.[9]

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[6] The former is typified by R. POSNER, ECONOMIC ANALYSIS OF LAW (1973); the latter by Reich, *The New Property*, 73 YALE L.J. 733 (1964). A very useful exposition of the common assumptions of these two strands of legal theory appears in Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545 (1982).

A splinter group calling itself the Critical Legal Studies Movement has offered little in the way of theoretical alternatives. *See supra* note 5. They seem intent on rescuing old-style legal idealism from the coals, while defending "trashing" as a legitimate scholarly endeavor. *See* Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229 (1982); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

[7] A few short years ago Peter Sellers' portrayal of Dr. Strangelove was witty satire. Today the President of the United States refers to the most awesome weapon of mass destruction ever devised, the MX missile, as "peacekeeper." It would be grave error to conclude from this that "peace" has no meaning, and that war is a joke.

[8] In a much celebrated essay, Morris Cohen rather off-handedly remarked:

> Unfortunately, however, whether because of the general decline of juristic philosophy after Hegel or because law has become more interested in defending property against attacks by socialists, the doctrine of natural rights has remained in the negative state and has never developed into a doctrine of the positive contents of rights.

Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 21 (1927).

It is not surprising that some of the most valuable American legal scholarship of this century was produced by a man without fear of socialism who struggled to put the lessons proffered by Hegel into practice. *See, e.g.*, Franklin, *A Precis of the American Law of Contract for Foreign Civilians*, 39 TUL. L. REV. 635 (1965). Professor Franklin's scholarship takes its place in a tradition of the study of law and social theory of which the present essay aspires to become a part.

[9] "Hegel remarks somewhere that all facts and personages of great importance in world history occur, as it were, twice. He forgot to add: the first time as tragedy, the second as farce." K. MARX, THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE 15 (3d rev. ed. of English translation 1963).

The conceptual framework of rules about property in Anglo-American common law promises to be a fruitful source of meanings that reverberate throughout our legal ideology. Besides being the oldest, most elaborate and often most arcane of the conventional categories of common law doctrine, it also contains the most comprehensive doctrinal representation of the variety of human relationships in society. Commercial law, by contrast, is almost exclusively concerned with a fairly discrete set of business relationships. Constitutional law articulates a boundary between public and private activity. Property relations entail both of these and much more, reaching to the rudiments of what it is to be and to be left alone, to be organized into collectives of one form or another, or to be autonomous in opposition to others. As the oldest and most comprehensive of the conventional categories, property law supplies the basic structure of common law consciousness which appears in analogical forms throughout the Anglo-American corpus juris. Thus, a likely place to begin an examination of what the law says and a speculation on what its expressions might possibly mean is the fundamental conceptual distinction between real and personal property.

The method of ferreting out meanings employed herein entails a critical examination of a small number of elementary concepts. In describing the goal of literary criticism Walter Benjamin stated:

> The object of philosophical criticism is to show that the function of artistic form is as follows: to make historical content, such as provides the basis of every important work of art, into a philosophical truth. The transformation of material content into truth content makes the loss of effect, whereby the attractiveness of the earlier charms diminishes decade by decade, into the basis for a rebirth, in which all ephemeral beauty is completely stripped off, and the work stands as a ruin.[10]

Benjamin's method of redemptive critique proceeds from a special sort of asceticism. Art criticism in search of beauty is, after all, a matter of taste. The work of art is beautiful because the critic, guided by the strictures of method, says it is; otherwise, the critic tells us with sober sincerity that the work of art is not art. Likewise, the legal critic in pursuit of justice tells us that an unjust law is not law. Having rendered the object of criticism a thing contingent in itself, the art form turns from the portrayal of some external beauty to a portrayal of itself—paintings about painting, novels about the novel, photographs

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[10] R. WOLIN, WALTER BENJAMIN AN AESTHETIC OF REDEMPTION 53 (1982) (quoting W. BENJAMIN, THE ORIGIN OF GERMAN TRAGIC DRAMA 182 (1977)).

about photography, films about cinema. Beauty is rendered irrelevant by the imperial ascendence of an arbitrary form. In like manner the rules of law abandon any vision of justice, and embrace instead law's inward reflection of itself, which is legitimacy. The critic in search of beauty—or justice, as the case may be—becomes a quaint anachronism, and the truth content of that which is represented to be beautiful or just is diffused in the contingencies of tastes and interests, called "freedom of choice." That *choice* is the antithesis of *freedom* is self-evident to the extent that "neither" is ridiculed, and "both" is not allowed. By refusing to choose, the critic in search of truth practices an asceticism that confirms rather than denies the relevance of taste and interest. It is an asceticism that does not quietly retire from the world, but instead audaciously confronts it.

I

The following discussion shall present an ideal reconstruction of the categorical scheme of the common law of property. This ideal reconstruction is a model drawn from historically determinate meanings of the names given to the categories of property by the common law, but it is not intended to be a representation of a coherent set of legal doctrines at any particular historical moment. It is a model designed to uncover meanings that are inaccessible when viewed from the standpoints of legal usage or particular historically contingent circumstances. From this theoretical standpoint the name given to a doctrinal category is an idiom of discourse. It is chosen precisely because of its meaning in some other (nonlegal) context. The model is suprahistorical because these idioms are deposited into legal discourse under disparate conditions in historical moments that may be separated by centuries. Taken together they comprise the vocabulary of the law in the present. The meanings arrayed within the model are meta-legal in that they suggest explanations of legal usages, rather than simply describe legal usages that are extant.

This discussion, then, does not seek to give the origin and genesis of legal rules, nor is it a dissertation on the proper application of legal rules to particular factual situations. Instead, the model is intended to foster theoretical insight into the nature of legal discourse. It is a mechanism that reveals meanings that are secretly invoked when actual relationships among persons in society are represented in the form of ideal legal expressions. Over the course of time the historical circumstance that gave rise to a feeling that was expressed in a name

may be forgotten,[11] but the name perpetuates the feeling for as long as it is applied to new circumstances. This perpetuation of the feeling is the foundation of legal and social continuity in the face of constantly changing legal rules in a constantly changing society.

The categorical scheme that is reconstructed herein is the distinction drawn in the common law between real and personal property. The commonplace generalization is that real property is land, and personal property is not land. This generalization is drawn from contemporary legal usage, and it holds true in the majority of circumstances, but there are important exceptions. The great division of ownership interests in this reconstructed model is the distinction, medieval in origin, between (personal) *property* and (real) *estate.* Viewed from the theoretical standpoint of this discussion, these categories are impenetrably opposed and invoke disparate values. Over the course of time a middle ground has been created, obscuring the distinction between the two. In contemporary legal usage it is not incorrect to speak of one's "personal estate" or one's "real property." These are hybridized expressions which bring together two different kinds of feelings that we have about the objects of ownership. This mixing of ideas and feelings is the content of the middle ground. By the late nineteenth century the middle ground already had been created, with the attendant confusion of meanings, as is indicated by an 1873 treatise on the subject:

> The word "estate" is doubtless used in a broad sense, in these days, to denote both things real and things personal; and the same may be said of the word "property." Consulting our own convenience in a reasonable degree, we shall use the words somewhat indiscriminately; not forgetting, however,—as the reader should not,—that

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[11] When the great Hasid, Baal Shem Tov, the Master of the Good Name, had a problem, it was his custom to go to a certain part of the forest. There he would light a fire and say a certain prayer, and find wisdom. A generation later, a son of one of his disciples was in the same position. He went to that same place in the forest and lit the fire, but he could not remember the prayer. But he asked for wisdom and it was sufficient. He found what he needed. A generation after that, his son had a problem like the others. He also went to the forest, but he could not even light the fire. "Lord of the Universe," he prayed, "I could not remember the prayer and I cannot get the fire started. But I am in the forest. That will have to be sufficient." And it was.

Now, Rabbi Ben Levi sits in his study in Chicago with his head in his hand. "Lord of the Universe," he prays. "Look at us now. We have forgotten the prayer. The fire is out. We can't find our way back to the place in the forest. We can only remember that there was a fire, a prayer, a place in the forest. So Lord, now that must be sufficient."

B. MYERHOFF, NUMBER OUR DAYS 112 (1978).

> the more technical and limited application of the word "estate" is to things real, while that of the word "property" is to things personal; for upon this distinction are founded some curious and interesting doctrines.[12]

The reconstruction set forth below restores property and estate to a condition of impenetrable opposition so as to reveal their hidden meanings and provide insight into the processes of the law whereby the distinction becomes obscured.

