*Introduction to Law and Legal Thinking*

I believe, substantially helped my research and teaching. I believe in practicing what one teaches.

If you are thinking about going to law school and becoming a lawyer, this book may help you in making your career decision. If

you like the kind of reasoning in this book, if you enjoy the concepts

and the way I've tried to illustrate them whenever possible by real­, life examples, and if you enjoy the advocate's perspective that I've utilized in writing the book, then I think there's a good chance that

you will enjoy the study of law. Lawyers never cease studying the law, never stop keeping up with the latest decisions and develop­ments. Whatever career you choose, it should be something that you really enjoy doing every single day of your life.

A first-year student at Harvard Law School went home for the Thanksgiving recess and his parents started carrying on about how

proud they were that he was a law student. His aunt, attempting to

be polite, said, "So tell me, how many laws have you learned so far?" Now, that was a law joke. It is distinctly unfunny to anyone except lawyers. Lawyers are amused because they recognize the sheer

inappropriateness of the aunt's question. For not only has the Harvard student not yet learned any laws, but in all probability he won't learn any laws during the remainder of his three years of law school.

Lawyers don't need to know laws; they only need to know how to look them up. Law school training enables a lawyer to figure out

which laws to look up and how to look them up, and most

importantly, what on earth to do with them once they are found. A superior law school education, therefore, is education in the concepts of law, the generalities of law, the groundwork of the legal

system upon which one can, at any later time, locate and make sense out of rules, regulations, statutes, and cases. This book is an introduction to a superior law school education.

CHAPTER 1. WHAT LAW DOES

**A. THE FUNCTION OF LAW**

Here is a simple definition of the function of law: *law is an artificial mechanism designed to channel human behavior into the directions society wants.* The "mechanism" consists of words and other signs and symbols that contain the language of the law, together with a whole setup of authoritative interpreters and appliers of the law (such as courts and judges), accompanied by enforcers of the law (such as police and a prison system). The words, symbols and signs are what we normally call the "law" itself; the other mechanisms apply and enforce the law. You may have noticed that I've omitted a mechanism for creating or modifying the law, such as a legislature. While law-creating mechanisms are typically part of modern legal systems, they were not always thought necessary. In medieval times, judges simply applied law that they said was immutable and immemorial; it was always around, never created and never de­stroyed. "The mind of man runneth not to the contrary," they said of the origins of this omnipresent law. Of course we can nowadays be skeptical and say that any rule of law must have originated somewhere, and if we are legal realists we will indeed take that position. But it's perfectly consistent to imagine law functioning in a society where the rules don't change and no one knows or remembers how they got started. Later in this book we will review how the three major schools of legal thought—positivism, realism, and natural law—have conceived of the problem of where the law comes from.

But for now, let us look at what law does. The definition I gave in the previous paragraph emphasizes the deliberate channeling func-

tion of law. It acknowledges that the only reason for having law at all is that it influences human behavior. Legal rules would be utterly worthless if they totally failed to influence anyone's behavior. To be sure, one might argue that even if law doesn't influence behavior, nevertheless as long as people behave in relatively consistent and generalizable ways, there is a kind of "law"—a law that generally describes their behavior. We might describe this as a kind of sociological rule. But there's a difference between the sociological rule that most Americans watch television on Monday nights and saying that there is a law requiring it. The "law" that I deal with in this book is that which the average person asks about in the question: "what *must I do or avoid doing,* in order to stay within the law?"

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As this question indicates, law channels our behavior in many ways other than the simple one of telling us to refrain from doing certain things, such as laws prohibiting the robbing of banks or driving through a red traffic signal light. Some laws require us to act, such as the requirement that we pay taxes on our income. You cannot be law-abiding by minding your own business and doing nothing; if you do nothing, you will be prosecuted for failing to file income-tax returns. Even so, for the most part law tells us what we should *not* do.

