Pre-Classical Private Law: Property

In the last chapter, we mapped only the horizontal dimension of pre-Classical thinking about public law. We reviewed the legal concepts that served as a vocabulary for the statement and justification of legal rules, without discussing the methods of judicial reasoning the judges employed when faced with a choice about what rules to adopt. In this Chapter and the next, I will pursue a similar approach to private law theory. Once again the emphasis will be on the set of concepts used, and on their interrelationship, rather than on the process of legal reasoning by which the judges constructed a body of rules.

My purpose is to show that between 1850 and 1885 there was a transformation of the conceptual map of private law. This transformation paralleled that of public law. By 1885, there was such a marked similarity between the two fields that it was an easy matter for thinkers so inclined to put them together into a single integrated Classical theory of law. That process of integration is the subject of Chapter V.

As in the last chapter, I will use as a framework the notion that this structure of consciousness is an instrument for the mediation of the contradictions of experience. In other words, I will present the transition from the pre-Classical to the Classical mode as a
transformation of a structure that allowed nineteenth century legal thinkers to deal with problems that seem to mid-twentieth century theorists insoluble. This presupposes that we do in fact experience private law as contradictory. The next section asserts more than it attempts to demonstrate that this is the case.

Modern theorizing about private law has left us with the sense that it is a mass of rules that cannot be understood as the rational working out of consistent general principles. It must rather be understood as the accumulation of the victories and defeats of two conflicting visions of the universe. Both judicial law making and judicial law application are indispensable to the working of the modern legal order, but both require the judge to engage himself in this battle of world views. To make things worse still, the typical member of the modern legal elite cannot claim to believe consistently in either of these ideologies. They define his discourse without compelling emotional involvement.

Short of the very abstract terms just used, there are many different ways to present the dilemma of private law. I have chosen a schema of four levels at which there exist readily accessible, stereotyped, pro and con positions for use in the construction of legal arguments. These are a kind of vocabulary that defines the possibilities of expression. The sense of contradiction arises as follows: all the different positions claim to describe the world accurately, and to prescribe for it rationally given obviously acceptable common goals; they cancel and refute each other; yet the private law system adopts all of them.

The first two problems have to do with the attitude the judge should adopt toward agreements or other undertakings of private parties. The judge must decide whether or not to give legal effect to some expression of intention or desire or decision, joint or individual. Arguments are presented to the effect that the expression is binding, and to the effect that he should ignore it. I have called these problems self-determination vs. paternalism and facilitation vs. regulation.
The third problem deals with the attitude the judge should adopt when there is no expression of intention that he can appeal to as establishing the appropriate structure for the parties' relationship. Either they are strangers or their undertakings have failed of legal effect. In the absence of agreement, one party has injured the other, or has appropriated benefits flowing from the other's action, or has refused to participate in losses that have resulted for the other party from some kind of joint action of the two. The question the judge must answer is whether there exists a legal duty of solidarity that requires one party to compensate, or share gains or losses with the other. I have called this the problem of autonomy vs. community.

The fourth problem concerns not the content or the objectives of the law, but the form in which the lawmakers should cast the rules that embody solutions to the previous problems. I have called it formality vs. informality. This, like each of the others, is a problem confronting the judge when his theory of his role tells him that he has some leeway in the sense of absence of directly or intuitively obviously controlling precedent. He must consult, or at least he feels free to consult "principle" and "policy." His problem is to decide what principle and what policy.

Problem #1: Self-Determination vs. Paternalism

(a) The Self-Determination Position
The parties are the best and the only legitimate judges of their own interests. It is not a reason to refuse to enforce a transaction that it would be better for one or both of the parties for such a transaction not to occur. As long as the parties observe the requirement that they not injure the rights of others, and have a due regard for the good of the community as a whole, they can do themselves "harm," behave "foolishly," and otherwise refuse to accept any other person's views on what is the wisest course for them.

(b) The Paternalist Position
The common law always has given and should continue to give the judge tools by which he can protect people from their own
error and foolishness, and from subtle manipulation falling short of duress or fraud (e.g., advertising). The common law includes rules prohibiting or refusing to enforce particular agreements that are snares for the unwary, and requiring the courts to look after the interests of others even when the others don’t want to be looked after.

**Problem #2: Facilitation vs. Regulation**

This problem is that of the legitimacy of bargaining power as the determinant of the distribution of income and the allocation of resources.

(a) *The Facilitative Position*

The rules as they were at some unspecified earlier point were a facilitative structure that allowed parties to act voluntarily to achieve their objectives. They allowed people to bind each other, and to keep each other off property, and they required compensation for injuries. Aside from that, they did not interfere to help one group at the expense of another. Nor did they attempt to induce one pattern or another of utilization of resources. The legislature has changed many of these rules to achieve particular allocative and distributive objectives. This is altogether fitting and proper, and the judges, of course, obey and cooperate with the legislature. Our problem is what to do when the legislature has not spoken. The answer is to develop the traditional common law policy of facilitating private action, which allocates resources and distributes income through the exercise of economic power within the neutral legal framework.

(b) *The Regulatory Position*

The common law rules represent the sovereign’s will concerning issues of allocation and distribution. They are not facilitative, but rather expressive of an historical congeries of policy views about economic activity. Judges and legislators have collaborated in developing these policies and working them out in the form of particular rules of law. When the judge has to make law without legislative guidance, he should consult these policies, including both that in favor of private enterprise and that which mandates
governmental control of the use of economic power in circumstances where it poses a threat to the public interest.

**Problem #3: Autonomy vs. Community**

(a) **The Autonomy Position**

The legal rules ought to impose an absolute minimum of reciprocal duties on persons who have not entered into contractual obligations defining their relationship. The sources of A's duties to B are essentially two: voluntary undertaking by A to do something for B, and the moral rules of coexistence that dictate that A should not deliberately or negligently injure B's interests. A has no obligation to support B, and no obligation to share B's losses, so long as A has neither agreed to do so nor been responsible for the damage. Likewise, A is under no obligation to share his own good fortune with B, even if B is in some measure its cause, so long as he has made no agreement to do so.

(b) **The Communitarian Position**

The law does and ought to recognize many duties of mutual solidarity, of willingness to share good and evil defined independently of contract, with those with whom one has entered partnerships, joint ventures, long term contractual relationships, short term contract transactions, pre-contractual negotiations, relations of businessmen and invitees, and social relationships. The duties imposed even on true strangers to look out for each others' interests are constantly increasing.

**Problem #4: Formality vs. Informality**

The "problem of form" is that of the design of the "factual predicates" or "triggers" that the judge must identify in applying a rule; it equally concerns the definition of consequences that follow once the predicate is established. The problem arises regardless of whether one favors regulation or facilitation, paternalism or self-determination, community or autonomy, although it should be obvious that the way one feels about those issues will influence the way one addresses it.
(a) The Formalist Position

The leeways that exist in the process of applying rules to facts are a serious weakness of the administration of justice because they make it possible for judges to subvert the policies embodied in the rules. The only way to deal with this problem is to accept that the rules must be designed as compromises between the policies that motivate them and the built-in limits on effective legal action. In other words, we must accept that in order to use the system the rule maker must be deliberately inaccurate. The classic example is the use of the age of 18 or 21 as the definition of various kinds of legal capacity. The rule excludes some who have the actual capacity we care about, and includes others who lack it. But to put it in the hands of the judge to decide who has actual capacity would be disastrous. The hardships involved in maintaining a formally realizable rule system are usually less severe than in this case of fixing the age of capacity, because parties can usually adjust their behavior when they know in advance what mechanical standard will be applied. For example, the requirement of a writing for some kinds of contracts can be expected to do little harm, since parties who intend to be bound can easily comply with it.

(b) The Informalist Position

First, the search for objective criteria has proved illusory. Second, the victims made by the unexpected application of rigid but necessarily artificial rules are often sacrificed without any real increase in certainty, because the lay world refuses to learn to manipulate the technicalities of the system. Third, the demand for objective criteria imposes substantive limits on legal policy behind a formal smokescreen. The reason for this is that by definition a formal system cannot deal with wrongs that cannot be stated in terms of clear standards whose application can be accurately predicted in advance. The common law has always contained many undefined or loosely defined doctrines whose function is to be safety hatches through which the judge can pluck the innocent victims of the technicalities of the system. These should be developed rather than abolished.

The problematic character of private law theory is aggravated
by the historical fact that legal thinkers have tended to believe in one or the other of two alignments of these positions:

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<th>Facilitation</th>
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<td>Autonomy</td>
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<td>Self-Determination</td>
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There is nothing logically necessary about either alignment. There would be no logical contradiction involved in believing both in rules securing a large measure of autonomy and in rules closely regulating the exercise of bargaining power. There are, however, two more abstract conflicts of legal philosophy that are relevant to each problem. There has been a tendency for the disputants in these more abstract debates to align the positions as I have just done, and this explains the sense of polarization. The first is the opposition between equity and efficiency: between the idea of justice as the resolution of disputes in such a way as to maximize the welfare of the community over time, even at the expense of an occasional injustice to individuals, and the idea of justice as rewarding virtue and punishing vice in the particular case, without regard to the cost to the community.

The argument in favor of efficiency combines the positions starting from the uncertainty and arbitrariness inherent in informal standards. Informality deters transaction and thereby stifle economic progress because legal actors have no security that they will be allowed to retain the benefits of their labors. But the ideals of regulation (social justice), paternalism (protection of the individual against himself) and community (enforcing moral duties as law) are inherently incapable of being framed in formal rules. If the judges take them up as guides in their law making activities, private parties will suffer paralyzing insecurity. Self-determination, facilitation and autonomy, by contrast are rendered determinate by their very absence of content. If they are adopted as ideals, private energies will be released, and over the long run everyone will be better off.

The response from the equitable position has two facets. One is
the simple argument that the cost of efficiently certain rules is too great, if the formal criteria require us to abandon the substantive goals of paternalism, regulation, community, as well as the procedural objective of justice in the individual case. A vague assurance that we will end up with all these things if we begin by vigorously renouncing them is not convincing. The other facet is an attack on the accuracy of the efficiency argument, beginning with the proposition that formality is more certain than informality. It may well be that the only way to achieve real certainty is to rely on the judge’s intuition of community values. The parties are more likely to be able to predict and control these, than the technicalities that inevitably proliferate when an attempt is made to design a fully formal legal system.

The second way to link up self-determination, facilitation, autonomy and formality is through the idea of rights. The facilitative position can be justified on the ground that there is a fundamental moral/political imperative that private actors can do what they like unless they injure others. The whole idea of a right is that it is a guarantee of autonomy: within one’s rights, one can injure the interest of others if that is necessary to pursue one’s own way. Rights are also an alternative to efficiency as the foundation of the individual’s refusal to let the state paternalistically define his best interests. And informality — the design of rule systems riddled with leeways for judicial discretion — is obviously a grave threat to any right dependent on judicial enforcement.

The answer from the perspective of public power is summed up in the word interdependence. The claim is that the proviso in the slogan “do anything you want so long as you don’t hurt anybody” has long since swallowed the main clause. In a modern economy or society there is virtually total intertwining of cause and effect between all actions; rights no longer have any core of obvious meaning that we can use to construct political systems. Rights are no more than delegations of sovereign power for particular purposes. They are the legal outcome rather than the natural origin of the governmental system. The public interest may not be a highly determinate, operative concept with plain implications, but “rights” are totally illusory.
What I have been describing is a subsystem of thought, a part of the total system of legal consciousness. I believe that 90% of the "policy" arguments made in private law cases fit into one of the above categories. But this does not mean that the legal profession is divided into two camps, one composed of Group A and the other of Group B thinkers. The phenomenon of alignment of the positions on the four problems, and the continuing oppositions of efficiency vs. equity and rights vs. powers render legal thinking ideological without polarizing the legal community.

The system, as a part of consciousness, defines the universe of possible rules without dictating any rules in particular. It defines the universe of "legal philosophies" without requiring the adoption of any one in particular. Within a particular dispute, it defines the possible arguments on the issues presented without dictating even that the advocate stay consistently to the Group A or Group B side. For most of the participants, there are no "killer arguments" available within the system. None of the positions on any of the problems in itself disposes of any case. One moves from problem to problem without hope for decisive resolution. The arguments are pointers; they have "weight," more or less in different circumstances. That is all.