II

Modern American law classifies all property as either real or personal, and the rights and responsibilities of the owner may vary greatly depending upon how the property involved is classified. Real property primarily includes interests in land, and personal property includes goods, money, and intangibles such as copyrights and investment securities. The differing treatment of these two classes of property is sometimes explained in terms of the natural qualities of the thing that is owned. Professor Brown, a leading authority, states:

> Property rights may be classified generally according to the nature of the object concerning which the rights are claimed. The most natural of these classifications is that between immovables (land and those things that are permanently attached to it) and movables (commonly designated in the law as chattels). . . . Part of this distinction is due to the inherent differences between the two classes. Land is permanent and immovable. Chattels are often of a temporary character and can be easily moved about. Land can be possessed or controlled by its owner in only an incomplete or limited manner, whereas chattels may be handled, manually transferred, altered, and usually even destroyed.[13]

At the outset it is evident that the nature of the object is mutable. Trees are permanently attached to the land and are therefore part of the realty. But if a person chops one down, the essential nature of the object is transformed from a living thing "permanently" attached to the realty into a dead article of commerce that has been severed from the realty and made into personalty. When land is strip-mined, minerals are severed from the realty and are reclassified as personalty, but their nature has not been changed. The nature of the land has been

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[12] 1 J. SCHOULER, A TREATISE ON THE LAW OF PERSONAL PROPERTY § 17, at 21 (3d ed. 1896) (footnote omitted).

[13] R. BROWN, THE LAW OF PERSONAL PROPERTY § 1.7, at 9 (3d ed. 1975).

changed drastically, but in contemplation of law the tract is still the same realty. The significance of mobility and permanence lies not in the nature of the object, but in the intentions and behavior of the owner. If we follow Professor Brown's explanation, the determination that property is either real or personal depends upon whether it is movable or immovable. Whether or not the object is movable depends upon the behavior of the owner. The owner's right to behave in a certain way depends upon whether the property is real or personal. Thus, the explanation of classifications in terms of the nature of the object is circular.

Brown offers the further explanation that the importance of this distinction is attributable to the feudal origins of the common law. He continues:

> The distinction between the law of land and that of movables . . . is due . . . in large degree to the circumstance that feudalism . . . was largely based on landholding. Upon the holding of land was based much of the structure of medieval English legal, political and economic society. It was natural, therefore, that concerning land a large body of common law developed which found no counterpart in the law relating to chattels.[14]

Here the reader is led to believe that all of English society was based upon the feudal system of landholding, and that therefore other interests were relatively unimportant.[15] Consequently, the common law developed a large body of rules concerning land, and the law of chattels was given little attention and remained undeveloped. This image of feudal England is grossly distorted. It leads to mistaken beliefs about the distinction between real and personal property in the development of the law.

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[14] *Id.* at 9-10.

[15] Long ago Maitland dismissed this absurd contention:

> Against the supposition that in the feudal age chattels were of small importance so that there was hardly any law about them, a protest should be needless. Not even in the feudal age did men eat or drink land, nor, except in a metaphorical sense, were they vested with land. They owned flocks and herds, ploughs and plough-teams and stores of hay and corn. A Cistercian abbot of the thirteenth century, who counted his sheep by the thousand, would have been surprised to hear that he had few chattels of any value. Theft has never been a rare offence; and even on the land-owner the law brought its pressure to bear chiefly by seizures of his movable goods. Indeed the further we go back, the larger seems the space which the possession of chattels fills in the eye of the law.

2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (2d ed. 1952).

At the time feudalism was introduced into England there were three centers of political authority: the crown, the church, and the locality. The feudal system of landholding was one mechanism for extending the authority of the crown over all the territory of England. After this process was begun the church and the localities retained for a period of time a certain measure of authority, including the authority to establish rules concerning chattels.[16] Thus, it is true that parts of the common law of chattels developed somewhat later than the early land law.[17] But it is not true that feudal law was unconcerned with interests other than landholding, nor is it true that the significance of landholding in the feudal law is attributable to the natural characteristics of land.

Under the feudal system the king asserted political authority over all of England, its land and its people. The assertion was realized through the feudal system of granting authority to individuals who then became obligated to the king. Thus, the king might grant authority over territory to one of his barons, who was then said to hold of the king. The baron might then exercise this authority by granting the land to some lesser feudal lord, who held directly of the baron and indirectly of the king. The significance of feudal landholding lies in the way it was used to extend the political authority of the crown downward into the local communities.[18] Authority granted by the

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[16] Indeed, alternative forms of social organization—i.e., those not monopolized by the state and concretized as reifications of the legal order—such as certain churches, unions, tribal groups, or political organizations have historically provided a social context within which emancipatory struggle may be carried out. *See, e.g.*, D. BROWN, BURY MY HEART AT WOUNDED KNEE (1970); C. JAMES, BLACK JACOBINS (1963); D. MONTGOMERY, WORKERS CONTROL IN AMERICA (1979); E. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS (1964).

[17] "Common law" is used here in its medieval sense as that uniform body of doctrine that was commonly applied by the King's courts throughout England. Much of the law having to do with the recovery of chattels remained within the jurisdiction of local manorial courts, guided by rules of peculiarly local application, well into the 13th century and beyond. *See* S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 11-13 (2d ed.1981); 2 F. POLLACK & F. MAITLAND, *supra* note 15, at 150.

[18] The relations of domination and dependence in the feudal hierarchy are inherently contradictory in that authority is alienated so that it might be secured. Perry Anderson explains:

> The consequence of such a system was that political sovereignty was never focused in a single centre. The functions of the State were disintegrated in a vertical allocation downwards, at each level of which political and economic relations were, on the other hand, integrated. This parcellization of sovereignty was constitutive of the whole feudal mode of production.

P. ANDERSON, PASSAGES FROM ANTIQUITY TO FEUDALISM 148 (1978). The invention of the common law provided an external mediator of this contradiction that eventually provided the ideological framework for the ultimate demise of the system it was intended to preserve. *See* E. KANTOROWICZ, THE KING'S TWO BODIES (1957); Franklin, *Bracton, Para-Bracton(s) and the Vicarage of the Roman Law*, 42 TUL. L. REV. 455 (1968).

king in this manner was not always linked to a particular tract of land. Persons who occupied administrative positions were granted their official capacity in like manner,[19] and franchises to exercise royal privileges were similarly granted. If the grant of authority was made in a certain way,[20] the interest came to be called a hereditament. Such interests constituted the holder's *estate*, and interests not created in this manner constituted *property*.

Brown's failure to grasp the political significance of feudal landholding leads to a mistaken understanding of the distinction between real and personal property:

> Roughly speaking, the distinction tenaciously drawn in the common law between real and personal property is that between rights in land and rights in chattels. At this point pause must be taken to consider these words, "real" and "personal," which in their origin denoted not the difference between the objects of property rights but that between the forms of action by which rights were vindicated. Real actions, or actiones in rem, were those actions in which the thing itself, the res, was recovered by the successful suitor, whereas in personal actions, actiones in personam, the successful plaintiff recovered not the thing itself, but only damages from the adverse party. Due to the importance, already mentioned, of landholding in the feudal system, the real action was reserved largely for actions relating to land, while the personal action was the customary remedy for wrongs relating to chattels. Since in feudal society the relation between man and man was usually determined by the manner in which particular tracts of land were held, it was important in case a holder of land was ousted from his domain that he recover that particular tract. This was not so in the case of chattels. Moreover, the typical chattel in medieval society was the beast. Our words "chattel" and "cattle" have a close affinity, and in many primitive civilizations cattle even served as money, as the medium of exchange. In the case of the wrongful taking of a beast therefore it was not essential that the identical animal be returned by means of the real action, but it was sufficient that its equivalent be secured by an action in personam against the wrongdoer. Then in the process of time (by a not-difficult transition) the terms "real" and "personal," referring originally to types of actions, came to denote the kinds of property, for causes concerning which these two types of actions were available.

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[19] See the table of classifications of property appearing in J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 220 (2d ed. 1979).

[20] *See generally* Thorne, *English Feudalism and Estates in Land*, 1959 CAMBRIDGE L.J. 193.

> Real property is land, or more technically rights in land, and personal property consists of chattels, or rights in chattels.[21]

This apparently plausible explanation of the distinction between real and personal property is based on a mistaken conception of feudalism. As a description of history it is simply inaccurate; as a description of modern law it has only limited validity because it leaves a great number of exceptions unexplained. For example, divorce and bankruptcy are both instances of proceedings *in rem*, even though the judgment does not order recovery of a particular thing, at least not in the sense suggested by Professor Brown. Replevin and theft are both actions to recover specific goods, but both are *in personam*.[22] Perhaps one might argue that since goods are personal property, their recovery must be by way of an action *in personam*. But this contradicts the more general argument Brown makes. If actions for recovery of land are *in rem* because land is unique, then it would seem to follow that actions for recovery of unique goods should also be *in rem*.