But there is a kind of law different from prohibitions and prescriptions. Although not readily thought of as "law" by the average person, there are rules of law that come to us in the form of conditional statements. They *empower* us to do certain things without requiring us to do them. For instance, there is a conditional license law; it says that if we would like to drive a car, we have to obtain a license. The license law is not a prescription—it does not say that we must drive a car. Nor is it a blanket prohibition—it does not forbid the driving of cars. Rather, it empowers us to drive a car so long as we obtain a license. Another example of a conditional law that empowers us, this one not involving a licensing procedure, is the law of wills: you don't have to leave a will, but if you want to have a valid will that succeeds in transferring your property after you die, you have to execute the will in a certain way, with witnesses and so on, according to the specific rules in your jurisdiction. Indeed, all the laws of contract and sales are of this conditional form. You don't

have to enter into a contract, but if you want to, you have to do it a certain way if you want the legal system to enforce the contract in the event that the other party reneges on his or her obligation to you. We say that license laws, the laws of wills, and the contract laws, give us legal powers. They enable us to change legal relationships by simply choosing to enter into certain kinds of activities, such as making a will or a contract. They empower us to do these things without requiring us either to do them or to refrain from doing them.

Here's a little mental exercise. We've seen that laws come in the form of prohibitions, prescriptions, and powers. Can we reduce these categories into one category? The legal philosopher Hans Kelsen thought of a way. He reasoned as follows: an individual is free to do anything. But some things that an individual chooses to do will be costly. In particular, the law imposes certain costs upon certain choices that individuals might make. Thus if you want to rob a bank, you are free to do so, but the law will impose a cost upon you. The law will put you in prison for a specified period of time (say, five years). Hence we can reformulate the no-robbery prohibition in terms of a power: "if you choose to rob a bank, then the law will imprison you for five years." We can reformulate the tax law as follows: "if you choose to not file a tax return, the law will imprison you for three years." In this fashion, all prohibitions and prescriptions can be transformed into powers.

Kelsen's idea seems a bit stilted; he is forcing prohibitions and prescriptions into the strange form of an empowering statement. He later refined and improved his reasoning by changing the person to whom the law is addressed, as we shall see in Chapter 3. But for the moment, Kelsen's idea does highlight the voluntaristic aspect of law. It points out the fact that the law simply adds a cost--often an intolerably high cost—to alternatives that we can freely choose. We are then led to ask whether law is indeed based upon the fundamental assumption of human free will.

**B. OBJECTIVE 1.AW AND THE QUESTION OF FREE WILL**

Contrary to the implications of Kelsen's position, 1 will now contend that law can more efficiently be studied as an objective and not as a subjective phenomenon. I will try to show that there is a

conceptual attractiveness in explaining law mechanistically--as if it does not depend on the free will of human beings. Indeed, I argue that law is more understandable if we do not presuppose a mind or a will that the law acts upon.

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We will lose something, however, if we regard law as a mecha­nism. We will lose the "justice" component of the law. I want to come back to "justice" in Chapter 7 of this book. But for now, our purpose is to get an efficient overview of law. Accordingly, I will now take a mechanistic, deterministic, and objective approach to our subject.

Here is a demonstration of how "law" can work even if we assume that human beings have no free will. Let us take one of the simplest of all legal rules—the ordinary traffic signal. It is a legal rule addressed to drivers of vehicles that simply means "stop on red, go on green." It is easy for us to assume that all drivers have the free will whether to obey the traffic signal or run the lights—as they say in England, "shoot the lights." But now suppose we have a totally impartial observer, an extraterrestrial visitor from another galaxy who observes traffic patterns at a busy intersection in the loop in Chicago. Our visitor duly observes that when the red beam shines from the stationary light at the corner of the intersection, it causes the wheeled vehicles to come to a stop; conversely, the green beam appears to energize those vehicles, setting them in motion. Our careful visitor notices that inside the hard metallic vehicles are "soft" machines who inhabit the vehicles and make gestures at a control panel and spin a primitive wheel. Perhaps the red and green beams from the traffic signal stimulate these soft machines who in turn direct the operation of the hard machines. Or perhaps the hard machines determine the responses of the soft machines. Regardless of which controls what, the important observation that the ET visitor makes is that the light beams affect the behavior of the vehicles.

If the ET visitor observes the situation for a period of time, once in a while a red beam will be observed to fail to stop a car. The visitor will probably conclude that the car has a defective beam-detection mechanism. But this is not unusual; on such a primitive planet, one could hardly expect its machines to operate perfectly.

Note that no assumptions are needed about free will. From the ET visitor's point of view, everything is explained mechanistically. While

*we—*the soft machines inside the automobiles--think that we are making choices, what we think may simply be a form of self delusion. It may be the action of our cerebral cortexes attempting to rationalize to our minds the deterministic behavior of our bodies. But this is not a book about the philosophy of the mind-body problem or the basis of epistemology, so we need look no further at the question of what "really" is going on inside our minds. My point is that the external perspective—which I have characterized in the traffic example as the ET visitor's perspective—may be the most efficient and revealing way to understand the workings of the law.'