There are ways to make all the dilemmas go away: delegalization via the administrative process, as in "no fault" automobile insurance; informalization through institutions like family courts; detailed codification, as in Article 9 of the UCC. These expedients generate problems of their own. But what is important about them for us is that they represent abandonment of the enterprise of judge-made, common law ordering of economic and social life, rather than vanquishing of its contradictions. Within the common law premises, there is no escape.

Probably the single most common state of legal consciousness for non-theoretical lawyers forced into awareness of the dilemma is something like this. There is (1) a sense of all of the available rhetorical riffs for each of the problems, and willingness to use them ad hoc in the interest of one’s client or of one’s intuition of justice; (2) a rather indistinctly defined "general position," leaning toward one broad vision or the other; (3) a sense that each
position is untenable when pushed to extremes, and a willingness to acknowledge some validity to each on its strongest ground, so that "good judgment," rather than any mechanical analytic mode, is essential to find one's way through the maze of pros and cons; (4) a tendency to feel strongly that the arguments on one side or the other do cleanly resolve some issues, and inability to penetrate behind them to any other justificatory system.

For a subgroup within the legal elite, the problem presents itself much more sharply, in the form of an acute sense of the falseness of the pretensions of the legal order to rationality. These more sophisticated thinkers have, often, the sense of having discovered a social secret, like the "facts of life" for a child. They are initiates into the backstage world where the illusion of the rule of law is mounted, and must find a way to survive the loss of innocence.

The heightened awareness of contradiction may be a source of anguish, or frustration, or cynicism, or nostalgia. It may provide amusement, confirmation of world view, a sense of smug superiority or knowledge. One can believe that the contradiction is not important, given the overall "effectiveness" and "workability" of the system; or that the "gap between ideal and actuality" is narrowing, or is stable, or is widening, or is a part of the "nature of things," or is inevitable only under a liberal pluralist political and economic regime. One can regard the acceptance of contradiction as the badge of maturity, of corruption, of the "tragic view of life," or of the impotence of bourgeois intellectuals. The point is that the experience is close to universal among modern American legal thinkers.

It has been fashionable, among those who are both aware of contradiction and accepting of the political and economic status quo it represents, to draw an analogy to pre-Classical legal thought and a sharp contrast with the Classical period. The pre-Classical system supposedly acknowledged and confronted pragmatically the dilemmas that the Classics strove by various illegitimate expedients to suppress or deny. The rest of this Chapter explores the question of the relationship of the three periods, arguing that modern legal thought is the heir to the irreversible
Classical accomplishment of reconceiving all legal relationships. The ultimate failure of that reconception defines our situation. The modern form of disintegration resembles only in the most superficial way that of the period immediately preceding the grand synthetic effort.

The Classical approach to private law differed from the modern in the following important particulars. First, the Classics believed that each of the conflicting positions was entitled to full respect, indeed to be accepted at face value, in resolving some issues, and should be ignored in resolving others. Second, the boundary lines of the areas of relevance of the different positions had been fixed at a very abstract level through general principles. Third, the judge could draw the line in particular cases by deductively elaborating the general principles into specific subrules.

The problems of individualism vs. paternalism and facilitation vs. regulation the Classics handled mainly through the concept of capacity, including duress. The law of capacity stated in general terms that only "free will" should be enforced, but that those with free will were entitled to enforcement to the hilt without judicial second guessing or interference. Problems of autonomy vs. community and some of facilitation vs. regulation yielded to analysis in terms of the contrasts between fiduciary relationship and arms length dealing, between contract and quasi-contract, and between family law and commercial law. The concept of estoppel came into play to distinguish situations in which the benefits of formality were to be disregarded in favor of direct reference to the understanding of the parties.

In public law, the Classics conceived the individual and state spheres of action as opposed entities whose boundary the judge delimitcd by deduction from general principles. In private law, it would be more accurate to picture a sphere of individualism, facilitation, autonomy and formality surrounded by a periphery of paternalism, regulation, community and informality. The boundary between the core and the periphery was defined by the con-
contrast between capacity and incapacity, arms length dealing and fiduciary relation, and so forth. This boundary once passed, there was an abrupt, indeed a violent reversal of ethos.

What distinguishes the modern situation is the breakdown of the boundary between the core and the periphery, so that all the different conflicting positions are at least potentially relevant to all issues. Instead of a situation that permits consistent argument within one ethos or the other, with a few hard cases occurring at the border when it is necessary to draw a sharp line, we have a situation in which each conflicting vision claims universal relevance, but is unable to establish hegemony anywhere.

Yet, the disintegration of the boundary between the core and the periphery has not altered the basic conceptual vocabulary in which we discuss the now pervasive conflict of visions. Just as the Classics did, we perceive the issues through notions like individualism vs. paternalism, regulation vs. facilitation, and so forth. While the deductive method now looks like a Classical mistake, the fundamental categorical scheme of Classicism seems a part of the nature of things, a postulate of legal consciousness.

What this means is that the basic structure of private law theorizing has not changed since the High Classical period around the turn of the century. We share with the Classics the sense that the fundamental private law issue is the extent to which the wills of individuals, their "rights," should be recognized when the outcome violates the community's (the judge's) sense of justice or morality. We share with them also the sense that the key to the successful administration of the system of rights and powers, however they are finally adjusted, lies in designing rules that private legal actors can work with, without either paralyzing uncertainty about standards, or equally paralyzing fear of mechanical arbitrariness.

What has changed is our faith in legal reasoning as a way of dealing with these issues. Exactly as in public law, we are left with a sense that discretion, policy, politics, ideology, are all that remains of the "scientific" solutions of the Classics. And, as in public law, it is difficult to imagine any alternative to believing in or being disillusioned with the Classical scheme. My aim here is to
persuade that there was a pre-Classical vision of the body of private law rules that was different.

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The apparently ineradicable categories of Classicism came to dominate thinking about private law only in the 1870's, although they were given their first definition and some elaboration in the 1850's. The whole period between 1850 and 1885 was one of the reworking of legal rules so that they would fit harmoniously either into the core or into the periphery. We will examine this process by taking up a large number of changes in the substance of rules, in their phrasing, and in their organization into doctrinal fields.

It was the core organized around the ideals of self-determination, facilitation, autonomy and formality that dominated legal thought; we will consequently pay most attention to it, leaving the development of the periphery to a later chapter. It seems best to begin by developing a bit more fully the general characteristics that define the horizontal dimension of Classical private law theory, and then to pass directly to the transition from pre-Classical to Classical visions of actual rules.

Self-Determination and Facilitation: The Will Theory

In Classical legal thought, self-determination and facilitation were part of a more general tendency to conceive the judge as responsible for carrying out the will of some legal power holder. The notion, which I will call the will theory, was that legal rules should have the following content: they should designate an actor as a power holder; and they should instruct the judge to execute the will of the power holder. The will theory applied both to public and to private law, although in this chapter we will look only at its private law aspect. Because of this limitation of focus, it is important to guard against a misconception that is common when the totality of Classical legal thought is lost sight of.

Neither "laissez-faire" nor "individualism" are logically implicit in the will theory. It is as much a theory of statutory inter-
pretation and of the judge's proper attitude toward corporations as it is a theory of response to purely private intentions. Yet the will theory did have content. It told the judge to pick the legal actor whose will was authoritative in the particular situation and then enforce that will. It was implied that for each actor there was a set of actions for whose execution he could get judicial support. Other actions might be prohibited by the will of some other actor with authority in the premises. Still others might be open to the actor only so long as he could persuade another actor not to invoke state aid against him. These sets of actions constituted the "spheres" of absolute power.

At first for public law and later for private law as well, the image of spheres conveyed vividly and explicitly what was only suggested by the usual definition of the will theory: that the judge whose only function was the interpretation and enforcement of the commands of legal actors had a restricted choice of response to a demand for assistance. If the plaintiff was entitled to ask what he was asking, then the judge had no business making his own assessment of its reasonableness, conduciveness to the general welfare, or fairness to others involved. If the plaintiff was asking assistance to achieve an object that lay within the power of some other legal actor, then the judge must sit on his hands, no matter how equitable, useful or just the request might be.

Thus the will theory was neutral among substantive objectives of legal actors but not among institutional arrangements to carry them out. The will theory said nothing about the most desirable resolution of conflicts between state and citizen, federal and state governments, executive and legislative branches. The theory did say that the judiciary could participate in those quarrels only as the agent of someone else's will.

But this requirement of judicial passivity was more than a restraint on the judge: it was a restraint on public and private law makers as well. The judge must never slip into the attitude of arbitrator, of the voice of natural law or good morals; he must never confuse his function with that of the legislature or the private contracting party. They in turn must accept that the judge would either back them to the hilt or ignore them utterly. Their assurance
that he would not slip into an active role was purchased at the price of renouncing any ability to force that role on him when it seemed appropriate, or vital to prevent a miscarriage of justice.

The will theory was thus a theory of the separation of powers both as between legislature and judiciary and as between private legal actors and judges. The judicial role was the same with respect to each. It consisted in deciding whose will, among those contending, the law entitled to protection, interpreting that will, and applying it to the facts at hand.

Objectivism as a Response to the Problem of Formality

Within the legal core, Classical legal thought was committed to formality. There was widespread acceptance of the proposition that legal rules should be framed in such a way that the judge would have little leeway in applying them, even if it was necessary to admit of a measure of crudity and arbitrariness in consequence. The Classical version of formality I will call objectivism, meaning the idea that the rules should attach legal consequences to actions when they were “reasonably” interpreted as manifesting a particular state of the will. What this program excluded was the “subjectivism” attributed to pre-Classical law, its concern with “actual” intent and its willingness to accept evidence meant to show the interior state of the willing party.

Objectivism meant a willingness to adhere to forms: to be valid a statute must be more than the will of the legislature — it must also have been formally enacted. It implied a respect for the literal words of statutes, conveyances and contracts — the “plain meaning” and parole evidence rules, for example. It also implied the search for the “reasonable man” as the standard of liability in tort, and the “objective” theory of the formation and interpretation of contracts.

Autonomy as a Strategy in Designing Rights

Before the parties can begin to exercise their wills with respect to the various objects of legal action, those objects must be given
some definition. The legal system must choose a set of rules that
tell people what they can do to each other in the absence of agree-
ment. Only then is there a basis on which they can deal.

The opposition of autonomy and community describes two
general approaches to the problem of designing these pre-con-
tractual groundrules. One strategy frames the rules so as to
require people by law to live up to the highest moral standards of
the community. This strategy legislates the “morality of aspira-
tion,” and requires people to compensate whenever they injure, to
avoid the vice of thinking more of their own small gains than of
others’ large losses, to volunteer to share their own gains when
another has contributed to them, and to share another’s losses
when they result from activities in common even though not con-
tractual. This is the communal strategy.

The strategy of autonomy may be aimed at precisely the same
outcomes as that of community. Its advocates may honestly
believe that they are most likely to further the morality of aspira-
tion by refusing to enforce it. Instead, they minimize extra-con-
tractual obligation. There must be a floor of obligation represent-
ed by the criminal laws against force and fraud. But beyond that,
the law tolerates many situations of “damnum absque injuria,”
meaning that there has been actual hurt but no legal redress for the
innocent victim. This was the strategy the Classics adopted in
framing the core of legal rules.

As with the will theory, there is danger of a misconception. It
was no part of the theory that the legal system could not impose
high moral obligations. Indeed, it was a common strategy for the
judge to urge the legislatures to do just that. There would then be
the will of the sovereign to substitute for the will of the parties,
missing ex-hypothesis. The strategy of autonomy prescribes not
the content of the total set of rules, but rather the principles the
judge can use when he has to make new ones.