Brown asserts that it was necessary to recover the particular tract of land because of the importance of landholding in feudal society. Substitute compensation for the loss of chattels was sufficient because after all "a cow is a cow is a cow."[23] This is simply wrong. In feudal times if a lord granted land to one man and then granted the same land to another, the first man would recover the particular tract and the second man would receive a judgment for equivalent land somewhere else.[24] The priority of right, and not the uniqueness of land or the importance of landholding, determined the type of recovery. In the case of chattels, replevin, one of the earliest common law writs, enabled the owner to recover specific chattels that were wrongfully taken.[25] Thus, the distinction between actions *in personam* and *in rem*

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[21] R. BROWN, *supra* note 13, § 1.7, at 10.

[22] Maitland explains that the early action of theft, which predates the criminal appeal of felony, was in the nature of a civil action. 2 F. POLLACK & F. MAITLAND, *supra* note 15, at 161.

[23] Maitland notes:

> We are not arguing that the typical chattels of the middle ages were indistinguishable from each other, or were supposed to be so by law. When now-a-days we say that 'money has no ear-mark,' we are alluding to a practice which in all probability played a large part in ancient law. Cattle were ear-marked or branded, and this enabled their owner to swear that they were his in whosesoever hands he might find them. The legal supposition is, not that one ox is indistinguishable from another ox, but that all oxen, or all oxen of a certain large class, are equivalent.

Id. at 151-52 (footnotes omitted).

[24] *See* S. MILSOM, *supra* note 17, at 121-22.

[25] *See id.* at 104-05.

has little to do with the natural qualities of the object or with the form of recovery.

Brown's error is that he equates establishing a right with remedying a wrong. Blackstone's distinction between rights and wrongs is a useful tool for unearthing the meaning of the distinction between proceedings *in personam* and *in rem*.[26] Though rights are related to wrongs (a wrong is an injury to a right),[27] the determination that one person has committed a wrong is not the same as the determination that another person has a right. A judgment *in rem* establishes a suitor's status, or authority, or right. Where land is involved, the *res* is the owner's authority over the land relative to all other claimants and not the physical land itself. Thus, in the case of the lord who granted land to two men, both were entitled to judgments *in rem* declaring their rights, even though one man receives the particular parcel and the other receives a substitute. A divorce is a proceeding *in rem* because the court is called upon to determine the status of the parties and establish their respective rights, primarily the right to remarry. Proceedings in bankruptcy are *in rem* because they establish the rights of the bankrupt, primarily the right to acquire property free of the claims of creditors. The right established by a judgment *in rem* is said to be good against all the world.

A judgment *in personam* does not establish a right. Rather, it declares that a party has committed a wrong and remedies the wrong that has been done. It is not necessary to establish a right when suing someone who has committed a wrong. Possession under a claim of ownership of land is sufficient to bring a personal action for trespass against someone who enters land and deprives the claimant of its use. If the interloper has an equivalent or greater right to be on the land then no trespass has been committed.[28] The plaintiff's right to recover is based on having a right superior to that of the defendant. But this is not an adjudication of the plaintiff's rights; rather, it is a determination of the defendant's wrongdoing. The judgment establishes rights only between the parties to the lawsuit. Consequently, a person claiming ownership of land may win an action against a trespasser and

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[26] The organization of *Blackstone's Commentaries* divides the subject matter into rights and wrongs. Books I and II treat the "rights of persons" and the "rights of things," and Books III and IV deal with "private wrongs" and "public wrongs." *See* W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765).

[27] *See* Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 221-72 (1979).

[28] This reciprocal justification provides the basis for using the trespass action to try title to land. *See* 3 W. BLACKSTONE, *supra* note 26, at *214.

subsequently lose an action *in rem* to establish rightful ownership of the land. Replevin and theft are actions *in personam* because they are brought to prosecute wrongs, not to establish rights. In replevin the defendant is accused of wrongfully taking goods from the plaintiff. In the early action of theft the defendant is charged with wrongfully detaining goods belonging to the plaintiff. The fact that the relief given is return of the particular goods has no bearing on whether the action is *in personam* or *in rem*.[29] It is *in personam* because it is the prosecution of a wrong.

Brown's misconception of the meaning of real and personal actions leads to a mistaken conclusion regarding the different treatment of different kinds of interests in land:

> This brings us to a curious anomaly in the common law. Not all rights in land are considered as real property. The English law subdivides rights in land according to the duration of the interest therein of their possessors. Certain of these interests therein are termed freeholds, that is, those interests that endure for the life of the holder or longer. For such interests the real actions are available. Other interests, however, those that endure for a term of years, however long, and those that endure at the will of the parties, are termed nonfreehold. Concerning these latter interests, during the formative period of the law no real action was available. The termor, or lessee as he is now commonly called, was considered to have no real interest in the land itself but to hold only at the will of the lessor, against whom his rights were purely of a contractual nature. His rights in the land were therefore not real but personal. While in early times he could not dispose of his freehold land interests by will, the restriction did not apply to chattels, and leasehold interests came within the latter class. The lessee's lack of a real action was later remedied, but the distinction

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[29] Maitland explained:

> If by a denial of the "realty" of movable goods we merely mean (as is generally meant) that their owner, when he sues for them, can be compelled to take their value instead of them, this seems a somewhat superficial phenomenon, and it is not very ancient. So long as the old procedure for the recovery of stolen goods was in use, so long even as the appellor could obtain his writ of restitution, there was an action, and at one time a highly important action, which would give the owner his goods. Also, as modern experience shows, a very true and intense ownership of goods can be pretty well protected by actions in which nothing but money can with any certainty be obtained. Indeed when our orthodox doctrine has come to be that land is not owned but that "real actions" can be brought for it, while no "real action" can be brought for just those things which are the subjects of "absolute ownership," it is clear enough that this "personalness" of "personal property" is a superficial phenomenon.

2 F. POLLACK & F. MAITLAND, *supra* note 15, at 181-82.

> previously drawn endured in the law, and today leasehold interests in land are for many purposes still treated as personalty. Such interests [are] technically known as chattels real to indicate their hybrid character. . . .[30]

Brown is misled by the common understanding that estates in land are measured in terms of duration. The "longest lasting" estate is called a fee simple. On the death of the holder it passes to the holder's heir, and the estate continues for as long as there are heirs. The fee simple is one of the so-called freehold interests. An estate that ends upon the death of the holder is called a life estate, and this too is a freehold. A lease for a term of years is a nonfreehold interest in land. Even if it is a long-term lease that is certain to last much longer than the life of the original lessee, it is said to be conceptually shorter than a life estate. It is conceptually shorter because it is nonfreehold. Again the reasoning is contradictory. The difference between freehold and nonfreehold is the duration of the interest. If a nonfreehold interest lasts longer than a freehold interest, then it is said to be conceptually shorter because it is nonfreehold. Brown offers the plausible explanation that the lease is based upon an agreement between the parties; therefore the rights are personal between lessor and lessee. The explanation is not satisfactory because freehold interests in feudal England were also created by agreement of the parties.[31] The king granted an estate to his baron who was then obligated to the king. The baron granted an estate to a lessor lord who became obligated to the baron

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[30] R. BROWN, *supra* note 13, § 1.7, at 10-11.

[31] One author has noted:

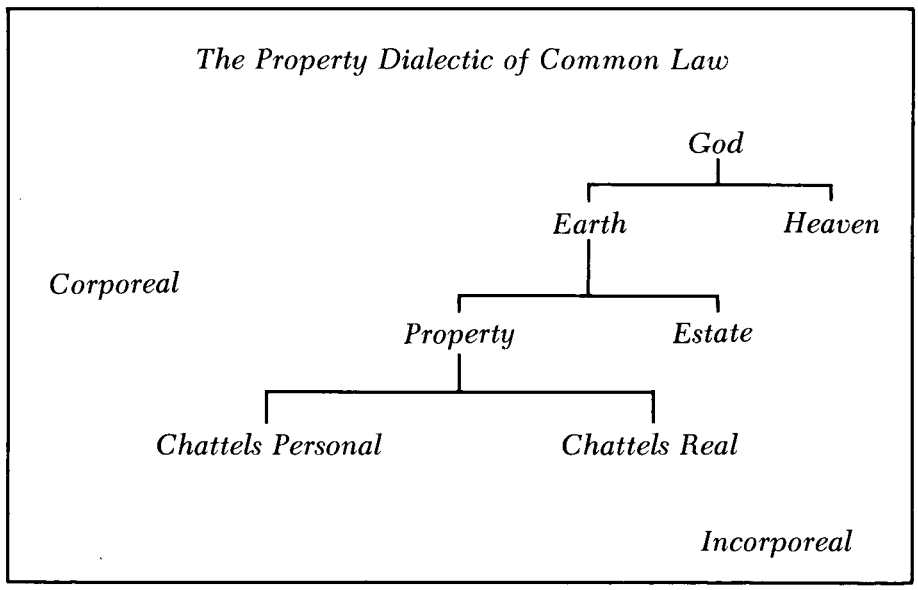
> As between the parties, proprietary language is out of place. There is a relationship of reciprocal obligations; and its properties were fixed at a time when it is the lord rather than the tenant who should be imagined as the buyer in some initial transaction. He is the buyer in the same sense that he is the owner: he is the one with the wealth, the only form of capital wealth there can be. Later he will turn its produce into a money income, and pay in money for what he needs. Now he buys services and pays directly in land. But of course the land is not transferred out-and-out: the basic purchase is a life's service for a life tenure. He buys a man. The logic of the matter was to be transformed by heritability. . . . But the elementary particle was the life arrangement between lord and tenant made within a lordship seen in isolation. The lord takes the homage or fealty of his man, and seises him of the tenement. If later the man fails in his service, not just the render but also the devotion required by his homage, the lord will disseise him. But by custom, and later by force of the king's assize, he may do this only after due process; and that is what the disciplinary jurisdiction of his court is about. Otherwise he owes the tenant enjoyment of his tenement as long as he lives; and when he dies the lord and his court will make a new arrangement with a new man.