Thus, I have invoked the extraterrestrial visitor to argue that a legal rule, such as a traffic signal, works even if we are machines lacking in free will. Machines can react to signals in their environment. The next step is to notice that there is nothing intrinsic about a red or green beam in my sci-fi example that made the cars stop at the intersection. Ordinary words have the same signalling power. The words "keep off the grass" will inform a person that unpleasant consequences, such as being stopped by the police, might attend walking across the grass. The words, then, are a signal to the mind, and our bodies respond the same way we do to many environmental signals. The words or the signal act as stimuli, and with the intervention of our minds as a translating device, our bodies respond. So far, no free will is needed.

It is certainly clear that words can affect our behavior. When the words of the law tell us to do something or refrain from doing something, we react to those words. The words signal to us that unless we do thus-and-so, certain unpleasant consequences are likely to befall us. Thus, if a legislature enacts a law decreasing the speed limit from 65 to 55 on a certain highway, many of the drivers using that highway will change their behavior and reduce their speed, for the words of the sign "Speed Limit 55" signals to the drivers that the unpleasant consequence of being arrested for speeding will result if they do not reduce their speed. Not all of the drivers will reduce their speed, but many of them will—all by a very inexpensive change in one of the signals in our environment. Tentatively, therefore, I conclude that even if you and l had no free

This "objective" perspective was first brilliantly depicted by Judge Oliver Wendell Holmes. See Bibliography.

will, no power to do anything other than what we in fact do, the law would be exactly what it is now. For what we do is a function of all the sensory inputs we receive, and the "speed limit" sign is one of those sensory inputs.

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My further contention is that this mechanistic view of law helps us, at the beginning, to understand law better. Later on, in Chapter *7,* I will cut back on this mechanistic picture when I discuss the function of justice.

C. THEORIES OE CRIMINAL PENALTY

To see if a mechanistic conception of law can be sustained, we should apply it to the area of law where common sense tells us it is the least likely to work, namely, criminal law. Isn't criminal law predicated on the notion of punishment—that a person who commits a crime is morally blameworthy and deserving of punish­ment? If people lack free will, how can we blame them for what they do? And wouldn't it be immoral—or at least grossly inconsistent—for us to punish people for doing things that they could not have avoided doing because they lacked free will? Hence, criminal law is the hardest test for the mechanistic theory of law. Let's see if it passes the test.

Taking the hardest example within criminal law, let us consider Mr. X, a man who is born with defective genes—genes that induce him toward criminal behavior. How does the law justify "punishing" this man for crimes that he has committed?

I put the term "punishing" in quotes because I want to argue that it begs the question. It is clear that we cannot ever justify punishing someone for something he could not have avoided doing. We don't hit our dishwasher if it malfunctions, we don't kick our vacuum cleaner if the rubber band in it snaps, and we don't scold our word processor if it loses the last half hour's worth of manuscript that we have programmed. (Of course, some people might do these things, but we consider their behavior aberrant or in some cases funny—as when the Three Stooges or Laurel and Hardy yell at the tools they use.)

So, if we cannot justify "punishing" Mr. X for committing a crime, we have to inquire whether the term "punishing" is an appropriate

description for putting him in prison. The way to begin to unravel this question is to ask *why* we imprison the man.

1. *Punishment*

If our answer is, "to punish him," then I think we can all agree that we cannot justify what we do. But we may have other answers. Indeed, I think a mechanistic view of law can provide us with some fairly satisfactory answers. As to each of the following answers, you should ask yourself whether you are completely or partially satisfied that the answer explains society's decision to imprison Mr. X, the man with defective genes.

1. *Deterrence*

instead of "punishment" as a reason, consider the theory of deterrence. We imprison Mr. X for ten years in order to deter the crime of armed robbery. Note that the deterrence theory does not apply to Mr. X himself, It applies to everyone but Mr. X. He isn't deterred from committing the crime, and in fact, because he committed it, we know for sure that he was not deterred. Even if he knew when he committed it that he would be penalized *ten* years, he was not in fact deterred. So, the theory of deterrence can riot apply to Mr. X. We are imprisoning Mr. X solely as an example to others! Since Mr. X is just an example, it doesn't matter whether he has free will. Free will or riot, he goes to prison so as to deter others from committing the crime that he committed,

As for all the other people out there—the ones being deterred by our imprisoning Mr. X---they don't have to have free will to be deterred, as we saw in the traffic-light example. Rather, deterrence works because their minds switch off a possible course of action so as to avoid the pain of imprisonment.