The notion of autonomy, moreover, is not tied to private law
or to relations among private parties. It was the guide for the
Classical theory of federalism and of rights against the state as
well as of property, torts and contracts. It was much more
abstract, more formal, than an idea like laissez-faire, and therefore
more widely applicable. Like the will theory and objectivism, it had content and could affect substantive outcomes. But like the other two characteristics, it did so by constraining the judge rather than by directing him.

*Will Theory, Objectivism and Autonomy Were More than Just Policies*

Classical legal thinkers defended the strategy of autonomy on many different grounds. They sometimes claimed that autonomy led to better moral results in the long run, but they also referred to the “intrinsic nature” of legal as opposed to moral duties, to the institutional incompetence of judges to make the judgments required in a communitarian system, and to the political illegitimacy of their pretensions to do so. It is not possible to understand the rise of the strategy without reference to the theory of judicial reasoning then coming into vogue. Many of the most striking instances of preference for autonomy over community were justified as logical implications of more abstract concepts such as “property as absolute dominion,” or “freedom of contract.”

Exactly the same complex web of causes lies behind both the will theory and objectivism. The Classics only rarely discussed their rationale, but when they did they were as likely to refer to the “nature” of law, or of language or science or whatever, as to the set of policies that now seem obvious motives. Furthermore the will theory and objectivism fitted together with the deductive theory of legal reasoning into a whole whose coherent structure was in itself a strong reason for clinging to each of its component parts.

My objective in this chapter is strictly limited to setting the stage for a description of that whole. To do so, it is essential to establish the reality of the change toward will theory, objectivism and autonomy even if we are not yet able to understand its causation. This requires a sketch, however superficial, of the characteristic pre-Classical modes of dealing with the contradictions of private law theory.
Pre-Classical legal thinkers organized the discussion of private law rules around the notion of a conflict between morality (or natural law, or natural justice) and “policy” (or utility, or the general good). One way in which this idea expressed itself was through the distinction between natural law and positive law. Counsel in the 1817 Supreme Court case of *Laidlaw v. Organ* defended his client’s behavior as follows:

> Even admitting that his conduct was unlawful, in foro conscientiae, does that prove that it was so in the civil forum? Human laws are imperfect in this respect, and the sphere of morality is more extensive than the limits of civil jurisdiction. The maxim of caveat emptor could never have crept into the law, if the province of ethics had been co-extensive with it. [15 U.S. 178]

The private law distinction between moral rules and positive legal rules was like that between natural rights and legal rights in public law. What was legal, and so within the judge’s jurisdiction, was something less than or narrower than, the full demands of morality. Positive civil law, as found by the judge, condoned evil doing. It thereby became not immoral, but simply less than *fully* moral. The explanation for this falling short was that reasons of policy militated against the fusion of law and morality. *Parsons on Contracts* (1853) contains a very perfect expression of the pre-Classical point of view on the subject. Parsons is discussing the law of fraud, and, in particular the distinction between:

> That kind and measure of craft and cunning which the law deems it impossible or inexpedient to detect and punish, and therefore leaves unrecognized, and that worse kind and higher degree of craft and cunning which the law prohibits, and of which it takes away all the advantage from him by whom it is practiced.

The law of morality, which is the law of God, acknowledges but one principle, and that is the duty of doing to others as we would that others should do to us, and this principle absolutely excludes and prohibits all cunning; if we mean by this word any
astuteness practiced by any one for his own exclusive benefit. But this would be perfection; and the law of God requires it because it requires perfection; that is, it sets up a perfect standard, and requires a constant and continual effort to approach it. But human law, or municipal law, is the rule which men require each other to obey; and it is of its essence that it should have an effectual sanction, by itself providing that a certain punishment should be administered by men, or certain adverse consequences take place, as the direct effect of a breach of this law. If therefore the municipal law were identical with the law of God, or adopted all its requirements, one of three consequences must flow therefrom; either the law would become confessedly, and by a common understanding, powerless and dead as to a part of it; or society would be constantly employed in visiting all its members with punishments or, if the law annulled whatever violated its principles, a very great part of human transactions would be rendered void. Therefore the municipal law leaves a vast proportion of unquestionable duty to motives, sanctions, and requirements very different from those which it supplies. And no man has any right to say, that whatever human law does not prohibit, that he has a right to do; for that only is right which violates no law, and there is another law besides human law. Nor, on the other hand, can any one reasonably insist, that whatever one should do or should abstain from doing, this may properly be made a part of the municipal law, for this law must necessarily fail to do all the great good that it can do and therefore should, if it attempts to do that which, while society and human nature remain what they are it cannot possibly accomplish.

There are numerous other issues that the pre-Classics cast in the same mold. I have already quoted from a discussion of the doctrine caveat emptor. Here are some further examples:

*Negotiability*: It was common to argue that it was immoral to force the maker of a note to pay a holder in due course after failure of the consideration. The law was requiring the maker to pay for something he never got. Morality suggested loss splitting but policy dictated the cutting off of defenses.
Incorporation: It was a Jacksonian objection to incorporation that it allowed stockholders to escape liability for their share of the debts of the corporation. The law obliged partners to live up to their moral obligations, but allowed stockholders to behave dishonorably. The answer was the policy in favor of the pooling of resources.

Competitive Nuisance: Why should a mill owner who ruined his competitors by underselling them escape liability for damaging their businesses? He would have to pay for any other kind of deliberately inflicted injury, but the policy in favor of economic efficiency dictated an exemption there.

Consideration: The common law refused to enforce promises whose performance was dictated by the most solemn moral obligation when they lacked consideration. The reason was the policy against the multiplication of lawsuits and the legalization of family life.

Prescription and Statutes of Limitations: The law refused to punish plain wrongdoing or to provide redress to its victims when the wrong had gone stale. The reason was the policy of repose.

Vicarious Liability: The law imposed liability on the principal for the torts of his agent and on the master for those of his servant in cases where there was not the slightest fault in the person held. The reason was a policy of encouraging close supervision.

Absolute Liability of Common Carriers and Innkeepers: Common carriers and innkeepers may be ruined by liability for damage to property altogether beyond their control and wholly without fault on their part. The reason was the policy of discouraging fraudulent claims of goods having been destroyed accidentally when in fact the carrier had been negligent or dishonest.

Breaching Plaintiff's Suit for Restitution: Most courts refused to honor the breaching plaintiff's claim for restitution even when the result was a windfall unjust enrichment of the defendant. To allow recovery would have created a dangerous incentive to lax performance.

Bankruptcy: Bankruptcy laws sanctioned and even encouraged the dishonorable conduct of refusing to pay one's debts. The reason was the policy against demoralizing economic actors by eliminating the incentive of self-enrichment.
Remedies of Landlords: The exceptional remedy of distraint put it in the power of landlords to arbitrarily abuse honest tenants in difficulties. The reason was the necessity of providing an effective remedy against the dishonest tenants.

Damnum Absque Injuria in Easements: The law permitted landowners to inflict many kinds of uncompensable injuries on their neighbors. The reason was that a consistent and thorough policy of compensation would have deterred economic development.

It is easy to see in the conflict between morality and policy in pre-Classical legal thought the prototype of the elaborate contradictory structure we know today. Policy required that the individual just and moral solution, that responsive to the individual merits and demerits of the parties, should be disregarded so that, in Llewellyn's phrase, we could “get on with it.” Morality, on the other hand, was uncompromisingly equitable and insensitive to questions of efficiency.

Morality was also concerned with the rights of the individual; indeed, it was another name for natural law or natural justice between individuals as it existed in an imagined state of nature without government. The whole point of policy, on the other hand, was that it was the pursuit of the regulatory interests of the state. National economic development, security of transaction, repose, the prevention of perjury, and so forth, were goals that could exist only within the context of a legal order. Their pursuit was part of official decision making. The very concept of policy presupposed a public role in the direction of private activity.

In spite of the implicit presence of the equity/efficiency and state/individual conflicts, pre-Classical private law theory seems strikingly innocent of the sense of contradiction. In public law, the problem of the relationship of natural right and sovereignty was both pervasive and urgent. Judges and theoreticians developed sharply contrasting positions, emphasizing positivism or transcendent reason, and attempted to apply them somewhat systematically to a range of issues. In private law, the conflict of morality and policy did not lead to a similar polarization. No one
seems to have doubted that both sources of law were legitimately available to the judge. No one seems to have doubted that judges had both a substantial measure of responsibility for creatively developing the body of common law rules, and that the legislature was ultimately empowered to resolve the issues as it saw fit.

There was a difference between the theory of public and of private law that goes some way, but no more than some way, toward explaining the unpolarized character of the former. In public law, positivism had an early and full elaboration. It may be true that:

The attribution of supremacy to the Constitution on the ground solely of its rootage in popular will represents a comparatively late outgrowth of American constitutional theory. Earlier the supremacy accorded to the constitutions was ascribed less to their putative source than to the supposed content, to their embodiment of essential and unchanging justice. [Corwin, 42 Harv.L.Rev. 149, 152]

But by the second quarter of the 19th century legal positivism was the ideology of public law, and the judges made every effort to present themselves as doing the bidding of some sovereign, right up to the moment at which they rebelled in the name of natural rights.

In private law, by contrast, there was the theory of “found not made,” inherited from Blackstone, but kept alive in opinions like *Swift v. Tyson* that distinguished radically between an artificial statute law and common law rules that were immanent in social life. My argument is that the “found not made” approach softened the conflict of policy and morality. Public law judges dealt with a specific, demanding, legislative sovereign opposed to a disembodied command of reason to honor natural rights. They had to choose which to obey. In private law, the exercise was less dramatic. Instead of a clash of commands, there was a problem of the ingredients discoverable in the mass of sources.

Today it is hard to believe that they took the idea of law finding seriously. If we do believe it, we tend to attribute it to a kind of pre-rational mind-set in which there are “brooding omnipres-
ences.” Nonetheless, there were concrete aspects of pre-Classical legal thought that made their vision plausible. The absence of these factors in public law helps to explain its greater positivism, and consequently more acute sense of contradiction.

The claim that the judge found the law was plausible in the private but not in the public system in part because the sources of law were so different. However “formative” it may have been, the body of pre-Classical private law was massive. From its first edition on, Kent’s Commentaries, cited many thousands of cases. In the enormous mass of precedent and in the volumes of legal exegesis one might actually carry out something like a search for authority. By comparison, public law issues were constantly of first impression. The words of the Constitution were the only available source of legitimacy for judicial decisions that simply had no elaborate body of precedent to rely on.

The private law judge, moreover, could appeal to two vast sources of theory and practice altogether outside the domestic context. Both English and Roman legal doctrine were universally accepted as relevant, if not “controlling,” no matter what the subject matter. In Callender v. Marsh, an 1823 Massachusetts case on consequential damages from digging down a road, counsel argued and the Court discussed at length the authority of Roman local officials with respect to the modification of highways. In this enormous web of matter, it was possible to argue forever without being forced to confront the fact of the judge’s autonomous power to choose.

Finally, there was the tradition of technical legal reasoning, conceived by everyone, laymen and professionals alike, as infinitely difficult, obscure and inaccessible and as highly systematic, coherent and determinate, supposing that one understood it. The three most striking dimensions of technicality were:

1. The system of common law pleading, including the elaborate system of causes of action only very deviously connected to the substantive rights they protected; and the system of move and countermove by which issues were presented to the courts.
2. The interaction of legal and equitable rules, so that for much of the law of property, of partnership, of husband and wife, there were two quite coherent, widely ranging conceptual systems one must learn before one could hope to predict an outcome.

3. The subdivision of types of property and the association of each type with a distinct set of rules for alienation and involuntary transfer, so that there were literally hundreds of logically autonomous categories of doctrine to be learned by the conveyancer before he could hope to effectuate the will of his client.

One can understand the emergence of new private law doctrines after 1870 as responsive to the disappearance of the pre-Classical conditions just described. The "found not made" idea lost ground to the positivism that already held sway in public law. English and Roman case law, as opposed to theory, began to seem less relevant to America. The technicality of private law was radically reduced by the reform of procedure, the abolition of the English categories of estates in land, and the merger of law and equity. In a later chapter, we will examine the impact of these developments on the theory of the judicial role. For the moment, it is enough to note that they created intense awareness of the previously unsystematic character of private law theorizing, and opened the way for the discovery of contradiction.