S. MILSOM, THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM 39 (1976).

and also to the king. Nevertheless, these rights were vindicated in proceedings *in rem*.

The distinction between freehold and nonfreehold, an example of the more general distinction between property and estate, does not depend upon duration measured in units of time with which we are familiar;[32] rather, it depends upon the kind of time in which the interest is measured. This notion that there is more than one kind of time is one of the theological underpinnings of the common law.

The categories of property can be understood as a succession of emanations from God, Creator of the universe. In the beginning God created the heaven and the earth. He placed man upon the earth and ordained that he shall have dominion over the earth and all the things upon it.[33] The dominion of God over the universe is divided into two spheres, heaven and earth; one is tangible and the other intangible, or in the language of both canon and common law, corporeal and incorporeal. The dominion of man is divided into its corporeal phase, called property, and its incorporeal phase, called estate (also known as hereditament). Property is further subdivided into chattels personal and chattels real.



[32] *See generally* J. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975).

[33] Blackstone initiates his discussion of property with a reference to *Genesis:*

> 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

Here we are concerned with property and estate as emanations of earth, the corporeal phase of God's creation. Included in this creation is the creation of human life. For God the only time is eternity. Land and human life are the works of God and therefore are manifestations of eternity. The things and relationships of the temporal world are the works of man, and these are measured in secular time.[34] The freehold estates were measured in terms of human life and lineage. Since these were manifestations of the eternal, they were treated differently than goods and leaseholds which were thought of as the works of man, existing in the temporal world and measured in secular time.

The distinction between the temporal and the eternal is not nearly as important in modern society as it was in feudal society. Today we are inclined to measure human life and all other earthly intervals in secular time. The public registry of births and deaths has superseded the carefully inscribed family Bible, and actuarial tables prepared by insurance companies have routinized Providential intervention. The modern secularization of the universe has forced us to rethink our conception of time because the temporal is no longer understood in opposition to the eternal. As scientists expanded the corporeal sphere of material existence outward into the heavens, it became necessary to invent the theory of relativity based upon the

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> over the fowl of the air, and over every living thing that moveth upon the earth." This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator.

2 W. BLACKSTONE, *supra* note 26, at *2-3.

[34] This is actually a simplification containing a difficulty that was recognized by medieval scholars. To say that life is the work of God and a manifestation of the eternal comes dangerously close to saying that men are gods, and this of course is blasphemy. The problem is constitutive of the medieval Christian consciousness. Huizinga states:

> All life was saturated with religion to such an extent that the people were in constant danger of losing sight of the distinction between things spiritual and things temporal. If, on the one hand, all details of ordinary life may be raised to a sacred level, on the other hand, all that is holy sinks to the commonplace, by the fact of being blended with everyday life. In the Middle Ages the demarcation of the sphere of religious thought and that of worldly concerns was nearly obliterated.

J. HUIZINGA, THE WANING OF THE MIDDLE AGES 156 (1955).

To be more precise, the earth and human life are touched by both the human and the divine realms through experience and creation, respectively. A third kind of time, the time of the angels (aevum) was interposed between the eternal (aeternitas) and the secular (tempus) to comprehend the duration of an estate in a nonblasphemous way. Like angels, estates were neither eternal nor were they consumed by time. The secularization of this dogma proved to be a potent ideological mechanism for explaining the exercise of secular power. *See* E. KANTOROWICZ, *supra* note 18, at 275-84. My thanks to Professor Katz for calling these matters to my attention.

time/space duality in order to have a workable conception of time. In feudal society the temporal/eternal duality similarly facilitated comprehension.[35]

Brown points out that no real action concerning nonfreehold interests was available in feudal times. This is quite right; the real

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[35] This is not to say that the feudal Christian consciousness was unproblematical. Professor Franklin writes:

> In his struggle to achieve the Vicarage of Roman law in feudal England Bracton exploited the contradicitions which obtained in feudal Europe, including England. He secularized the contradictions which existed in feudal Christian consciousness, described by Hegel as the "unhappy". . . or contrite consciousness, because it recognized itself as a "doubled" or dual or contradictory consciousness. Kojève writes: "Religiosity is characterized, according to Hegel, by *Entzweiung*, by the scission of the unity of consciousness into an empirical *Moi*, which—being connected to the world—is mortal, and a transcendent *Moi*: the immortal soul in direct contact with God. And it is the impossibility of suppressing the *Widerspruch*, the opposition of the two contradictory elements of the *divided (gedoppeltes) consciousness*, which is the source of *misfortune (Unglück, Schmerz)* of the religious Man. This Man, not arriving at unity with himself, never attains *Befriedigung*, the *satisfaction* which is the supreme end and the final justification of human existence. . . . The source of the dualism which is at the base of religion, and consequently of misfortune, is double. On one hand, it is the desire for individual immortality, servile and subjugating fear of death. As in the Struggle for life and death . . . Man becomes the Slave of his adversary because he wishes at any cost to save his life, he becomes the Slave of God when he wishes to avoid death, by seeking in himself, in the time of the religious Man, an immortal soul. On the other hand, Man arrives at religious dualism because he has not succeeded in realizing his liberty, that is to say, his true being, in the herebelow. In the defeat caused by fear of death, the Slave cedes the World to the conquering Master, and as he will not decide to combat the Master in order to conquer the World, he can only seek his liberty in the hereafter of the World, in the *Jenseits*, in the religious *trans*cedent. The Slave who seeks his liberty in living in a World dominated by the Master, is forced to make a distinction between the enslaved empiric *Moi* and the *Moi* who is supposed free or to become free in the hereafter, that is to say, to live in a religious attitude. But in fact, the transcendent *Moi* is still less free than the servile empiric *Moi*, for in his immortal soul the religious man is the Slave of God, of the absolute Master. Thus, the religious Man *lacerated* within himself *(entzweit)* does not come to realize his liberty. Therefore he does not attain *satisfaction*, and he rests forever in the misfortune of Servitude." The Christian above all sought to recover "peace in losing himself in the feeling of his aspiration toward the absolute," Niel writes, "Refusing to accept the world where he sees the expression of evil, he will seek his safety in flight from present action, and in union with an absolute situated beyond him. Alone in confronting himself, penetrated by the feeling of his wretchedness, the believer places the assurance of his justification in the will to be united to Christ, in his application to think the unchangeable. But this effort is condemned to the most complete defeat. From the instant, where departing from its imprecision, the soul seeks to attain Christ, it falls back into its own particularity. . . . The mystic consolation is converted into desolation." These contradictions, in which the faithful is both contingent and unchangeable, and in which the faithful recognizes the contradiction or doubling within his consciousness, explains the priest, who emerges, in Hegel's language, as the "mediator" between the absolute and the particular.

Franklin, *supra* note 18, at 486-88 (footnotes omitted).

actions concerned estate, and property was the subject matter of personal actions. The reason for this lies in the history of the opposition of church and state. The first usurpation in the rise of the absolutist state was the secularization of authority over estates. The church retained an interest (the tithe) in estates of men, but the secular authority predominated. In appropriating this jurisdiction to itself, the state reiterated the church dogma distinguishing the temporal from the eternal. The church retained for a time a limited jurisdiction over personal property.[36]

Church dogma of that time instructed that it was desirable for an individual to dispose of all earthly possessions before his soul goes to meet his Maker. This follows the New Testament parable that it is easier for a camel to pass through the eye of a needle than for a rich man to pass through the gates of heaven. To see to it that wealthy men were not burdened with sacks of gold when they met Saint Peter, the church devised the procedure of the sworn last will and testament. The church, of course, realized a substantial income through the administration of this procedure for the protection of the testator's soul. Later in the development of English feudalism, as the authority of the secular state was consolidated, the king's system of justice appropriated the procedure that previously had been administered by the church.