You might object to the deterrence theory by pointing out that among the people out there whom we are trying to deter is Mr. Y, who has defective genes similar to those of Mr. X, and who will not be deterred by the fact that X has been imprisoned far ten years. Indeed, you could add the fact that Mr. X himself was not deterred, even though he obviously knew that other people before him who

were convicted of armed robbery received long prison sentences. So isn't this a hole in the deterrence theory?

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Advocates of the deterrence theory can reply in two ways. First, they can say that they never claim that deterrence is WO% effective. We know that people commit crimes every day and many are caught and convicted; obviously deterrence doesn't work in all cases. But it works in a sufficient number of cases so that the crime statistics are a lot lower than they would be if criminals were not imprisoned. It is like the traffic light example; not every car stopped at the red light, but most of them did. Secondly, advocates of the deterrence theory can say that we are not really sure even about Mr. X and Mr. Y. Did Mr. X in fact commit armed robbery in broad daylight when there were police nearby? Probably not. Most crimes are committed in circumstances where there are relatively few people around, and not in sight of the police. This suggests that the typical criminal, including X, looks for situations where he can "get away with it," and not be caught. In other words, imprisonment does deter X and Y, in the sense that they are more circumspect about the timing of their nefarious activities. It is certainly true that different people calculate different odds about being apprehended and convicted for their crimes. The very fact that Mr. X tried to reduce the odds of being caught means that he adjusted his behavior slightly in light of the deterrence factor. Most of us adjust our behavior a great deal more—all the way up to the point where we don't commit the crime. Criminals such as X and Y tend to adjust their behavior to the point of committing the crime under the least detectable circum-

stances. So the deterrence theory may work as far as it goes. What the defective-gene theory should tell us is that increasing the penalty

for crime will probably have a negligible effect as far as deterring X and Y are concerned, and that for people like X and Y the best way to reduce crime is to have more police personnel visible on the streets.

But deterrence will not work for some people, regardless of "defective genes," if imprisonment itself is not painful to them.

Consider the case of Charles Manson, the Los Angeles "cult killer" who directed the brutal and senseless knife-murders of at least nine persons including actress Sharon Tate when she was pregnant. When Manson was convicted for murder, California did not have the death

penalty. Interviews with Manson in prison brought out the fact that he had spent much of his youth behind bars and actually preferred prison life to "life in the real world." Prison to him meant security, routine, not worrying about getting food and shelter, and so forth. It was alleged that although Manson had an extreme fear of dying, and would have been deterred if the law had provided for capital punishment, in fact the thought of mere imprisonment for his crimes was no deterrent; it was an attraction to him. This example, like the others I've given, shows that deterrence theory is built upon empirical assumptions that should be continually tested and retest­ed. I'm personally opposed to capital punishment, but the Manson story is one that I've found very troublesome in light of my opposition.

*3. Social Contract*

A third theory can be called the "social contract" theory. It is perhaps close to the biblical "eye for an eye and tooth for a tooth" concept. Society says that if you harm a member of society you have to pay for it. You have an implicit contract with society not to violate society's fundamental rules, but if you do, society will fulfill its end of the contract by imprisoning you. Society does this not so much as a penalty but simply to ensure respect for its contracts.

This theory is rather close to the deterrence theory in that society carries out its end of the bargain in order to show to others—not necessarily just to you—that it will carry out its contracts in all cases and imprison all criminals. But it is slightly different from the deterrence theory in that it is a way of institutionalizing vengeance. If we had no legal system at all, we might expect the friends and relatives of the victim of a crime to go after and punish the criminal. "Vigilante justice" is the term used for this process in the old west. But in an organized society with a legal system, society monopolizes the retribution process; the friends and relatives will be placated because they know that society will catch, accuse, convict, and imprison the criminal. The idea that much of law exists in order to replace and preempt the violent revenge that would occur in the absence of law, is a deep idea in our concept of law and we will return to it several times in this book.