Besides the contrasts, there were strong similarities between the public and private law systems. During the pre-Classical period, morality was thought of as prior to policy, as a set of principles of universal and transcendent validity, very like public law natural rights. Policy was much more mundane; like sovereignty in relation to natural right, it was hierarchically inferior to morality. But like sovereignty it controlled the extent to which the more exalted concept could achieve practical realization through positive law. As in public law, the judge often saw himself as obliged to make painful choices between the two most important ideals in his system.
In public law, various mediating devices (e.g., the hierarchical ordering of concepts; the vested rights doctrine; and the doctrine of implied limitations) reduced the sense of conflict. Similar and sometimes identical structures prevented the conflict of morality and policy from taking the form of insoluble contradiction. For example, private law and public law judges distinguished between rights and remedies in a way designed to reconcile natural rights to sovereignty and morality to policy. In interpreting the Contracts clause, the fundamental doctrine was that the legislature could do what it would with contract remedies so long as it left the right, here equated with the “obligation” alone. It was not uncommon to argue that limitations on compensation for eminent domain takings were legitimate because they recognized the property right, through taking away any remedy for consequential damages.

In private law, the same formula applied to nuisances: the law took away the individual’s remedy against a nuisance that was public and gave it to the state, but did not in the process interfere with the right. Statutes of limitation, of frauds, of bankruptcy, took away remedies, for good policy reasons, but did not interfere with the right which was founded on morality. The debt barred by the statute of limitations was alive in the sense that it would justify the foreclosure of a lien or pledge, and justify the creditor in retaining money paid in ignorance of the bar. Likewise for reasons of policy, the law denied a remedy to the creditors of women under coverture, minors and lunatics, but did not deny that their unenforceable contracts sometimes gave rise to moral obligations. The rights corresponding to those obligations might become enforceable if for some reason the policy ceased to be applicable.

My notion is that the pre-Classical judges felt less conflict between morality and policy because the distinction between right and remedy could often be used to create relatively well-bounded niches for each of the concepts. Policy confined its pretensions to remedies, making no attack on the existence of moral obligation and conceding that moral obligation created rights that would once again have legal effect when the problem of policy disap-
Morality claimed to be the one and only source of obligation and the guiding star in the formulation of all legal principles. It conceded, however, that it must sometimes confine itself to the theoretical domain of rights, allowing considerations of policy to curtail the remedies through which rights were implemented.

There were two other conceptual clusters that played similar but much more important roles in pre-Classical private law theorizing. The first of these was the descriptive dichotomy of "liberality" vs. "technicality." The second was the notion of rules founded on the "implied intent" of parties to stereotyped legal transactions. Each of these provided a way to mediate each of the fundamental dilemmas of private law: they blurred the contrast between the will of the state and the will of private parties (i.e., the opposition of rights and powers) and they obscured the necessity of choosing between the arbitrariness of rigid rules and the arbitrariness of flexible standards. My argument is that the presence of such mediators helps to explain why the acknowledged conflict between morality and policy did not develop into the acute contradiction we now experience.

I will take up the liberality/technicality distinction in the context of the law of real property, and the notion of implied intent will serve as an organizing theme for the discussion of the range of subjects pre-Classical thinkers classified under the general head of contract. In order to understand this approach, the reader must have some familiarity with the way in which categorical schemes of the whole private law system changed over the course of the 19th century.

The subject is unfamiliar because abstractions of the kind necessary to arrange all the doctrines seem meaningless to modern legal thinkers. As far as I know, the last American effort was Pound's table of all the "social interests" law protects, with appropriate doctrinal subdivisions annexed. Before Pound, however, classificatory schemes were an important part of legal thought. A review of the way they changed between 1800 and 1900 will give us an initial sense of the transformations of consciousness during the same period.
There were three classificatory phases during the 19th century. In the first, the dominant category was property law, with most of private law being seen as concerned either with objects or with the personal status of the possessors of objects. The second phase was that of contract: property law was reconceived as a specialized conveyancing discipline and virtually all of the rest of law seen as concerned with agreements. The third phase was the Classical, with the emphasis on will.

Blackstone (1765) and Kent (1825) were the great classifiers of the first phase. It requires a real empathic effort to understand their scheme of "law of persons"/"law of things." Here are the subjects that (apart from public law) comprise the law of persons:

1. Rules defining legal disabilities of aliens, lunatics and infants. These are involuntarily assumed "statuses."

2. Rules defining the mode of creation of and the rights and duties implied in the relationships of: husband and wife; parent and child; guardian and ward; master and servant.

3. The rules defining the special legal characteristics of corporations ("artificial persons").

The law of things included two major types of rules: those defining the various interests that a person could have in the various types of property, and those regulating the creation and transfer of interests. What is most striking from our perspective is that neither contracts nor torts was a separate heading in either Blackstone or Kent.

Most, although by no means all of contract and tort were there. They were distributed among the other categories as follows. First, contract law figured as an important formal category of the law of alienation of personal property. In other words, after dividing up all of property into real and personal, the question arose how one acquired title to the various types. Title to real property was by deed, by grant, by fine, etc. Title to personal property could be acquired by gift or by contract. There followed
a more (Kent) or less (Blackstone) detailed description of how one formed a valid contract transferring title to goods, and how the title might be defeated by such supervening events as a breach.

For us, such a classification seems bizarre because contract as a category is not tied to the transfer of title to goods. Indeed, the opposite is true. We now conceive the sales contract as a specialized subclass of the more general phenomenon of contract. This more generalized phenomenon never appears in Blackstone or Kent. Instead, various species of contract crop up here and there. For example, the modern category of employment contracts, including labor law, comes in under: the law of persons - status voluntarily undertaken - master and servant. Under bailments, defined as rules about temporary transfers of rights in property, it was possible to include the law of common carriers and innkeepers. Building contracts were contracts for the sale of an item of personal property, namely the finished building.

Another way in which relationships that we now see as part of the contract system could be assimilated to the property concept was through the *partial* abstraction of the idea of real property. Thus rents, easements and franchises were classified as "incorporal hereditaments." The notion of the status-thing dichotomy could be maintained without excluding types of social arrangements that "really" involved neither.

Some deformation was involved in this; it is not generally true that there are *many* classificatory schemes all of which will accommodate a given body of material with equal ease. For example, many of the contracts of common carriers involve no property at all. They are simply contracts to carry a person. Innkeepers are involved with their guests' property, but have special duties unrelated to them. And there are many contract types that involve neither property nor employment (or another status), such as agency. The existence of "incorporal" property that is nonetheless "real," although subject to different rules of definition and transfer than land, could serve as a type of unsatisfactory system building.

Kent wrote some lectures on the law of "injuries to the person" but decided that the subject was not important enough to include
in his Commentaries. Blackstone dealt with what we would call
torts in his section on Private Wrongs. Private wrongs were the
different ways in which a person might violate another’s basic
rights. Injuries to the right of property were categorized accord-
ing to the forms of action. These included trespass and case, but
also types of wrong we would not classify as tortious. Breach of
contract, under assumpsit, figured as the wrong of interfering
with a property right acquired by contract. There was not the least
suggestion of the existence of the modern category of general
duty to observe a standard of care in one’s relations with others in
general.

The Blackstone/Kent schema suggested that the two main
concerns of legal actors are the control of other members of a
society with fixed social roles, and the control of physical objects
that represent power, particularly land. In Blackstone’s own time,
it would have been absurd to describe English society in such
terms. But it was not yet true that the main conscious preoccupation
of the legal system was regulating the concerns of social strangers
alternately contracting with and accidentally injuring one anoth-
er. Tort and contract, as we see them, were perceived embedded in
the elaborated social contexts of status and land holding. Because
they were relatively unimportant concepts, they could be simply
tacked onto the larger structure of the Commentaries.

By the time of Kent, this ordering had lost all of its
autonomous intellectual power. Kent did not hesitate to construct
what amounted to a general survey of all the basic commercial
contractual relationships under “Title to Personal Property,”
although there were no property hooks for most of the contracts
involved. After the contract for the sale of a chattel came Agency,
Partnership, Negotiable Instruments and Marine Insurance.
Bailment included a discussion of railroad law as it related to
passengers. The placement of a subject within the contract cate-
gory no longer suggested anything at all about its connection
with the law of personal property. Kent preserved Blackstone’s
general scheme without any apparent belief that it was more than
convenient.

Holmes remarked in 1872 that “generations of students must
have been puzzled that in Kent the law of master and servant [status; law of persons] appeared several hundred pages away from the law of principal and agent [contract; law of personal property].” A review of a treatise on personal property pointed out that many of the rules included “belonged rather to contract law.” By 1872, it had already been clear for a full generation that the old arrangement was inorganic. In fact, beginning in the 1840’s, a new total ordering around the concept of contract had begun to emerge. The exemplars were Metcalf (1825), the little known seminal thinker, W. W. Story (1848) and Parsons (1853), the writer who summed up the tradition and represented it to posterity.

The basic idea of pre-Classical contractual classificatory schemes was that virtually all legal relationships are contractual if we consider that all legal obligation is, in a sense, the result of an implied assent to be bound. The person-thing or status-property dichotomy disappeared to be replaced by a contract-real property dichotomy. The various status relations were restated as contracts. Their implied rights and duties were treated as consensual. Their main significance was that they made necessary a special contract sub-category called “Parties,” which included all of the special rules of husband and wife, master and servant and so forth. At the same time, the various commercial law specialties were liberated from the “Title to Personal Property” rubric. They were treated as the analogues of the old status relations in that they too involved stereotyped relationships (partnership; bailment) and the implication of assent to a set of judge-made rules.

This approach allowed the incorporation of all of the law of injuries except that which governs strangers. In other words, as part of each relationship he constructed, a writer like Parsons included an implied consent to a set of rules of liability for injuries. The only injuries that such an approach dropped out were those to real property and those personal injuries inflicted outside of a contractual relationship. Likewise, all of corporations was contractual: there was the law governing the contract of formation and that governing the corporation as a party.

The one body of law that was unequivocally distinguishable
from contracts was real property. Thus isolated, the law of real property was reformed. By the Civil War it had taken on most, although not all, of its most striking modern characteristics. It then exercised a profound influence—as an abstract model rather than as the core of an all-embracing doctrinal category.

The Post-Civil War development was the dissolution of the omnivorous law of contract and the reconstitution of its elements. The different parts of the Classical labor of rearrangement were thus accomplished at different times and with different degrees of rapidity and neatness. The most important elements were:

1. The reorganization of the law of alienation of property around the idea of respect for the will of the owner, subject to restraints imposed by the will of the sovereign in the public interest.
2. The attack on the corporeal-incorporeal distinction in property law, and its replacement with the idea of property as a right to protection of the will.
3. The sharp differentiation from contract law of types of obligation deriving from the will of the sovereign rather than from that of the parties to a transaction:
   (a) Tort
   (b) Status/Domestic Relations
   (c) Quasi-Contract
4. The reorganization of contract law around the idea of respect for the objective expression of the will of the parties subject to the restraint of the consideration doctrine.
5. The emergence of Torts as a field with its own internal structure of opposition between liability based on a defect of the will of the tortfeasor (intentional torts and negligence) and liability imposed by the sovereign without regard to the condition of the will.

It is this set of events that we will consider as reflected in the vicissitudes of the liberal/technical distinction and the notion of implied intent.
Pre-Classical legal thinkers classified legal rules as "liberal" or "strict and technical." Indeed, one of the most striking differences between the pre-and post-Civil War periods in American law is that the liberal/technical distinction was omnipresent in the earlier discussions. Today it is unfamiliar to the point of unintelligibility. References to the concepts can be culled by the dozens from the early reports, but it seems better to approach them as they appear in all their aspects in a single sustained work. What follows might be called the Romance of Liberality in Chancellor Kent’s volume on the law of Real Property (1826).