Finally, Brown tells us that leaseholds are called "chattels real to indicate their hybrid character."[37] The character of these interests seems to be a hybrid because Brown fails to understand the importance of the distinction between property and estate. Nonfreehold interests are chattels, viz., property, because they are not estates (not manifestations of the eternal). They are "real" because they are derived from the authority of the lessor. As was stated previously, the estate in land is the political authority of the holder of the estate and not the land itself. This political authority is intangible, or incorporeal. The actual tract of land is a corporealization of the estate. Thus, if a feudal lord corporealizes his estate by considering it merely as land, he can then grant its use to another for a term of years. This corporealization of estate effectively turns a portion of the estate into property. According to the feudal law, a portion of the estate was retained. The part retained was the rent which was considered an

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[36] In this regard the church was in competition with local secular authorities as well as the central secular authority. *See supra* note 17.

[37] R. BROWN, *supra* note 13, § 1.7, at 11.

estate (an incorporeal hereditament) and not a contract right as Brown suggests. Hence the common law adage, "rents issue from the land."

The reversibility of categories is typical of the common law. In the example of leases of land, an estate in land becomes property which then gives rise to an estate in rent. Legal fictions facilitate the reversibility of categories, and the basic structure of the law becomes obscured because of the artificial character of their use. The result is that learned commentators reach erroneous conclusions that do not explain the importance of legal fictions found everywhere in the law and also leave a host of unexplained anomalies. Brown's interpretation has been set forth in considerable detail not simply to show that it is mistaken. It is an accurate representation of the conventional wisdom of property law that regularly appears in judicial opinions and other authoritative texts. The complaint to be lodged against this type of discourse is that meanings are absent-mindedly rearticulated when they might properly be subjected to criticism.

III

In the common law scheme of things property includes all worldly goods, possessions, and ownership interests that are not estates. These are temporal interests measured in secular time. Another characteristic of all property is that it is *occupied* by an owner. The universe of common law property interests is divided into chattels personal and chattels real. The distinction between the two turns on the type of occupancy that is involved.

Chattels real involve occupancy of another's estate subject to the estate holder's authority. When the holder of an estate in land grants to another the right to occupy and use the land for a term of years, or a shorter period, or a period that may be terminated at the will of the parties, a chattel real (more commonly called a leasehold) is created. The rules concerning chattels real make up the law of landlord and tenant.[38] Chattels real are incorporeal interests because they consist of the intangible authority to occupy land. The interest is not the land itself. This intangible authority to occupy a particular tract of land is derived from and subject to the authority of the holder of an estate in the same land. Chattels real are incorporeal property interests consist-

[38] The present discussion of chattels real is concerned only with the opposition of chattels personal and chattels real, and not with the internal structure of the law of landlord and tenant.

ing of the occupancy of another's estate subject to temporal authority and measured in secular time.

Chattels personal do not involve occupancy of another's estate. This category of property includes occupancy (legal possession) of goods. Chattels personal are the corporeal phase of personal property because the thing occupied or possessed is a complete representation of the owner's relationship to the thing and to the rest of the world. The land underlying a chattel real represents both more and less than the lessee's interest: more in that the land represents both the lessee's chattel real *and* the lessor's estate (incorporeal hereditament) in rents; less in that the land does not represent the authority relation of landlord and tenant (the material representation of this relation is the money or goods paid as rent). Chattels personal by contrast are thought of as ownership interests not subject to any supervening authority. The owner of goods has an interest that is good against all the world. This ownership interest is represented by the owner's title. In the usual course of property relations title is transferred from one individual to another by transactions such as purchase, gift, or inheritance. In the case of items not previously owned, original title may be acquired by reducing the object to occupancy (taking it into possession) with the intention of retaining it as private property.

Disputes over original title have posed the question: what constitutes occupancy sufficient to establish a property interest in goods not previously owned? The leading American case on this subject is *Pierson v. Post*.[39] The facts of *Pierson v. Post* are fairly straightforward and are set forth in the syllabus:

> The declaration stated that Post, being in possession of certain dogs and hounds under his command, did, "upon a certain wild and uninhabited, unpossessed and waste land, called the beach, find and start one of those noxious beasts called a fox," and whilst there hunting, chasing and pursuing the same with his dogs and hounds, and when in view thereof, Pierson, well knowing the fox was so hunted and pursued, did, in the sight of Post, to prevent his catching the same, kill and carry it off.[40]

On this statement of the facts the court was asked to decide whether Lodowick Post had acquired a property right in the fox.

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[39] 3 Cai. R. 175 (N.Y. 1805). The case has been noted by treatise writers and commentators since James Kent did so in 1826. 2 J. KENT, COMMENTARIES ON AMERICAN LAW *349 (1873). Moreover, after 178 years the report of this case remains one of the most commonly studied opinions in American legal education. Of 10 current basic property law casebooks surveyed, three include *Pierson v. Post* as a principal case, and five report it as a note case.

[40] *Pierson*, 3 Cai. R. at 175.

Justice Tompkins, writing for the court, noted that "a fox is an animal *ferae naturae*, and that property in such animals is acquired by occupancy only."[41] Whether the plaintiff's actions amounted to occupancy was treated as a question of natural law, and Justice Tompkins examined the commentaries of writers on natural law such as Justinian, Puffendorf, and Grotius in search of general principles that would serve as a basis for decision. Justice Tompkins' review of the authorities led to the conclusion that "pursuit alone vests no property or right in the huntsman. . . ."[42] This principle was found to be subject to a single qualification:

> [T]he mortal wounding of such beasts, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him; since, thereby, the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control.[43]

In light of the principle stated, as qualified, the instant case was clearly one of mere pursuit. The court was not unsympathetic to Post's ethical claim, but concluded: "However uncourteous or unkind the conduct of Pierson towards Post, in this instance, may have been, yet his act was productive of no injury or damage for which a legal remedy can be applied."[44]

In the final analysis, the court decided against moral sentiment, and in favor of the administrability of legal rules:

> We are the more readily inclined to confine possession or occupancy of beasts *ferae naturae*, within the limits prescribed by the learned authors above cited, for the sake of certainty, and preserving peace and order in society. If the first seeing, starting, or pursuing such animals, without having so wounded, circumvented or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation.[45]

In a dissenting opinion Justice Livingston criticized the mode of analysis adopted by the court. After restating the issue he proclaimed:

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[41] *Id.* at 177.
[42] *Id.*
[43] *Id.* at 178.
[44] *Id.* at 179-80.
[45] *Id.* at 179.

> This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, or Blackstone, all of whom have been cited; they would have had no difficulty in coming to a prompt and correct conclusion. In a court thus constituted, the skin and carcass of poor Reynard would have been properly disposed of, and a precedent set, interfering with no usage or custom which the experience of ages has sanctioned, and which must be so well known to every votary of Diana. But the parties have referred the question to our judgment, and we must dispose of it as well as we can, from the partial lights we possess, leaving to a higher tribunal, the correction of any mistake which we may be so unfortunate as to make.[46]

The dissenter chose instrumental reason as the proper mode of analysis for deciding the case. He pointed out that the fox is a noxious beast. "His depredations on farmers and on barnyards, have not been forgotten; and to put him to death wherever found, is allowed to be meritorious, and of public benefit."[47] The proper rule should be one that encourages "destruction of an animal, so cunning and ruthless in his career."[48] Justice Livingston took the position that the rule announced by the court would have the contrary effect:

> [W]ho would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and for hours together, *"sub jove frigido,"* or a vertical sun, pursue the windings of this wily quadruped, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honors or labors of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit?[49]

Justice Livingston went on to say that the laws of the Emperor Justinian may have been well-suited to ancient Rome, but that circumstances in nineteenth century New York demanded the adaptation of a more suitable rule. He inquired, "if men themselves change with the times, why should not laws also undergo an alteration?"[50]

Livingston examined the same authorities considered by the court and found that there was a great "diversity of sentiment among

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[46] *Id.* at 180 (Livingston, J., dissenting).
[47] *Id.*
[48] *Id.*
[49] *Id.* at 180-81 (Livingston, J., dissenting).
[50] *Id.* at 181 (Livingston, J., dissenting).

them."[51] The role of the court, he said, must be to consider these opinions, but fashion a rule best adapted to contemporary circumstances. He proposed the following:

> Now, as we are without any municipal regulations of our own, and the pursuit here, for aught that appears on the case, being with dogs and hounds of imperial stature, we are at liberty to adopt one of the provisions just cited, which comports also with the learned conclusion of Barbeyrac, that property in animals *ferae naturae* may be acquired without bodily touch or manucaption,, provided the pursuer be within reach, or have a reasonable prospect (which certainly existed here) of taking, what he has thus discovered [with] an intention of converting to his own use.[52]