A few years ago there was a brutal rape-murder of a fifteen-year-old girl. The police got a tip that the criminal was in a local bar, and they went there and were told by the bartender and some of the patrons that Mr. N, sitting in a corner nursing a drink, was the murderer-rapist. N was arrested, tried, and acquitted. The prosecut­ing attorney angrily complained to the press that the acquittal was a miscarriage of justice, brought about by the high-paid criminal defense attorney's use of dirty tricks. The family of the fifteen-year-old victim thereupon went after Mr. N, and killed him. Believing that the state had failed to do justice, they took justice into their own hands. The state then had no choice but to prosecute the family for murder.

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The story is even worse than that. What actually happened at N's trial was that his attorney was able to prove that the bartender and other persons at the bar falsely accused N, because they knew who the real murderer-rapist was and were physically afraid of him. Thus it turned out that the prosecuting attorney's false and self-serving statement to the press that the trial was a miscarriage of justice was the real cause of the victim's family attacking and killing innocent Mr. N. The prosecutor made the statement because, as an elected official, he did not want the public to think he had prosecuted the wrong man. Thus, we see that the "social contract" theory of criminal imprisonment only works if the public perceives it to work; when the public is misled, as by the prosecutor in this case, then law can break down and people can take the law into their own hands.

1. *Incarceration*

A fourth theory of imprisonment for crimes is the incarceration theory. It's the simplest theory; it says that we put a criminal behind bars for the same reason that we cage a wild animal. The theory simply looks to the temporary protection of the public for the duration of the imprisonment.

1. *Rehabilitation*

Finally, there is the theory of rehabilitation. In the 1930s it was widely felt that with modern psychiatric counseling and improve­ment of prison conditions, criminals could be taught during their

prison term how to fit in with society. However, in recent years, prisons have turned out to be institutions for learning how to commit greater and more violent crimes. Nevertheless rehabilitation is usually listed as a theory of criminal law.

Consider the possibility of a frontal lobotomy; the surgical removal of portions of the cerebral cortex can change a criminal's personality sufficiently to make any further criminal act extremely unlikely. Is such an invasion of a person's body worse than keeping the person behind bars for ten, twenty, or thirty years? If you think that it is more humane, you ought to consider further the ever-present possibility that an occasional convicted criminal is in fact innocent: for such a person, imprisonment at least carries the potential of an eventual reversal of the conviction without permanent personality change.2

Now, as to these five theories, which of them is dependent upon the premise of free will? Only the first, the theory of punishment. I contend that the other four are perfectly applicable even on the assumption that the criminal had no choice but to commit the crime. If you consider this issue and come to the conclusion that these other four are sufficient, in combination or even singly, to justify

2 Does a convicted person have a right to be freed if he can show he was in fact innocent? For the most part, the law is unconcerned with actual innocence; it deems a person "guilty" who has been convicted at trial.

Once a person has been convicted and the conviction has been affirmed by the appellate court, his only further recourse to a court would be through the various procedures generally known as "habeas corpus." Habeas corpus is an ancient writ of law, going back to the Magna Carta. It says that a person who claims he is illegally imprisoned has a right to be brought before a court, and if the court finds that his imprisonment is in fact illegal, the court has the power to release him immediately. But can you see wisty innocence does not count as an "illegal" imprisonment? A person is lawfully in prison if a court of competent jurisdiction, and a jury of his peers, found him guilty of a crime. The fact that the jury may have made a mistake—and convicted an innocent man—is said by the law to be irrelevant. I he law is only concerned with the fact that *the* jury found him guilty, not with whether he was in fact guilty. This rule works both ways. A guilty man may he mistakenly found to be innocent at trial, If so, he goes free, and the prosecutor can not try him again for the same crime.

The apparent injustice of the rule that an innocent man is lawfully incarcerated is currently leading the Supreme Court to rethink the basis for habeas corpus. The Court has held that the evidence presented at trial must at least suffice to convince a "rational trier of fact" that the defendant is guilty beyond a reasonable doubt. This is not the same thing a! an innocence test, but it seems to be moving in that direction. At the same time that the Court is taking cautious steps to liberalize habeas corpus to allow at least a test o evidentiary sufficiency, it is also moving to disallow many of its earlier precedent! regarding various assertions of illegality. Some trials have technically violated a defendant!s constitutional rights, yet the overwhelming evidence at the trial was that the defendan was guilty. The Supreme Court is taking a hard look at precedents in this area, and moving toward a position that obviously guilty defendants will not be freed on a technicality, ever if their constitutional rights were violated.

imprisonment, then you can agree with the organizing theory I've suggested: that the law generally does not depend on any assump­tion of free will.