_Toward a Definition of Liberality_

Kent began the final section of his work as follows:

In passing from the subject of personal to that of real property, the student will immediately perceive that the latter is governed by rules of a distinct and peculiar character. The law concerning real property forms a technical and very artificial system; and though it has felt the influence of the free and commercial spirit of modern ages, it is still very much under the control of principles derived from the feudal policy. We have either never introduced into the jurisprudence of this country, or we have, in the course of improvements upon our municipal law abolished all the essential badges of the law of feuds; but the deep traces of that policy are visible in every part of the doctrine of real estates, and the technical language, and many of the technical rules and fictions of that system, are still retained. [III-593]

In the ensuing chapters, this theme recurred more consistently than any other. Indeed, the law of real property for Kent was mainly an occasion to raise over and over the question of the relation of liberality and technicality.

Let me begin with a quotation from his discussion of the
requirement that, in order to convey a fee simple interest in land, the deed must mention both the recipient and his heirs. Kent's treatment suggests both the importance of the liberal/technical distinction and its complexity.

If a man purchases lands to himself forever, or to him and to his assignees forever, he takes but an estate for life. Though the intent of the parties be ever so clearly expressed in the deed, a fee cannot pass without the word heirs. The rule was founded originally on principles of feudal policy, which no longer exist, and it has now become entirely technical. A feudal grant was, stricti juris, made in consideration of the personal abilities of the feudatory, and his competency to render military service; and it was consequently confined to the life of the donee, unless there was an express provision that it should go to his heirs.

But the rule has for a long time been controlled by a more liberal policy, and it is counteracted in practice by other rules, equally artificial in their nature, and technical in their application. It does not apply to conveyances by fine, when the fine is in the nature of an action, as the fine sur conuazance de droit, on account of the efficacy and solemnity of the conveyance, and because a prior feoffment in fee is implied . . . .

It is likewise understood, that a court of equity will supply the omission of words of inheritance; and in contracts to convey, it will sustain the right of the party to call for a conveyance in fee, when it appears to have been the intention of the contract to convey a fee.

Thus stands the law of the land, without the aid of legislative provision. But in this country the statute law of some of the states has abolished the inflexible rule of the common law, which had long survived the reason of its introduction, and rendered the insertion of the word heirs no longer necessary. [IV-5]

Throughout the Commentaries, there are pitted against each other two teams, good guys and bad guys, most of whose members are brought together in the passage above:
### The Rise and Fall of Classical Legal Thought

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<th>132</th>
<th>The Strict, Technical Team:</th>
<th>The Liberal, Progressive Team:</th>
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Even this list leaves out Common Law vs. Civil Law, and Artificiality vs. Rationality, but their roles can be divined from the examples which follow.

The underlying theme of the law of mortgages is set out in the second paragraph of Kent’s treatment:

There is no branch of the law of real property which embraces a greater variety of important interests, or which is of more practical application. The different, and even conflicting views, which were taken of the subject by the courts of law and of equity, have given an abstruse and shifting character to the doctrine of mortgages. But the liberal minds and enlarged policy of such judges as Hardwicke and Mansfield gave expansion to principles, tested their soundness, dispersed anomalies, and assimilated the law of the different tribunals on this as well as on other heads of jurisprudence. The law of mortgage, under the process of forensic reasonings, has now become firmly established on the most rational foundations. [IV-138]

The villain of mortgage law was the feudal common law, which, in the absence of explicit provisions to the contrary, regarded the mortgagor as the legal owner of the property, subject to the condition that it would revert to the mortgagor if he paid his debt on time. “So rigorous a doctrine, and productive of such forbidding, and, as it eventually proved, of such intolerable injustice” [IV-142] led the equity courts to intervene, overlaying the common law system with a whole new set of rules.

In ascending to the view of a mortgage in the contemplation of a court of equity, we leave all these technical scruples and diffic-
culties behind us. Not only the original severity of the common law, treating the mortgagor’s interest as resting upon the exact performance of a condition, and holding the forfeiture or the breach of a condition to be absolute, by nonpayment or tender at the day, is entirely relaxed; but the narrow and precarious character of the mortgagor at law is changed, under the more enlarged and liberal jurisdiction of the courts of equity. Their influence has reached the courts of law, and the case of mortgages is one of the most splendid instances in the history of our jurisprudence, of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the courts of law. Without any prophetic anticipation we may well say, that “returning justice lifts aloft her scale.” [IV-161-162]

The equitable treatment of mortgage had two salient aspects. First, in contrast to the “strict technical principles of the common law” it treated the mortgage according to “the true intent and inherent nature of every such transaction.” [IV-163] Second, the equity courts imposed restraints on the terms of the mortgage in favor of the mortgagor, and these could not be altered or removed even by express agreement of the parties.

The two notions of responsiveness to intent and unwillingness to countenance injustice recurred whenever there was a contrast of equity and law. For example, in the discussion of when two estates held by a single person will “merge” by operation of law, Kent says:

The rule at law is inflexible; but in equity it depends upon circumstances, and is governed by the intention, either express or implied (if it be a just and fair intention), of the person in whom the estates unite, and the purposes of justice, whether the equitable estate shall merge or be kept in existence. [IV-105]

Some other ideas associated with liberality were cultivation, refinement, complexity, plasticity, enlightenment and progress. Kent’s vision of the rise of “uses,” a whole system of equitable interests in land existing parallel to the common law system, is an example. Uses “were required by the advancing state of society and the growth of commerce. The simplicity and strictness of the
common law would not admit of secret transfers of property, or of dispositions of it by will, or of those family settlements which become convenient and desirable. . . All such refinements were repugnant to the plain, direct mode of dealing, natural to simple manners and unlettered ages." [IV-298]

Uses were well adapted to answer the various purposes to which estates at common law could not be made subservient, by means of the relation of trustee and cestui que use, and by the power of disposing of uses by will, and by means of shifting, secondary, contingent, springing, and resulting uses, and by the reservation of a power to revoke the uses of the estate and direct others. These were pliable qualities belonging to uses, and which were utterly unknown to the common law, and grew up under the more liberal and more cultivated principles of equity jurisprudence. [IV-299]

The trust was the modern equivalent, in Kent's time, of the medieval use, and, according to him different from it only in being the object of a "more liberal construction... and, at the same time, a more guarded care against abuse." This development was closely linked with progress in general:

The advantages of trusts in the management, enjoyment, and security of property, for the multiplied purposes arising in the complicated concerns of life, and principally as it respects the separate estate of the wife, and the settlement of portions upon the children and the security of creditors, are constantly felt, and they keep increasing in importance as society enlarges and becomes refined. [IV-310-11]

On the legal, as opposed to equitable side, Kent's hero was Lord Mansfield, the most "liberal" of the English judges of the 18th Century. Here also, the themes of intentionality, but also of the control of overreaching, were dominant. For example, Kent approved the Roman and English rules to the effect that tenancies "at will" should be construed as tenancies for a year with a requirement of notice of termination. After describing the Roman approach, he says:
And when the sages at Westminster were called to the examination of the same doctrines, and with a strong, if not equally enlightened and liberal sense of justice, they were led to form similar conclusions, even though they had to contend, in the earlier period of the English law, when the doctrine was first introduced, with the overbearing claims of the feudal aristocracy, and the scrupulously technical rules of the common law. [IV-119]

Perhaps the quintessence of technicality was the English doctrine of wrongful disseisin. Without attempting to explain the content of the rules, we can gather something from the epithets Kent directs at the positions of the two sides in the debate. There were, on the one hand, "ancient and strict" notions on the question, which were also productive of "unreasonable and noxious" and "inequitable" consequences. On the other side, Lord Mansfield and his allies attempted to "disarm the doctrine of disseisin of much of its ancient severity and formidable application." They made everything turn on "the intention of the party, or...overt acts that leave no room to inquire about intention." This was the triumph of "good sense and liberal views" over an "old and exploded theory." [IV-534-35] In any case, none of this law applied in America, which had radically simplified and improved the whole system of conveyancing.

As a final illustration, consider the disposition of real property by will. There was an English rule that a disposition was revoked if the testator changed his interest in the property before his death, even though the change was temporary or purely formal, and he died in the same legal relation to the property as he had been in when he made the will. In Kent’s opinion, this was "very strict and technical;" "shocking;" "had brought scandal upon the law;" was "hard and unreasonable." The courts were "holding an act to be a revocation which was not so intended, and even when the intention was directly the contrary."[IV-58] Unfortunately, the American courts had adopted the rule, although avoiding "some of the excesses to which the English doctrine had been carried." The solution was a statute abolishing the whole doctrine:
The simplicity and good sense of these amendments recommend them strongly to our judgment; and they relieve the law from a number of technical rules, which are overwhelmed in a labyrinth of cases; and when detected and defined, they are not entirely free from the imputation of harshness and absurdity. [584-85]

At this point, let me hazard a definition. Technicality meant to Kent three tendencies: (a) to attach particular legal meanings to words and acts and stick to those meanings in dealing with laymen who clearly meant something else by those words and acts; (b) the restriction of private transactions to a limited set each of which was defined by a set of judge-made rules rather than being a plastic reflection of the will of the parties; (c) the restriction of the judge to a relatively small number of remedial responses to disputes and wrongdoing, so that he must often choose between extreme treatments rather than tailoring the punishment to the wrong. Liberality meant adopting the opposite position on each point.

In a modern discussion of this program, we would be tempted to say that Kent grasped only a part of the problem of designing private law rules. His endorsement of the ideal of liberality was ideological, we might say, because it papered over rather than resolving the basic contradictions of private law theory. (1) It embraced the informal side of the dilemma of formality, ignoring the problems of uncertainty and arbitrariness that arise when the judge is invited to consider subjective intent. (2) It attempted to adopt simultaneously a position of judicial subordination to private will and of ad hoc judicial control of that will according to standards of morality and policy nowhere clearly stated. In other words, it attempted to embrace both sides of the conflicts between regulation and facilitation and between individualism and paternalism. (3) The ideal of liberality tells us nothing about what the grundrules of social life ought to be in the absence of agreement; it was unresponsive to the dilemma of autonomy vs. community.

I do not think that Kent would have found these objections at all convincing. For him, the ideal of liberality mediated successfully between the conflicting demands of morality and policy. This was possible because of an historical analysis that portrayed
legal progress as moving from a particular brand of medieval technicality based on the peculiar conditions of medieval law toward a particular brand of modern liberality based on the peculiar conditions of early 19th century America. Because the opposition of liberality and technicality was also the opposition of modern America and feudal England, it lacked the hopelessly deadlocked quality of our present contradictions.

The Historical Analysis of Technicality

The medieval legal system had been characterized by a mode of thought—the "rigorous, simple, pure, strict" mode of the common law—unsuited to "civilization," "progress," "refinement," "cultivation," and "commerce." Moreover, the law had been designed to achieve the objectives of the feudal regime or "policy." These objectives included social hierarchy, collective military defense, self-sufficient agricultural economy, the organization of life around landed property, and hostility to all kinds of dynamism. The distinguishing marks of the feudal legal policy were two kinds of restraints on alienation: those imposed by testators through entails, and those imposed by the crown in favor of the lord at the expense of the tenant.[III-Ch. 53 passim]

The spirit and meaning of English legal history, according to Kent, lay in the "progress of the common law right of alienation from a state of servitude to freedom." The culmination of that progress was that "[e]very citizen of the U.S. is capable of taking and holding lands by descent, devise or purchase, and every person capable of holding lands, except [persons without legal capacity], may alien the same at his pleasure, under the regulations prescribed by law." [IV-475-76; see IV-269-70]

Technicality was a phase of this progression. The feudal restraints on alienation by tenants had once been highly rational, although not in accord with morality:

The restrictions were perfectly in accordance with the doctrine of feuds, and proper and expedient in reference to that system, and to that system only. The whole feudal establishment proved
itself eventually to be inconsistent with a civilized and pacific state of society; and wherever freedom, commerce, and the arts penetrated and shed their benign influence, the feudal fabric was gradually undermined, and all its proud and stately columns were successively prostrated in the dust. [IV-473]

Likewise, the system of entailts arose from "the desire to preserve and perpetuate family influence and property," which "is very prevalent with mankind and deeply seated in the affections." The problem was that:

Entailments are recommended in monarchical governments as a protection to the power and influence of the landed aristocracy; but such a policy has no application to republican establishments, where wealth does not form a permanent distinction, and under which every individual of every family has his equal rights, and is equally invited, by the genius of the institutions, to depend upon his own merit and exertions. [IV-18]

A major instrument in the struggle against the combination of the archaic form of common law reasoning and the feudal policy was, according to Kent, the judiciary. There consequently came into existence several layers of policy and several layers of rules, so that the inherent bizarreness of common law reasoning was worse confounded rather than alleviated. The great advantage of America was that it could import from England only the progressive net outcome of these struggles, rather than the total structure in which the English embodied them.