This proposed rule was justified by Justice Livingston on the basis of societal needs rather than natural law principles:

> When we reflect also that the interest of our husbandmen, the most useful of men in any community, will be advanced by the destruction of a beast so pernicious and incorrigible, we cannot greatly err, in saying, that a pursuit like the present, through waste and unoccupied lands, and which must inevitably and speedily have terminated in corporal possession, or bodily seisin, confers such a right to the object of it, as to make any one a wrongdoer, who shall interfere and shoulder the spoil.[53]

The opinion of the court, written by Justice Tompkins, suggests a need for certainty in the law. It seems more important that the matter be settled than that it be settled in accord with any particular reasoning. The rule itself is therefore somewhat arbitrary. Oliver Wendell Holmes makes the same observation:

> In the Greenland whale-fishery, by the English custom, if the first striker lost his hold on the fish, and it was then killed by another, the first had no claim; but he had the whole if he kept fast to the whale until it was struck by the other, although it then broke from the first harpoon. By the custom of the Gallipagos, on the other hand, the first striker had half the whale, although control of the line was lost. Each of these customs has been sustained and acted on by the English courts, and Judge Lowell has decided in accordance with still a third, which gives the whale to the vessel whose iron first remains in it, provided claim be made before cutting in. The ground as put by Lord Mansfield is simply that, were it not for

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[51] *Id.*

[52] *Id.* at 182 (Livingston, J., dissenting).

[53] *Id.*

> such customs, there must be a sort of warfare perpetually subsisting between the adventurers. If courts adopt different rules on similar facts, according to the point at which men will fight in the several cases, it tends, so far as it goes, to shake an *a priori* theory of the matter.[54]

There is no determinate answer to the question put to the courts in these cases. Though there is a policy interest in promulgating a rule that will bring certainty and predictability to this kind of situation, which is certain to recur, the court must look beyond the immediate situation to justify its decision. Otherwise the rule announced will seem entirely arbitrary and may not be respected and followed by hunters and whalers.

The apparent arbitrariness of the rules in the whaling cases is ameliorated by the courts' reliance on the customs of the class of persons affected by the rule. Where the rule cannot be shown to comport with reason (it is no more logical to award the whale to the first ship than the second) the courts' selection of a rule must be justified by its authority over the litigants and the subject matter of the suit. An English court's assertion of authority over the oceans, and over an industry engaged in by whalers from many different countries, is tenuous at best. The jurisdiction of such a court hardly amounts to incontestable authority over the carcass of a whale. Consequently, the custom of the industry appears to be an authoritative source more likely to be respected and followed by whalers. Justice Livingston expressed a like sentiment when he said: "This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, or Blackstone. . . ."[55] In the whaling cases the courts' resort to custom is an attempt to reach the same decision that would have been reached by the whalers had the issue not been submitted to the court for adjudication. In reality, of course, the case was submitted to the court precisely because no decision amenable to the parties could be reached in the absence of judicial intervention. The irony of judicial resort to custom is this: Custom without judicial intervention would not produce a solution that the parties would perceive as being legitimate; judicial intervention without resort to custom (or some other justification) would seem arbitrary and therefor illegitimate; but the two taken together (judicial intervention

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[54] O. HOLMES, THE COMMON LAW 212-13 (1881) (footnotes omitted).

[55] *Pierson*, 3 Cai. R. at 180 (Livingston, J., dissenting); *see also* text accompanying note 46.

guided by custom) produce a result that the parties are more likely to perceive as being just.

Justice Tompkins' opinion for the court pursues a different justificatory strategy. It is significant that the hunt in *Pierson v. Post* took place "upon a certain wild and uninhabited, unpossessed and waste land."[56] The wild animals of such a place are free for the taking, and to Justice Tompkins this meant the animal must be deprived of its natural liberty before the hunter could acquire a property interest. This is entirely consistent with Blackstone's natural right theory of property. Blackstone wrote of a state of nature in which man acquired goods by the exercise of physical dominion resulting in actual possession. This God-given power is for Blackstone the basis for an absolute right to property.[57] In the state of nature property is whatever you can take and keep for yourself. Since this was wild, uninhabited, unpossessed wasteland, the fox belonged to the first taker, and this was to be determined according to principles of natural law and right. This same argument could easily have been applied in the whaling cases which the courts instead decided on the basis of custom.

The dissent in *Pierson v. Post* criticized the court's reliance on natural law justifications. Justice Livingston recited the opinions of commentators on natural law as did his Brother Tompkins, but he used these materials in a different way. He also suggested that the customs of sportsmen would provide a better ground for decision than the commentary of these learned authors. He did not, however, base his opinion on custom as did the courts in the whaling cases (probably because these were matters in which he was blissfully ignorant). Instead, Justice Livingston's strategy was implicitly based on a particular conception of sovereignty and on the sovereign's authority over the uninhabited wasteland, the fox, and the hunt.

The common law assumes that everything within the territory to which it applies is subject to the authority of the sovereign. Indeed, in medieval England wild fish and game were included among the royal privileges. The rights to hunt and fish were granted by the king. These franchises were estates (incorporeal hereditaments) similar to estates in land.[58]

Sovereign authority over wildlife may be more or less tenuous, as was indicated by Justice Holmes writing for the United States Supreme Court in *Missouri v. Holland*:[59]

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[56] *Id.* at 175.

[57] 1 W. BLACKSTONE, *supra* note 26, at *138-39.

[58] *See supra* note 20 and accompanying text.

[59] 252 U.S. 416 (1920).

> The State as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away. If we are to be accurate we cannot put the case of the State upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that but for the treaty the State would be free to regulate this subject itself.[60]

Here the authority of the state over migratory birds is admitted, but is subject to the higher authority of the United States acting under the treaty power granted to the federal government by the United States Constitution.

The court in *Pierson v. Post* did not rely on the authority of the sovereign over the fox; it considered the uninhabited wasteland as if it were still in the state of nature. The dissent implicitly asserted the authority of the sovereign over such wasteland, including the authority to regulate the hunt. The case presented a "knotty point" not because the writers on natural law had failed to provide a clear answer, but because, the court observed, "we are without any municipal regulations of our own. . . ."[61] In other words, the problem was the lack of a clear rule in the common law of the State of New York. The authors cited were referred to merely for suggestions as to how to approach the problem. The underlying justification of the dissenting opinion is the far more modern understanding that it is within the positive power of the state to regulate the behavior of its citizens.[62]

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[60] *Id.* at 434.

[61] *Pierson*, 3 Cai. R. at 182.

[62] This is a premise that has steadily gained popularity despite the lack of any support from any text of the United States Constitution. This, of course, was not a hinderance to the Englishman, H.L.A. Hart, in developing the premise. *See* H. HART, THE CONCEPT OF LAW (1961). The attitude of legal positivism produces dissonance in the mind of the lawyer whose experience of the world cannot be reconciled with his or her entrenched understanding of legality. Thus, lawyers and legal scholars who perceive the threat of nuclear war as ultimately destructive of legal order have called for a "creative constitutionalism" that will lead to a determination that nuclear weapons are illegal. *See, e.g.*, Miller, *Nuclear Weapons and Constitutional Law*, 7 NOVA L.J. 21 (1982). The impetus of creative constitutionalism springs from the

Justice Livingston's modern approach tends to collapse the distinction between chattels personal and chattels real. It was said earlier that ownership of chattels personal constituted an absolute right, and Blackstone explained this in terms of the law of nature. Chattels real, by contrast, were described as ownership interests subject to the authority of another, and Blackstone described this sort of situation in terms of relative rights and modifications of natural rights by civil institutions for purposes of convenience.[63] By abandoning natural law justifications and eschewing the requirement of actual capture of the fox, Justice Livingston's approach would render the legal meaning of occupancy or possession an incorporeal right subject to the authority of the sovereign. If chattels personal are subject to the sovereign's authority, then they are no longer clearly distinguishable from chattels real which are subject to the authority of the holder of an estate in land. This blurring of the distinction between the two kinds of chattels accounts for the confusion of twentieth century scholars like Professor Brown, and the rather meaningless conclusion that chattels real are specially classified because of their "hybrid character." The problem created by this sort of error is that it fails to meet the modern lawyer's need for a working knowledge of the common law distinction between chattels personal and chattels real. Although such knowledge is not indispensible, it is useful for developing a perspective that allows insight into certain anomalies in modern law that the conventional understanding articulated by Professor Brown leaves unexplained.