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More than that, you might want to reconsider the moral founda­tions of the theory of punishment itself. Since it has shown up as exceptional among our five theories, perhaps it is really out of place in a legal system. Maybe it builds upon subjective emotional factors that can result in injustice due to the difficulty of quantifying what we mean by proper and adequate punishment. Maybe the punishment never quite fits the crime. We will come back to this question of justice in Chapter 7.

D. DEGREES OF INTENTION

Let's move away from our focus on criminal law, and look at all kinds of law. Despite my emphasis on objectivity, the law does draw a distinction among different degrees of intention. It does so across the board, in criminal law, tort law, contract law, property law, and so forth. The intention spectrum runs, first, from acts that we clearly and rationally decide to do, second, to acts that we do recklessly, third, to negligent acts, and fourth to things that we did not intend at all.

Our organizing principle so far—that law is possible even if there

is no assumption of free will now helps us in determining these   
states of mind, these degrees of intentionality. For although much of the law concerns itself with states of mind, the evidence and proof of these states of mind are treated objectively by the law. The law does not attempt to "look into" a person's mind to see whether she voluntarily decided to act, but rather sets up certain standards that characterize states of mind irrespective of whether the person in question actually had that state of mind or not.

Here's an example of legal objectivity in a contracts case. Suppose I enter into a contract with an organization to give a lecture, and the organization agrees to pay me my average fee of $50,000.3 But the contract omits anything about when the lecture is to be delivered. As soon as the contract is signed, the organization informs me that I must give the lecture in a week. I reply that I need to come up

3 *if* they do, it will be the first time ever that they reach my average.

with a good idea for the lecture, and that might take a year. I add that the contract said nothing about when the lecture must be given, and the organization replies, "that's right, so it means that you have to give the lecture whenever we tell you to." I refuse, and the organization then sues me on the contract to get me to give the lecture right away. The contract is perfectly enforceable even though it says nothing about when the lecture is to be given. The judge, acting as factfinder, must interpret the contract as if it had a clause in it saying when the lecture is to be given. The judge stares at the blank space in the contract and proceeds to "read" what the blank says. The law tells the judge how to fill in the blank. The law says that the blank must be filled in with a "reasonable" time.

The "reasonable" time has nothing to do with my state of mind—what I thought the time should be—nor with the organization's collective thoughts on the matter. The organization says "one week" but since it is only one party to the contract, what it says cannot determine how the blank should be filled in. I say "one year," but for the same reason I cannot determine that the blank space should be interpreted to read "one year." Nor does the judge "split the difference" and say that the blank space is six months—the halfway point between the organization's position and my position. The "reasonable" time is none of these, even though the law invented the reasonable time standard as a substitute for what the parties intended. The intention of the parties may have given rise to the "reasonable time" interpretation centuries ago when it first came up in a contracts case, but since then the "reasonable time" standard has lived a life of its own. It has nothing to do with what the parties actually intended. The law in effect is saying, "we know what you intended even if you swear to us that you never intended it."

I don't know what the court would decide in this case. Much depends upon the judge, the quality of the arguments, the circum­stances surrounding the making of the lecture contract, and for all we know, the weather on the day of the decision. The judge may say "three months." If so, that will be deemed the reasonable time. End of case.

In tort cases—cases where the plaintiff is harmed and is suing the defendant for money damages—the turning-point issue for the jury

is often whether the defendant acted reasonably or prudently in the circumstances. The jury will not psychoanalyze the defendant but rather will decide whether a mythical reasonable person in the defendant's position would reasonably have acted the way the defendant acted. This is the way the law objectifies states of mind.

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*1. Intentional Acts*

So let's begin with the first type of intentionality: acts that are clearly intended. For example, suppose a television evangelist embezzles funds from his ministry, and is subsequently brought up on criminal charges of embezzlement. Suppose his defense is: "God told me to do it. I had no free choice in the matter." Let's make the further assumption that the man is perfectly sincere and honest in saying this, and he is even able to convey to the jury his total sincerity. The judge, however, will instruct the jury that if the jury finds that the minister took funds which did not belong to him with the intent to convert those funds to his own use—that is, to spend the money on things for himself and keep what he bought—then they should find him guilty of the crime of embezzlement. The judge will tell the jury that it is irrelevant whether the defendant was acting under the strict orders of God. What matters is the objective fact that this defendant took these funds and intentionally converted them to his own use. Thus, even if the defendant has no free will at all, that fact is irrelevant if he took the money with the intention of converting it to his own use.