Technicaiity in the law of his own time Kent could therefore regard as essentially vestigial. It represented the object of an almost completed work of law reform that had been going on for generations, under the leadership of the equity courts, of Mansfield, and of the American courts and legislatures that had received English doctrine selectively rather than wholesale. Liberality on the other hand, was the spirit of the age. It represented the implication for law of the modern policy, which was progressive, commercial, contractual, individualist, egalitarian, rational and economically dynamic.
Technicality may appear to us to represent a viable counter-
position to Kent’s liberality. We sense that it might have been possi-
able to defend it on the ground that it was at least certain, and that it prevented the judicial arbitrariness inherent in any system that allows the ad hoc review of private will according to the judge’s notions of policy and fairness. But Kent believed that liberality was more rather than less certain than technicality, so that it could legitimately claim the virtues of both sides of the modern dilemma of formality. He also believed that liberality represented real freedom, as opposed to the arbitrariness of technicality; he did not see it as taking a side of the dilemma of regulation vs. facilitation.

The Uncertainty of Technicality

The theme of the uncertainty of technical systems of law is one of the most striking in the Commentaries, because it sharply contradicts modern notions on the subject. To look to intent on a case by case basis, to subordinate the structure of legal institutions to the actual practice of laymen, subject only to equitable restraint on overreaching—this program was designed to make law simple, clear, predictable and nondiscretionary. Here is a typical example from the law of mortgages:

A very vexatious question has been agitated, and has distressed the English courts...as to the time at which money provided for children’s portions may be raised by sale or mortgage of a reversionary term. The history of the question is worthy of a moment’s attention, as a legal curiosity, and a sample of the perplexity and uncertainty with which complicated settlements “rolled in tangles,” and subtle disputation, and eternal doubts, will insensibly incumber and oppress a free and civilized system of jurisprudence. [IV-151]

Speaking of N.Y. statutory revision of the English and American common law rules about remainders, Kent says that change “will disperse a cloud of difficulties and a vast body of intricate learning relating to the subject.” [IV-259] Of the law concerning the mutual relations of tenants in common, he says:
The ancient law raised this very artificial distinction, that tenants in common might deliver seisin to each other, but they could not convey to each other by release. A joint tenant could not enfeoff his companion, because they were both actually seised, but for that very reason they might release to each other; whereas, on the one hand, tenants in common might enfeoff each other, but they could not release to each other, because they were not jointly seised. Nothing contributes more to perplex and obscure the law of real property than such idle and unprofitable refinements. [IV-378]

On the practically important subject of the warranties accompanying the sale of real property, the "liberal" doctrine was to reduce the buyer's protection by requiring a writing to establish any obligation at all in the seller. The explanation was as follows:

These provisions leave the indemnity of the purchaser for failure of title, in cases free from fraud, to rest upon the express covenants in the deed; and they have wisely reduced the law on this head to certainty and precision, and dismissed all the learning of warranties, which abounds in the old books, and was distinguished for its abstruseness and subtle distinctions. It occupies a very large space in the commentaries of Lord Coke, and in the notes of Mr. Butler; and there was no part of the English law to which the ancient writers had more frequent recourse to explain and illustrate their legal doctrines. Lord Coke declared "the learning of warranties to be one of the most curious and cunning learnings of the law;" but it is now admitted by Mr. Butler to have become, even in England, in most respects a matter of speculation rather than of use. [IV-513]

Statutory reforms in N.Y. had "swept away all the established rules of construction of wills, in respect to the quantity of interest conveyed," creating instead a set of presumptions that could be overcome by a showing of contrary intention. Kent approved: "These provisions relieve the courts in N.Y. from the study of a vast collection of cases, and from yielding obedience any longer to the authority of many ancient and settled rules, which were dif-
ficult to shake and dangerous to remove. Their tendency is to give increased certainty to the operation of a devise.” [IV-590-91]

Liberality and the Dilemma of Formality

Nonetheless, even in Kent's Commentaries one can see the beginnings of the very different perception of the problem of formality that now afflicts us. To begin with, Kent was quite willing to recognize that the proper response to English technicality was sometimes a set of clear, simple but essentially arbitrary rules:

Our registry acts, applicable to mortgages and conveyances, determine the rights and title of bona fide purchasers and mortgagees, by the date and priority of the record; and outstanding terms can have no operation when coming in collision with a registered deed. We appear to be fortunately relieved from the necessity of introducing the intricate machinery of attendant terms, which have been devised in England with so much labor and skill, to throw protection over estates of inheritance. Titles are more wisely guarded, by clear and certain rules, which may be cheaply discovered and easily understood; and it would be deeply to be regretted if we were obliged to adopt so complex and artificial a system as a branch of the institutes of real property law. [IV-94]

Second, Kent had a clear sense that in the argument about technicality there was a counterattack based on the uncertainty of liberality, with its associated danger of inefficiency and judicial usurpation:

It is most desirable that there should be some fixed and stable rules even for the interpretation of wills; and whether those rules be founded upon statute, or upon a series of judicial decisions, the beneficial result is the same, provided there be equal certainty and stability in the rule. There has been a strong disposition frequently discovered in this country to be relieved from all English adjudications on the subject of wills, and to hold the intention of the testator paramount to technical rules. The question still occurs, whether the settled rules of construction are not the best means
employed to discover the intention. It is certain that the law will not suffer the intention to be defeated, merely because the testator has not clothed his ideas in technical language: But no enlightened judge will disregard a series of adjudged cases bearing on the point, even as to the construction of wills. Established rules, and an habitual reverence for judicial decisions, tend to avoid the mischief of uncertainty in the disposition of property, and the much greater mischief of leaving to the courts the exercise of a fluctuating and arbitrary discretion. The soundest sages of the law, and the solid dictates of wisdom, have recommended and enforced the authority of settled rules, in all the dispositions of property, in order to avoid the ebb and flow of the reason and fancy, the passions and prejudices of tribunals. [IV-592]

Finally, he did not blink the fact that his position implied the necessity of a residuum of pure technicality in a modern system. He was including himself when he said that: “All the great property lawyers justly insist upon the necessity and importance of stable rules; and they deplore the perplexity, strife, litigation and distress which result from the pursuit of loose and conjectural intentions, brought forward to counteract the settled and determinate meaning of technical expressions.” “Convenience and policy equally dictate adherence to [a particular] old and established doctrine.” [IV-236-37] His comments on the abolition of equitable “uses” in N.Y. were typical of his style when he felt that the antitechnical position had been carried too far:

The operation of the statute of New York in respect to the doctrine of uses will have some slight effect upon the forms of conveyance, and it may give them more brevity and simplicity. But it would be quite visionary to suppose that the science of law, even in the department of conveyancing, will not continue to have its technical language, and its various, subtle, and profound learning, in common with every other branch of human science. The transfer of property assumes so many modifications, to meet the various exigencies of speculation, wealth, and refinement, and to supply family wants and wishes, that the doctrine of conveyancing must continue essentially technical, under the incessant operation of skill and invention. [IV-307-08]
At this point it may appear that Kent was simply an inconsistent thinker. From one point of view, this is quite true. He often felt it was enough to condemn a rule that it was strict or technical, but sometimes insisted that technicality was positively desirable. He provided no guide for deciding when one conclusion was more appropriate than the other.

Yet there is a passage in his discussion of the N.Y. statutory reform of the law of trusts that suggests that Kent had a highly sophisticated vision of the relation of liberality and technicality in a fully modern legal system. New York had enacted that there should be three, and only three kinds of express trusts and a fourth category of constructive trust. The claim was that the statute would “sweep away an immense mass of useless refinements and distinctions, relieve the law of real property, to a great extent, from its abstruseness and uncertainty, and render it, as a system, intelligible and consistent.” Kent’s response was as follows:

Nor can the law be effectually relieved from its “abstruseness and uncertainty,” so long as it leaves undefiled and untouched that mysterious class of trusts “arising or resulting by implication of law.” Those trusts depend entirely on judicial construction; and the law on this branch of trusts is left as uncertain and as debatable as ever. Implied trusts are liable to be extended, and pressed indefinitely, in cases where there may be no other way to recognize and enforce the obligations which justice imperiously demands. . . . It is in vain to think that an end can be put to the interminable nature of trusts arising in a great community, busy in the pursuit, anxious for the security, and blessed with the enjoyment of property in all its ideal and tangible modifications. . . . We cannot hope to check the enterprising spirit of gain, the pride of families, the anxieties of parents, the importunities of luxury, the fixedness of habits, the subtleties of intellect. They are incessantly active in engendering distinctions calculated to elude, impair, or undermine the fairest and proudest models of legislation that can be matured in the closet, and ushered into the world, under the imposing forms of legislative sanction. [IV-325-26]

Kent regarded the essence of liberality as the control of technicality in the interests of morality and policy. He did not think it
possible or desirable to abolish technicality, but neither did he treat it as an ideal parallel to or “in tension with” liberality. He turned it into a means. This made liberality a truly integrating, mediating concept: it was the guide for the “interminable” process of building up technical rules and then sweeping them away.

The essence of such an approach is its ambiguity. It refuses: (a) to admit that it will sometimes sacrifice to the judge’s intuition of justice expectations of the parties about how the rules will be administered; and (b) to admit that it will sometimes sacrifice justice in the individual case to the preservation of the integrity of the system of rules. In other words, the ideal of liberality is a way to suppress the contradiction of formality and informality.

In Kent, the suppression was nearly complete. The reader gets the impression that Kent believed that there was always a solution, be it loose and equitable or strict and technical, that satisfactorily served the ends of a liberal administration of justice. In the typical situation, all that was required was good sense in order to see the diritta via between evils.

After Kent, for several decades, there seems to have been no theoretical work that overtly developed the problem of formality. But little by little it must have become apparent that feudal technicality was a straw man in 19th century America. The ancient doctrines succumbed one by one to the reformers, until what technicality there was in the law was clearly part of that residuum Kent had recognized and accepted as functional rather than vestigial. And at that point, there was no way to escape the question of how much and of what type was functional. Beginning with Parsons on Contracts and culminating with Holmes’ lectures on criminal law and negligence, Classical theorists developed their answer in the form of objectivism. We will take this up in the next chapter in the discussion of contracts and torts.

The Will Theory in Property Law

A fundamental difficulty with Kent’s theory of property law was that he believed both that freedom of alienation was the message of history, and that the state ought to restrain the freedom of
alienation by refusing to recognize dispositions of property that contravened the liberal policy. Kent’s treatment disguised what now seems an inconsistency by expedients we will presently examine. The Classics unmasked these as the evasions they “really” were.

I want to qualify and soften this schema. The law of property after the Civil War was more like what it had been before than was true of any other basic doctrinal field. Contract was shattered and rebuilt; torts came into existence; domestic relations changed in coverage and content; corporations underwent a conceptual revolution. Property concepts took their modern forms during the great statutory reforms of New York in the 1820’s and 1840’s.

More: the new property structure that emerged before the Civil War had profound influence on the post-war development of all those areas of law I have just mentioned. Property had included, in Blackstone and Kent, everything but status, and real property had been its core. But during the period between 1825 and 1870, real property ceased to play that role and became a “technical,” specialized category not integrated into the new all-embracing concept of contract. During this period of exile, property law transformed itself. After 1870, its transformed state served as a paradigm or model for the construction of new fields out of the ruins of the empire of contract. Property played a role in private law similar to that of federalism in public law. Each was a precursor whose development before the Civil War turned out to have all sorts of implications for the Classical reconception of law in general.