IV

An example of such an anomaly is the conventional understanding of labor in modern American law. The employment relationship is understood as a contract between an employer and an employee, but

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perception of great urgency in the face of the inevitably deconstitutionalizing consequences of the use of nuclear weapons, and from a feeling of intense frustration with accepted notions of constitutional theory and practice. The potential threat to environmental quality posed by just one MX missile is self-evident; yet the suggestion that a government contract for the production of hundreds of these weapons be subjected to environmental impact study seems almost laughable for reasons that are taken to be similarly self-evident. Indeed, those in attendance at a Conference on Nuclear Weapons & Law sponsored by the American Society of International Law, held at Nova University Law Center, Fort Lauderdale, Florida, February 5, 1983, collectively responded to the suggestion with nervous, self-conscious tittering. The situation creates dissonance within legal consciousness because it raises the spectre of unchecked powers and rights without remedies. For a dialectical alternative to the positivist rendering of constitutional texts see Franklin, *The Ninth Amendment as Civil Law Method and Its Implications for Republican Form of Government:* Griswold v. Connecticut; South Carolina v. Katzenbach, 40 TUL. L. REV. 487 (1966).

[63] *See* 2 W. BLACKSTONE, *supra* note 26, at *1-15.

in many respects this contract is unlike other contracts. A contract is an agreement between individuals (or legal entities which may be any of various collective forms such as partnerships or corporations) to exchange property, goods, services. Identifying such an exchange relationship as a contract, however, signifies something more. Contract is a legal category to which certain rules apply. These rules are of two kinds: rules aimed at administering the intentions of the parties to an agreement (based on what may be called the "will" theory of contract) and rules that specify what kinds of agreements are fair and ought to be enforced by court order (based on what may be called the theory of "just exchange"). Identifying an exchange relationship as a contract signifies an understanding that the state, primarily courts, will intervene in the relationship and adjust the rights and obligations of the parties in accordance with the rules of contract law.

At the outset we can identify three levels of ambiguity in the structure of contract law. At the highest level of generality there is uncertainty as to whether the agreement falls into the category of contract or some other legal category. At the second level there is uncertainty as to whether the test of a contract's validity ought to be based on the will theory of contracts or on the theory of just exchange. The third level of ambiguity exists within each of these two sets of contract rules. The intentions of the parties are subjective. Moreover, people do not always say what they mean or mean what they say. As to the fairness of the agreement, the concept is inherently subjective and vague. One must ask, "fair to whom, and for what purposes?"

The ambiguities of contract law allow exchange relationships to be labeled as contracts and analyzed as such without confronting serious contradictions. It is possible, for example, to think of marriage as a contract. Such an agreement differs drastically from a contract for the sale of goods, the loan of funds, or insurance against casualty loss. Where a court would decide an issue between buyer and seller by reference to the intentions of the parties, the same kind of issue between husband and wife might be tested in terms of the fairness of the agreement. Thus, a clause in a sales contract specifying the quality of the goods is likely to be interpreted by surmising the intentions of the parties, but a clause in a marriage agreement specifying the quality of spousal services is likely to be interpreted in terms of its fairness in the context of the marriage relationship. As this sort of analysis is conventionalized with respect to a specific kind of agreement, a relationship such as marriage may come to be understood as a contract that is unlike other contracts. The notion that marriage is a contract does not seem crazy; it only seems anomalous from the perspective of other kinds of contracts.

In the foregoing example, the legal category of contract is a metaphor for the marriage relationship. Metaphor is a linguistic device that conveys meaning by relating one kind of experience to an understanding of another kind of experience. Considering marriage in terms of contract identifies the legally salient features of marriage as those that are most contract-like. This metaphorically conveyed meaning is both incomplete and overinclusive. It is incomplete in that marriage signifies collectivity and status as well as an exchange relationship. The meaning conveyed by the contract metaphor emphasizes the exchange aspects of marriage at the expense of the other features. The metaphorical meaning is overinclusive in that contract imports individual autonomy and presupposes official intervention for purposes of regulating the exchange relationship. Both of these characteristics of contract are inconsistent with the institution of marriage as it actually exists. Contract as a metaphor for marriage conveys meanings about that relationship. When the metaphor becomes the anchor of conventional understanding, the anomaly of a contract unlike other contracts is created, and the meanings contained in the anomalous features of this special kind of contract are obscured. These hidden meanings can be uncovered by identifying analogies of the anomalous contract elsewhere in the categorical structure of law.

The employment relationship is an anomalous contract. Unlike other kinds of contractual relationships, the employment contract is terminable at the will of either party in the absence of an express agreement to the contrary.[64] In addition to this "employment-at-will" rule, the rights and obligations of the parties are often determined by implied contract provisions such as the employee's duties of diligence[65]

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[64] The "employment-at-will" doctrine, also known as "Wood's Rule" is this:

> With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.

H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877) (footnote omitted); *see also* Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

[65] In the 19th century the understanding was that:

> If a contract to perform any work, or to transact any business, be not tainted or connected with any illegal consideration or object, the law implies an engagement on the part of the person undertaking to do the work, that it shall be performed and completed, with due care, diligence, and skill, or according to the orders given and assented to; and a promise by the party who employed the workman, to pay him, in money, a reasonable remuneration, to be ascertained by a jury, if no specific price be agreed upon.

J. CHITTY, A PRACTICAL TREATISE ON THE LAW OF CONTRACTS 430 (1834).

and loyalty[66] and the employer's duty to provide a safe place to work.[67]

These anomalous features of employment contracts raise doubts about the precise nature of the exchange contemplated by the contract. Clearly, something more than the employee's work product is exchanged for wages. Otherwise the employment contract would be the same as a contract for goods. The employment contract is also something more than an exchange of wages for services. Such an exchange is characteristic of the relationship of hirer and independent contractor. The principal difference between the independent contractual relationship and the employment relationship is that in the latter the person for whom the work is done exercises supervisory control over the work process. The rules concerning tort and contract liability between the person who does the work, the person for whom the work is done, and third parties vary drastically depending upon this element of control.[68] Taking these special characteristics of the employment relationship into account, we can conclude that in exchange for wages the employer receives the right to direct, supervise, and control the behavior of the employee, and the right to appropriate the product or benefits of the employee's efforts.

The anomalous contract rights of an employer are analogous to the interest of the owner of a chattel real. The characteristics of chattels real, set forth above, are that: (1) they are temporal interests

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[66] In the case of bound servants the master was entitled to the fruits of the servant's labors, even if the servant ran off and hired himself out to another employer:

> Whatever an apprentice earns by his labour, whilst he remains in the actual employ of his master, clearly belongs to the master. So, where an apprentice leaves his master's service, and is employed by a stranger, the master is entitled to his wages or earnings in respect of such employment during his apprenticeship.

S. COMYN, A TREATISE OF THE LAW RELATIVE TO CONTRACTS AND AGREEMENTS NOT UNDER SEAL 224 (1809). No such recovery was allowed in the case of hired servants, but the servant's loyalty was nevertheless valuable to the master who could maintain an action in tort for damages arising from a breach of loyalty, even though the servant had only a contract remedy for the master's breach. *Id.* at 226. Moreover, if the servant quit the master before the end of the term of a periodic hiring and retained other employment, the master had actions against the servant and against the new employer. Against the servant the master could recover damages in tort or contract. *Id.* Against the new employer the master had an action *per quod servitium amisit* (for lost services). 4 BACON'S ABRIDGEMENT 582 (1811). This was essentially the same as an action for trover by which an owner who loses a chattel can recover its value from the person who finds it.

[67] *See* W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 546 (1964); *cf.* Occupational Safety and Health Act of 1970, 29 U.S.C. § 654 (1976).

[68] "A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." RESTATEMENT (SECOND) OF AGENCY § 220(1) (1958); *cf.* D. MONTGOMERY, *supra* note 16.

measured in secular time; (2) they involve occupancy of another's estate subject to the estate holder's authority; and (3) they are incorporeal interests consisting of intangible authority to occupy and use land. As is the case with leaseholds, the employment relationship is measured in secular time. Moreover, employment is, in a sense, occupancy of another's estate. A person's ability to do work is like an estate in that it is an attribute of human life, a manifestation of the eternal, and is not limited by any measure of secular time. In addition, the ability to do work constitutes a sphere of authority (human will and volition in commanding one's own body) similar to the authority over a territorial jurisdiction that constitutes an estate in land. The meaning of estate in the medieval scheme of things was more general than a simply technical classification of various legal interests. One's estate might include or even be identified in terms of these interests, but one's estate in life referred to his status in the church, in the family, and in the community as well. The most fundamental attribute of a person's estate in life is his estate in labor. The employment relationship is in a sense the employee's grant to the employer of the authority to occupy and use the employee's ability to do work. Though the employer secures authority over the time and efforts of the employee, it is derived from and authorized by the employee at the outset, and the employer's interest remains subject to that ultimate authority. The employee's engagement to do work for another, subject to his control and supervision, is called in common parlance the employee's occupation. The employer's occupancy of the employee's labor is an incorporeal interest consisting of the intangible authority to direct, supervise, control, and reap the benefits of the employee's ability to do work. The services rendered or the goods produced represent both more and less than the employer's interest: more in that the work done represents both the benefit to the employer and the employee's claim for wages; less in that the completed work does not represent the authority relation between employer and employee (the material representation of this relation is the money or goods paid as wages).