You might object, "but he cannot have taken the money *intentionally* if he was under the total influence of an outside Power, such as the Deity." That may be your definition of intentionally, but it is not the law's definition. The law says that intention is proven by the acts that the defendant did, and cares nothing about why. Intention is an objective, and not a subjective, fact.

There is a difference, however, if a defendant can prove that he had no idea what it was that he was doing. For if he can prove *that,* even the law will say that he could not have intended to do what he did. Thus, if the defendant was under hypnosis and believed that he was on another planet and the checks he was writing to himself drawn on the ministry's funds were really travel vouchers required

by the extraterrestrial ministry of transportation—and of course it's not likely that a jury will believe all this—if a defendant can prove he had absolutely no idea of what really was going on, then the law would not hold him responsible.

Can you see how this case is distinguishable? In the previous case, the defendant knew that he was converting real money to his own use, but believed he was doing it under God's orders. But in the hypnosis case, the defendant presumably did not know that he was converting "money" to his own use. Even the average, reasonable person could be the victim of a hallucination, or under hypnotism, or whatever, and thus be totally controlled in his actions. In such a case, if you believe him, what he actually did was to sign extraterrestrial travel vouchers.' Thus, applying the law's objective test to his acts, we say that he did nothing wrong. Naturally, the more complicat­ed the crime, and the more steps the defendant had to go through to commit it, the less we would believe any such defense.

Here is a further variation on our hypothetical case that I will leave as a problem for you to solve. The defendant argues that he was under hypnosis, and imagined himself to be on another planet working for an evil organization. Because he wanted to destroy that organization, he wrote checks on the organization's bank account that were payable to himself, and he cashed them. If you were the judge, would you find the defendant innocent or guilty of embezzle­ment? Why?

*2. Recklessness*

Let's take a different degree of intentionality—that which is called recklessness. A reckless act falls short of clear and deliberate intentionality. Suppose a pedestrian is hit by a car, and the driver of the car says, "I was so drunk that I had absolutely no control over the wheel; I didn't know what I was doing; I had no intention to run down a pedestrian." Now, we should put to one side the separate

4 From an objective point of view, the human machine is defective when hallucinating, so that no matter what is inputted into the machine, the machine engages in "runaway" eccentric behavior that is stimulated, rather than deterred, by the inputs. In such a case, the machine cannot be controlled by varying the inputs; rather, one has to intervene in the machine directly (such as de-bugging it).

crime of drunken driving; as to that crime, the defendant driver of the car is clearly guilty. He may lose his license as a result. But the driver is facing a possible felony indictment. is the driver guilty of criminal assault and battery in hitting the pedestrian?

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The law will hold the defendant responsible for all those acts committed while he was drunk on the theory that he knew, before he got drunk, that driving under the influence of alcohol could result in injuries to other persons. The element of criminal intent, then, occurred when the defendant decided, at time t-O, to get drunk and then drive a car. What happened after he was drunk at time t-1 is then attributed to him, even though he may have been so drunk that he had no control over his actions including no specific intention to hit a pedestrian.

If we think of the drunk-driving case as one where the legally relevant decision was made at time t-O and where its instrumentality carried out the actual act at time t-1, then the same legal result should follow even if two different people acted, one at t-O and the other at t-1. That is why we are beginning to see some bartenders being prosecuted for selling too many drinks to persons they had reason to know would be driving a car after leaving the bar. The bartenders are acting at time t-O by providing the drinks that led to the subsequent accident. We can even distinguish this case from the televangelist. If a drug was slipped into the televangelist's drink at t-O that made him hallucinate that he was signing extraterrestrial travel vouchers instead of checks, then he himself committed no act at time t-0. Thus, whatever he may have been hallucinating at time t-1, he should not be held legally responsible for his acts at t-1.

*3. Negligence*

Our third category, negligence, comprises perhaps the bulk of accident cases. The objective theory of law predicts that the legal test for negligence will have nothing to do with the state of mind of the defendant who is accused of acting negligently. And indeed, the law says that a defendant is negligent if the cost to him of avoiding

the accident that occurred his cost of precaution—is less than the   
probability that such an accident would occur multiplied by the magnitude of the loss suffered by the victim of the accident. Thus, if

a driver of a car knows his brake is defective but he fails to get it repaired, and then he drives his car, his brakes fail to hold, and he hits a pedestrian, he is guilty of negligence and must pay the victim's entire hospital bills and compensate the victim for pain and suffering. The formula is wholly objective; the fact-finder (judge or jury) has no need to inquire into the driver's actual state of mind.