There were two stages to the emergence of the will theory, each of which was well begun in property earlier than anywhere else. The first stage was the clear recognition that the outcomes of lawsuits are determined not by the intrinsic characteristics of the legal “objects” involved, but by the application of rules that have their origins in the desires of social actors. The vehicle for this stage was the theory of liberality, with its critique of technicality and its exaltation of rationality and intentionality.

The second stage was the focussing of attention on the specific identities and the claims to legitimacy of the different legal
actors among whose proposed rules the judge had to choose. The second stage involved an attack on the ideal of liberality as an inadequate because obscurantist criterion for deciding which actors should have the power to make the rule in any particular situation. We can see each of these movements in Kent’s treatment of the central issue of restraints on alienation.

Technicality as a Restraint on Alienation

There is no need to repeat here the familiar story of the reduction in the number and internal complexity of legally recognized interests in land, with the attendant reduction of the diverse modes of conveying them to the omnipresent grant. Much of the description of liberality is a review of the different aspects of this process. What we need to grasp is the radical conceptual transformation that was implicit in the attack on technicality.

Here are two examples of the phenomenon. Under the old system, it was conceptually impossible to convey an incorporeal hereditament by livery of seisin, because there was no thing that could be delivered. It followed that an actor who had intended to grant an easement or assign a term for years, and who cast his intention in the language of livery, had simply failed to alienate his interest. [IV-537] Or take the problem of the effect of the “nature” of remainders on attempts to convey them:

There must be a particular estate to precede a remainder, for it necessarily implies that a part of the estate has been already carved out of it, and vested in immediate possession in some other person. The particular estate must be valid in law, and formed at the same time, and by the same instrument with the remainder. The latter cannot be created for a future time, without an intervening estate to support it. If it be an estate of freehold, it must take effect presently, either in possession or remainder; for at common law, no estate of freehold could pass without livery of seisin, which must operate either immediately or not at all. “If a man” said Lord Coke, (a) “makes a lease for life to begin at a day to come, he cannot make present livery to a future estate, and, therefore, in that
The great occurrence of Kent’s time was that all of this began to seem silly if not sinister. It came to seem obvious that the only reasons for distinguishing different modes of conveying different types of interest was a state policy in favor of greater formality in the more significant transactions. [IV-482; 539] It was only as a result of primitive thinking and historical accident that the different interests had seemed to require by their very nature different forms of transfer. A New York statute could simply declare that contingent remainders survived the determination of the precedent estate, and the only consequence would be an increase in the likelihood that private actors would succeed in carrying out their intentions. [IV-253]

Unfortunately, it soon became apparent that there was more to it than my two examples suggest. The intricate classification of estates and forms of conveyances had imposed dozens and dozens of restraints on alienation, in the sense that formal requirements are restraints. But there were also dozens of things that you just couldn’t do with property, no matter what form you used, because to do them required saying or thinking things that were inconsistent with the imagery of the system. The structure of these constraints was the result of centuries of theorizing into which had been poured not only pre-scientific ideas about classification, but also all the political and economic issues of feudalism, mercantilism and emerging liberalism. In many cases, a particular restraint justified as no more than a logical consequence of the nature of the legal interest in question, served also to further a particular state policy that had nothing to do with the conceptual metaphysics. Let me illustrate this with two incomprehensible sentences from Kent’s chapter on Powers:

The use declared by the appointment under the power is fed (to use the mysterious language of the conveyancers) by the seisin of the trustees to uses in the original conveyance. The consequence of this principle is, that the uses declared in the execution of the power must be such as would have been good if limited in the original deed; and if they would have been void as being too
remote, or tending to a perpetuity in the one case, they will be equally void in the other. [IV-339 my emp.]

The abolition of technicality meant the placing of the courts at the disposition of the wills of private parties, subject only to those limitations that judges and legislators were willing to declare and enforce on their own merits. The state could no longer exercise an elaborate but politically invisible control through the expedient of nullifying transactions as incompatible with the “nature” of property.

The work of the ante-bellum property lawyers was both to dismantle the technical system, and to identify the policies that had been implicit in its structure, assess their usefulness in 19th century America, and work out the doctrinal implications of those found still serviceable. Property law was reconceived as a facility for the exercise of private will subject to limitations the state imposed on private will in order to protect larger interests of the community. This accomplishment was the indispensable precondition of Classical and modern theorizing about property, but it did not lead the ante-bellum thinkers themselves to anything more than a vague foreshadowing of the later approaches.

For Classics and moderns alike, the essential dilemma of the reconceived property system was that once it was recognized that the will of the sovereign could legitimately interfere with the alienation of property in order to achieve some community objectives, such as preventing the creation of family empires or keeping the wheels greased by preventing the creation of hidden encumbrances, the whole property structure was in danger of politicization. In public law, the question was: If it is constitutional to restrain the alienation of property for these purposes, can there be any objection to other kinds of legislative interference also motivated by the public interest? In private law, the problem was that of deciding when the judge should attempt to regulate and when he should conceive himself as merely a facilitator.

The Classical mode was to recognize a conflict between the will of the parties and the will of the sovereign, but to insist that
it had been dealt with at a very high level of abstraction by the adoption of the policy against private restraints on alienation. This policy once adopted, it functioned like the requirement of consideration, as a fountain of deductions. Judges worked out its implications for all the different aspects of property law with no sense that they were personally or politically intervening to shape social and economic life. That had been done once and for all by the abstract principle that drew the line between the conflicting public and private wills. The moderns differ only in that they have lost faith in deduction, and so must carry out the accommodation through ad hoc interest balancing.

The pre-Classical mode was more complex. It had the following striking components:

(a) A limited recognition that there existed a perennial and irreconcilable conflict between private parties and the public interest, with the judges continually struggling against private restraints, sometimes in alliance with but sometimes opposed to the legislatures.

(b) The assertion of the existence of a solution of the judge’s problem of what to do, in the form of:

(i) definitions of the various estates carefully phrased so as to render restraints on alienation “repugnant” to their “nature”;

(ii) a general principle of hostility to “all” restraints on alienation, public or private, casting the judiciary in the role of the defender of the natural right of alienation against assaults from all sides; and

(iii) a general principal that private parties have an “absolute” control over the disposition of property, but no right at all to control the “form” or “nature” of property, whose definition is a state function.

(c) The retention within the law of real property of a large residuum of unanalyzed technical doctrine still functioning to restrain private will but not yet recognized as anything more than a set of rules based on the nature of things.
Kent took up restraints on alienation piecemeal in almost every chapter on real property, but he had a general vision as well. That vision "vibrated," as he might have put it, between the acknowledgment and the suppression of conflict. He agreed with Coke that the courts should refuse to enforce restraints imposed by private will because they are "repugnant to reason," and "unreasonable." [IV-136] He began his discussion of the then vast learning of executory devises as follows:

The history of executory devises presents an interesting view of the stable policy of the English common law, which abhorred perpetuities, and the determined spirit of the courts of justice to uphold that policy, and keep property free from the fetters of entailments, under whatever modification of form they might assume. Perpetuities, as applied to real estates, were conducive to the power and grandeur of ancient families, and gratifying to the pride of the aristocracy; but they were extremely disrelished, by the nation at large, as being inconsistent with the free and unchallenged enjoyment of property. "The reluctant spirit of English liberty," said Lord Northington, "would not submit to the statute of entail; and Westminster Hall, siding with liberty, found means to evade it." Such perpetuities, said Lord Bacon, would bring in use the former inconveniences attached to entail; and he suggested that it was better for the sovereign and the subject, that men should be "in hazard of having their houses undone by unthrifty posterity, then be tied to the stake by such perpetuities." [IV-269-70]

He concluded the same discussion with the remark that in spite of "the constant dread of perpetuities, and the jealousy of executory devises, as being an irregular and limited species of entail, a sense of the convenience of such limitations in family settlements, has enabled them, after a struggle of nearly two centuries, to come triumphantly out of the contest." [IV-273] But his approach was far more often to obscure this aspect behind a series of devices that now seem no more than rhetorical.
The notion of repugnancy seems today the most transparent. You cannot attach a particular restraint to a particular estate because it is part of the definition, i.e., the "nature," of that estate not to be so limited. It just so happens that there does not exist, in the repertory of estates, any capable of being qualified as you desire. It follows that you cannot achieve your objective, but no one has made a policy or moral decision to thwart you. You simply can't get there from here. [IV-4; 135-36]

A much more sophisticated approach was to claim that the common law judges pursued a policy of securing the freedom of citizens. The judges therefore opposed both attempts by the sovereign to limit the natural right of alienation and equally politically noxious attempts by individuals to do the same thing. Here there was an attempt to turn the idea of freedom around, ignoring the limitation on the exercise of private will and emphasizing that the recipients of interests in property would be freer if unrestrained. The first step in that argument was the characterization of the feudal restraints the sovereign had imposed on private landowners, in favor of their overlords and their heirs respectively:

A feoffment in fee did not originally pass an estate in the sense we now use it. It was only an estate to be enjoyed as a benefice, without the power of alienation, in prejudice of the heir or the lord; and the heir took it as a usufructuary interest, and in default of heirs, the tenure became extinct and the land reverted to the lord. The heir took by purchase, and independent of the ancestor, who could not alien, nor could the lord alien the seigniory without the consent of the tenant. This restraint on alienation was a violent and unnatural state of things, and contrary to the nature and value of property, and the inherent and universal love of independence. It arose partly from favor to the heir, and partly from favor to the lord; and the genius of the feudal system was originally so strong in favor of restraint upon alienation, that by a general ordinance mentioned in the Book of Fiefs, the hand of him who knowingly wrote a deed of alienation was directed to be struck off. [III-779-80]
Kent took the second step in his "condensed view of the progress of the common law right of alienation from a state of servitude to freedom." [IV-475] After describing the various statutes and judicial decisions that eroded the feudal restraints in favor of lords and heirs, he proceeded, without transition of any kind, from the policy of the sovereign to that of individuals:

In the time of Glanville, considerable relaxations as to the disposition of real property acquired by purchase, were tolerated. Conditional fees had been introduced by the policy of individuals, to impose further restraints upon alienation; but the tendency of public opinion in its favor induced the courts of justice, which had partaken of the same spirit, to give to conditional fees a construction inconsistent with their original intention. This led the feudal aristocracy to procure from Parliament the statute de donis of 13 Edw. I., which was intended to check the judicial construction, that had, in a great degree, discharged the conditional fee from the limitation imposed by the grant. Under that statute, fees conditional were changed into estates tail; and the contrivance which was afterwards resorted to and adopted by the courts, to elude the entailment and defeat the policy of the statute, by means of the fiction of a common recovery, has been already alluded to in a former part of the present volume. [IV-474]

The Distinction Between the Nature of Property and its Disposition

But the most interesting argument, and that which had by far the greatest influence on Classical legal thought, was one based on the distinction between the "nature" and the "disposition" of property. This distinction was at the very center of Kent's more general development of property as a right against the state:

In England the right of alienation of land was long checked by the oppressive restraints of the feudal system, and the doctrine of entailments. All those embarrassments have been effectually removed in this country; and the right to acquire, to hold, to
enjoy, to alien, to devise, and to transmit property by inheritance to one's descendants, in regular order and succession, is enjoyed in the fulness and perfection of the absolute right. Every individual has as much freedom in the acquisition, use, and disposition of his property, as is consistent with good order and the reciprocal rights of others. [T]he legislature has no right to limit the extent of the acquisition of property, as was suggested by some of the regulations in ancient Crete, Lacedaemon, and Athens; and has also been recommended in some modern utopian speculations. A state of equality as to property is impossible to be maintained, for it is against the laws of our nature; and if it could be reduced to practice, it would place the human race in a state of tasteless enjoyment and stupid inactivity, which would degrade the mind and destroy the happiness of social life. When the laws allow a free circulation to property by the abolition of perpetuals, entailments, the claims of primogeniture, and all inequalities of descent, the operation of the steady laws of nature will, of themselves, preserve a proper equilibrium, and dissipate the mounds of property as fast as they accumulate. [11-422-23]