The analogy of employment to chattels real is complete. The duration of the relationship is measured in secular time. The employer, like the tenant, acquires an incorporeal interest consisting of the authority to occupy the estate of another. Finally, the residue of that estate retained by the employee is in the form of wages analogous to the estate in rent retained by the lessor of land.

The Analogy of Employment to Chattels Real

	Employment	*Chattels Real*
Duration Measured In:	Secular Time	Secular Time
Conceptual Character:	Incorporeal	Incorporeal
Occupancy Of Estate:	In Labor	In Land
Residue Of Estate:	Wages	Rent

The complex authority relation of employer and employee (most evident in issues related to control) appears to be completely anomalous when employment is understood in terms of the contract metaphor. That authority relation is directly analogous to the content of the category of chattels real. Consequently, the legal meaning of the employment relationship can more comprehensively be conveyed by analogizing to a category of property (chattels real) than by metaphorical reference to contract.

The authority relations of chattels real (broadly construed to include the employment analogue) are determinative of original title to chattels personal. In *Pierson v. Post*, Justice Tompkins considered the fox found in a wild and uninhabited wasteland to be in the state of nature and free for the taking. The usual course of production in our time (and in Justice Tompkins' as well) entails practice of the useful arts (e.g., husbandry, agriculture, manufacture) not upon the state of nature, but upon the estates and property of persons. Thus, at common law the tithe, an incorporeal hereditament manifested by a periodic payment to the church, was thought to issue from the estate in land. It is defined as "the tenth part of the increase, yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants. . . ."[69] Since profit from lands was attributed to the natural increase of the estate, mortgage, vifgage,[70] or rental of estates in what were essentially credit transactions were not thought to be usurious. The charge of interest upon the loan of money constituted usury. Estates, being manifestations of God's creation, increased naturally; but property, being the work of man, did not increase naturally. The increase of money (interest) was attributed to some estate. Hence, a charge of interest upon the loan of money was the use of temporal advantage, not sanctioned by God, to

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[69] 2 W. BLACKSTONE, *supra* note 26, at *24.

[70] *See infra* text accompanying note 73.

exact a toll from one of God's creatures, and therefore was condemned as usury.

In the common law scheme of things, that which is on the land belongs to the estate in that land and that which is created by labor belongs to the estate in labor. Where one's estate in land or labor is lawfully occupied by another, the other is the owner of a chattel real (or is an employer) and he acquires original title to the goods created out of the estate. This is the modification of natural rights that Blackstone explains in terms of convenience.[71] Instead of a state of nature in which persons appropriate resources and "own" them for so long as they maintain actual dominion, the common law distributes all resources into the various spheres of authority called estates. The resources are incorporated into goods, which are then owned by one individual or another depending upon the authority relations with respect to the underlying estates.

In sorting out title to newly created goods, the initial inquiry must be into the authority relations of the person who manufactured them. The question of fact in *Pierson v. Post* (has the hunter deprived the fox of its natural liberty?) is determinative only in the case of independent hunters in a wild and uninhabited wasteland. As with the hunt, a free agent who appropriates resources from such a wilderness is deemed to be the owner of the resources taken and of the goods into which that free agent incorporates them. This, however, is the atypical case. The usual course of production entails gathering resources from land in which someone, whether it be a private party or the sovereign, has an estate. The resources are fashioned and incorporated into goods in a factory or some other place that is located upon someone's estate in land. The labor applied to the resources to transform them into goods is a portion of someone's estate in labor. Each link in the chain of production involves the holder of an estate and an occupant of the estate. Where these two are the same person, the only question remaining is the one posed by *Pierson v. Post*: Does the person claiming a property interest have a lawful occupancy of the goods claimed? Where one person is the holder of an estate and another is an occupant of the same estate, the estate holder is entitled to rent (or wages) for authorizing the occupancy, and the occupant has title to the goods created from the natural and human resources of the paramount estates.

Determining who has original title to newly created chattels personal depends not so much upon factual questions concerning

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[71] *See supra* note 63 and accompanying text.

occupancy of the goods as on the form of organization of the human actors who brought them into existence. Thus, the legal relationships of a tenant farmer are different than those of a hired farmhand even though the ultimate economic result may be the same, and the legal rules, including those that locate title in one person or another, vary according to these differences in legal relationships.

Not only does the form of organization determine who is the owner of goods, it also determines the quality of ownership. As the examples of marriage and employment show, forms of social organization involve more than detached exchange relationships. When people endeavor to combine their resources and talents to produce goods, they commit their estates and property to certain uses. This commitment is something more than a promise and an expectation of official intervention for enforcement. It involves a sort of pledge whereby the parties bind themselves to each other. In old English law this pledge was called a "gage," a term that is the root of the modern terms "engagement" and "mortgage." The employer becomes the occupant of the employee's labor, and the employee secures that occupancy by a pledge. The security of the pledge is the laborer's inherent authority over his ability to do work. Thus, to hire is to en- (put into) gage (pledge). A mortgage is a so-called "dead" pledge. The mortgagee makes a loan of money, and the mortgagor secures the promise to repay by pledging certain property or estates. According to Blackstone it is called a dead pledge because when the time for repayment of the loan has passed and tender has not been made, the property or estate continues in the mortgagee and it is dead or gone to the mortgagor.[72] Another term, vifgage, infrequently used today, is a so-called "living" pledge. Under this kind of arrangement a debt is secured by the pledge of rents or profits of an estate rather than the estate itself. The estate remains "alive" in the debtor, but the profits of the estate, or a portion thereof, go to the creditor until the loan is fully repaid.[73]

Forms of organization differ according to the kinds of pledges the parties make to each other. This becomes important in determining who owns property, who has claims against the property, and even in answering such questions as whether a thing is fixed to or severed from an estate. The answers to these questions are found in the elaboration of the legal rules concerning liens, pledges, fixtures, crops, and other chattels. The point here is that the categories of chattels personal and chattels real (occupancy of goods and occupancy of estates) are related to each other, and title is a representation of this complex relationship.

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[72] *See* 2 W. BLACKSTONE, *supra* note 26, at *157-58.

[73] *Id.*

V

This essay has attempted to demonstrate an alternative to either resigning ourselves to a conventional belief in the sufficiency of a doctrine we no longer understand, or joining with critics who pompously assert that they understand very well that the doctrine really does not make sense.[74] Far from being "incoherent," common law doctrine is the unfolding over centuries of a very precise dialectic that is rooted in an alien, barely comprehensible cosmology and corresponding universe of social relations. If we take the trouble to encounter briefly that cosmology we discover in common law doctrine a quite explicit ordering of relations of domination. Stripped of its charms of legality and justice, the common law's kernel of philosophical truth is revealed in the feudal Christian cosmology itself: it is the struggle to be an individual connected to, and not estranged from, the universe. Walter Benjamin once wrote:

> There is a conception of history which out of confidence in the infinity of time discerns only the rhythm of men and epochs which, quickly or slowly, advances on the road of progress. . . . The following consideration leads, against this conception, to a determinate state in which history rests collected into a focal point, as formerly in the utopian images of thinkers. The elements of the end condition are not present as formless tendencies of progress, but instead are embedded in every present as endangered, condemned, and ridiculed creations and ideas. The historical task is to give absolute form in a genuine way to the immanent condition of fulfillment, to make it visible and predominant in the present. . . . however, it is only comprehensible in its metaphysical structure, like the Messianic realm or the idea of the French Revolution.[75]

If we no longer remember the prayer, and the fire has gone out, and we cannot find our way back to the forest, perhaps we ought to seek wisdom elsewhere.

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[74] A summer program announcement of the Conference on Critical Legal Studies in May 1983, states:

> The "incoherence of doctrine" has become a widely accepted tenet of Critical Legal Studies, yet most members aren't completely sure that they know what it means, much less that they know how to demonstrate "it" to their students. Many people believe Hans Christian Andersen's story about the vain emperor and his insecure, conformist subjects is relevant to the issue of the incoherence of doctrine, but not everyone is sure whether the naïve truth-telling child would be exposing the incoherence claim itself as naked. We propose to make these questions a central focus of summer camp.

Announcement of Summer Program, Conference on Critical Legal Studies (May 31, 1983).

[75] R. WOLIN, *supra* note 10, at 49 (quoting and translating W. BENJAMIN, 2 GESAMMELTE SCHRIFTEN 75 (R. Tiedemann & H. Schweppenhauser eds. 1972)).