*4. Strict Liability*

Consider now the fascinating cases called "strict liability" cases, which is our fourth category along the intentionality spectrum. Suppose the owner of a pit-bull dog has the animal fenced in, but a neighborhood teenager, on a "dare" from his friends, climbs over the fence, opens the gate, and the dog escapes through the gate, runs across the street and attacks a pedestrian. The injured pedestri­an can of course sue the neighborhood teenager for damages, since the teenager was "negligent" under our previous test—the teenager could have made sure the accident would not occur at truly minimal cost—simply by not opening the gate. However, it could turn out that the teenager might not have any money and the pedestrian's hospital bills could be very high. Can the pedestrian sue the owner of the dog?

The attorney for the dog owner would argue that his client had absolutely no intention for the dog to be in a position to attack anyone off the owner's own premises. Indeed, the dog-owner took reasonable precautions; he erected a high fence to ensure that the dog would not get out. He had no reason whatsoever to foresee that a neighborhood kid would trespass onto his property and let the dog free. In short, not only is there no blameworthy state of mind that we can attribute to the owner, but he took every reasonable precaution and hence is not even negligent on an objective theory of negli­gence.

What result? The attorney for the dog owner is trying to convince the court to apply a negligence standard. Under that standard, the owner would not be held liable for the pedestrian's damages. But this argument won't work, because the court will not apply a negligence theory at all. The court will award the judgment to the pedestrian by holding the dog owner strictly liable.

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Under the old case law, this was the "wild animal" theory, and strict liability—liability in total absence of intent—was found against the owners of lions, tigers, bears, elephants, wolves, some monkeys, and wild boars. Under the analysis I've been developing, we can look at the time t-0, which was the time when the owner made his initial decision to have a pit bull on his property. True, no one could have foretold at time t-O exactly how the dog might ever be set free, or what the dog might do if freed by some unforeseeable agency. But remember at time t-O the driver who decided to become intoxicated also could not know what accident might occur, if any, once he started driving the car. In the same way, we simply point out that the dog owner at t-O decided to own a pit bull and put it in his front yard. That choice turned out to result in an accident to the pedestrian. The law holds him responsible, objectively, for the injuries caused by the dog because a pit bull dog is dangerous enough that anyone who takes the animal into a community is creating an abnormal danger to others. In such cases, the owner will be held liable for the animal's acts on a "strict liability" theory.

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En all these cases, we see the law focussing upon the channeling of human behavior at t-O, the time when the presence of the law can make a difference in the behavioral decision reached by persons subject to the law. We don't need a subjective theory of free will to explain this; the law works simply by changing the environmental considerations inputted into the mind of the decision maker at time t-O, which is when the decision maker's mind is susceptible of being influenced. In other words, the•law says that if you decide to own a pit bull or decide to get drunk, you're going to be stuck with responsibility for the consequences of those decisions. If you don't like those consequences, then you should not buy the pit bull or get drunk in the first place.

**CHAPTER 2. WHAT LAW EMPOWERS US TO DO**

The definition of the function of law that I set out at the beginning of Chapter **1** may have suggested to you that it is the government itself that consciously channels human behavior into socially desir­able directions. Actually, the government is directly concerned with only a small part of the law. The government is of course concerned with the laws providing for taxation, for licensing, social security, foreign policy, immigration, public services such as highways, post offices, and national parks, but all of that adds up to just a fraction of the law. Most of the law regulates private conduct, the things that affect us in **our** daily lives. And much of this law originated in court decisions where one injured person sought redress against another person who allegedly caused the injury. The injuries I speak about could be injuries to the body, or financial injuries, injuries to reputation, or injuries to property. The way today's law affects us the most is in the provisions it makes for the rights and obligations that we have vis-à-vis other people.

**A. TYPES OF LEGAL CAPACITIES**

Let's take a look not at the substantive content of law, but rather at the forms and structures that law takes. Law doesn't just regulate us, it also empowers us. Consider the idea of a contract. From one standpoint, a contract is something a court can enforce, and by enforcing it the court constricts and regulates the actions of the parties. But from another, equally valid, standpoint, if it were not for the possibility of judicial enforcement of the contract, the contract as a mechanism would not exist. The possibility of enforcement, in other words, gives binding force to an agreement between two