Had the distinction occurred only in this passage, where its political function is transparent, one might doubt its reality as an aspect of the thought of the time. But Kent had not invented it to a special purpose; it was an established tool of analysis in conveyancing:

Mr. Justice Buller observed, that if the testator made use of technical words only, the courts were bound to understand them in the legal sense. But if he used other words, manifestly indicating what his intention was, and that he did not mean what the technical words imported, the intention must prevail, if consistent with the rules of law. That qualification applies only to the nature and operation of the estate devised, and not to the construction of the words. A man is not to be permitted by will to counteract the rules of law, and change the nature of property; and, therefore, he cannot create a perpetuity, or put the freehold in abeyance, or make a chattel descpicable to heirs, or destroy the power of alienation by a tenant in fee or in tail. [IV-237]
Kent himself made it the key to the problem of liberality and technicality in the construction of wills:

The intention of the testator is the first and great object of inquiry; and to this object technical rules are, to a certain extent, made subservient. The intention of the testator to be collected from the whole will, is to govern, provided it be not unlawful, or inconsistent with the rules of law. The control which is given to the intention by the rules of law is to be understood to apply, not to the construction of words, but to the nature of the estate—to such general regulations in respect to the estate as the law will not permit; as, for instance, to create an estate tail, to establish a perpetuity, to endow a corporation with real estate, to limit chattels and inheritances, to alter the character of real estate, by directing that it shall be considered as personal, or to annex a condition that the devisee in fee shall not alien. To allow the testator to interfere with the established rules of law, would be to permit every man to make a law for himself, and disturb the metes and bounds of property. [IV-586]

The Classical Approach

The Classical version of the problem, as represented by John Chipman Gray's small treatise on Restraints on Alienation (1883) is different in ways that reflect the transition from one consciousness to another, yet there is more continuity than will appear in the subjects taken up in the next chapter.

The striking innovation, as Gray was proud to point out, was the abstraction of the conflict between sovereign and individual will as a single problem capable of unified treatment:

Such errors as have risen in discussing restraints on alienation are largely due to the subject having been dealt with discon- nectedly. If the restraint was in the form of a condition, it was treated with conditions. If it was in the form of a direction to a trustee, it was treated with trusts. Involuntary alienation, or liability for debts, has been considered without reference to voluntary transfers. It will be a gain to clear thought to bring the whole subject together. [Gray, Rest. 4-5]
The question was: "[U]nder what limitations, if any, does the law say it is against public policy to allow restraints to be put upon transfers which public policy does not forbid." [2] Once the disparate instances had been brought together, it became apparent that the various devices used to suppress the conflict had been mistaken: "The rule seems not to allow or call for any reason except public policy." [Id. 1-4]

The rule once justified on this basis, the remainder of the book works out its "logical" implications for the different kinds of estates. For example, Gray divided the whole into restraints in the form of conditions imposing forfeiture as a penalty for a forbidden alienation, and restraints in the form of limitations on the power of the grantee, without mention of forfeiture. Having established the rule against forfeiture in general on the ground of public policy, he introduced the discussion of simple limitations of power as follows:

As a gift over upon alienation by a tenant in fee simple, or one having the absolute interest in personally, is void, so a fortiori any provision that such tenant or owner shall be seised or possessed of his property in spite of himself, that is, any provision against alienation, is void. [Id. 67]

Gray's book is a good example of the second stage of the will theory. He assumed that his readers were free of the kind of archaic thinking against which Kent battled interminably. The problem was to identify clearly the conflicting wills of the relevant legal actors, and to resolve that conflict deductively by reference to general principles. Indeed, he wrote at a time when the triumph of the rationalizing spirit had rendered the traditional learning irrelevant. The world of legal theory seemed on the brink of dramatic advances in the formulation and elaboration of such principles. It was possible for an American analytical jurist writing in 1883 to begin his chapter on property, thus:

In our law the most conspicuous division of property rights is into real and personal. This division is largely accidental. Though in any system of law property in immovable and in movable
things cannot be treated exactly alike, yet the exaggerated importance which our law attaches to the difference is indefensible on any rational grounds. Still more absurd is the classification of the lesser estates in land, under the incongruous name of “chattels real,” with rights in movables instead of with the other rights in land. How this came to be done can be explained by reference to certain historical facts which were its causes, but it cannot be reconciled with any principle of arrangement which ought to be resorted to in a system of modern law. I propose therefore in this chapter to lay out the subject on a somewhat different plan, bringing into greatest prominence those resemblances and differences which are of the greatest intrinsic importance. Tenure, which is theoretically extinct in some of the United States and practically so in all, and of no great importance in England, I shall pass over without notice;... [Terry 369]

Kent, by contrast, still paid homage to the “clearness,” “accuracy” and “elegance of style” of Blackstone. [III-593; IV-4] Both the opportunities and what proved the insurmountable difficulties of the Classics were obscured for him by the continued viability of the old categorical scheme. Gray’s confident generalization could come only after the critical spirit Kent had applied here and there to technicality had worked its solvent effect on the whole structure of imaginary property entities. Holmes’ analysis of the law of easements, covenants and privity is one of the most striking examples of this process, as well as of the second stage of focus on the conflict of wills.

**Exirpating the Residuum of Technicality**

What Holmes did in his 1872 annotations to Kent’s Commentaries was to show that two sets of rules Kent treated as mechanical derivations from the nature of particular property concepts ought to be understood as attempts to implement a basic policy. The first set of rules was that about easements. Their peculiarity was that they were a closed class of incorporeal hereditaments giving the owner of a dominant tenement the right to demand that the owner of the servient tenement suffer some
interference with his power to use his land. Covenants, which Kent treated 420 pages further on, were promises made by one land owner to another respecting the two properties. Their peculiarity was stated by Kent as follows:

The distinction between the covenants that are in gross and covenants that run with the land (and which are covenants real, annexed to or connected with the estate, and beneficial to the owner of it, and to him only) would seem to rest principally on this ground, that to make a covenant run with the land, there must be a subsisting privyty of estate between the covenancing parties. [IV-517]

Holmes argued that both sets of rules were designed to prevent the creation of complex burdens that would “tie up land.” One could not justify the rules that defeated the intentions of the grantor of the easement, or of the covenantor who intended to permanently modify the legal relationship of the owners of two pieces of land, on the “narrow ground” of privity, or on the ground that there are only so many “kinds” of easement “known to the law.” “The law” was willing to restrain private will in particular in order to retain economic flexibility in general. “[T]he question of liability ought, in the United States, to be determined by considerations of policy...and a test of such doubtful meaning as privity between the parties should be abandoned.” [IV-526]

He then considered the policy. His conclusion seems to have been that the modern trend toward making covenants run with the land, when the parties so intended and the covenant was meaningfully related to it was a good thing. [IV-526-28] In any case, by rejecting Kent’s technical formulation, he made it possible to get at the policy overtly. And when he and Gray did go at the policies, they rejected the formula of liberality. They tended to see the problem in terms of the sacrifice of the individual to the group rather than in the more rosy hue of conflicts overcome, and they were proud of their clear-sighted tough-mindedness (as they seem to have thought it).

This brings us to a final aspect of the emergence of Classical property law: the growth of the idea that, the landowner’s rights
being absolute so long as he acts within the boundaries of his lands, he is entitled to inflict various kinds of damages on his neighbor without having to pay any compensation. It was here that the tough-mindedness of the young appeared to contrast most starkly to the question begging liberality of the old.

The Strategy of Autonomy in Property Law

The emergence of the will theory meant that the question of what rules should govern private interaction presented itself in terms of a conflict of private and public will. But the will theory did not answer the question of what policy the judges should pursue when they had the power to shape the rules themselves. There was, however, a bias associated with the will theory—that in favor of autonomy.

In the context of property law, autonomy had two meanings. First, it meant an effort to prevent “dormant encumbrances” (Kent’s description of dower), perpetuities, and complex inter-relations of estates that would reduce the marketability of land. The program aimed at a situation in which each piece of land would be under the control of a single legal actor with a power to develop it or sell it that was both complete and easy to establish to the satisfaction of others. The second meaning of autonomy was that adjoining landowners should have a minimum of power to control each other’s use of property. In practice, this meant the elimination or attenuation of the rights of “quiet enjoyment” which an owner could assert to prevent a neighbor from engaging in activities that disturbed him.

Autonomy was one of the strands of liberality, one of the characteristics that distinguished it from technicality. Kent’s position on restraints on alienation and other complex encumbrances such as dower was a first attempt to generalize a version of autonomy to all estates in land. During the second quarter of the 19th century, the courts went much further than he would have in the piece-meal implementation of this vision. Gray and Holmes, the Classical successors, did not do much more than to precipitate out a general theory and show it to be more pervasively relevant than even Kent had thought.
Pre-Classical thinkers seem to have been less self-conscious about the constriction of the landowner’s rights of quiet enjoyment. Fortunately for us, Morton Horwitz has collected and analyzed the mass of cases. I will limit myself to a summary of his conclusions, which provide a striking confirmation of the general description of Classical legal thought.

Horwitz distinguished three phases in the law of easements. The doctrine of 1800, heavily influenced by England, amounted to a proliferation of easements so as to give the owner relief against almost anything a neighbor might do in the way of damage. This liability was based on the idea that ownership meant a right to compensation for injuries, rather than on any theory of fault or negligence in the other party, and it was prototypically “technical.” The trend in the other direction began with Thurston v. Hancock, a Massachusetts case of 1815, which held that, if he exercised due care, Ebenezer Hancock could excavate on his Beacon Hill building lot right up to his boundary line, even though this caused a house built on a neighboring lot to fall. Thurston came to represent the general idea of treating injuries caused by what an owner did within his own boundaries as damnum absque injuria.

At first, the courts replaced the “quiet enjoyment” emphasis of 18th century law with “reasonableness” tests. For example, in the law of riparian rights, the old doctrine gave an owner an absolute right to existing flows. The intermediate phase was one in which the courts allowed mill owners, for example, to make reasonable diversions and interferences without liability to those injured. Similarly, in 1836, in interpreting the Thurston rule, the Massachusetts court spoke of the “absolute dominion” of the excavating landowner, his right to “consult his own convenience,” but nonetheless stated clearly that “malice” would render an undermining excavation legally actionable. This was the phase of the ideal of liberality, with its tendency to fuzz the issues behind appeals to progress and immanent social rationality.

In the third phase, beginning in the 1850’s and continuing through the Civil War, the courts began to cut off cleanly the owner’s rights to protection against damage caused by what neighbors did within the boundaries of their land. Counsel in an
1855 New York case summed up this development: “There is much vulgar error touching rights supposed to exist beyond the line of the lot owner’s boundary. Much of it has been exploded in this country.” He then cited cases restricting riparian rights, ancient lights, support from adjoining land, and the right to existing unobstructed prospect.

The New York courts held that by erecting a barrier on his own land, an owner could divert the flow of draining surface water onto his neighbor’s land. Moreover, he could drain his neighbor’s well, so long as he tapped the underground water by a shaft on his own land. At the same time, the courts began to argue that the absoluteness of rights precluded any inquiry either into the subjective malice or the objective reasonableness of their exercise.

The constriction of easements corresponded in time to the rise of the general principle of liability for negligence, which we will examine in the next chapter. As the owner lost his right to be compensated for injuries regardless of his neighbor’s state of mind in inflicting them, he acquired a right to insist that whatever his neighbor did, he do it with reasonable care. The owner therefore retained some power to control adjoining property. The point is that there was a sharp reduction in the legal recognition of interdependence. Horwitz summed up the total evolution in a passage that deserves full quotation:

There were essentially three stages in the development of American law relating to conflicting uses of property. In the first stage, which continued until roughly 1825, the dominant theme was expressed by the maxim sic utere. Dominion over land was defined primarily as the right to prevent others from using their property in an injurious manner, regardless of the social utility of a particular course of conduct. This system began to break down in the second quarter of the nineteenth century as it became clear not only that common law doctrines led to anti-competitive results, but that the burdens on economic growth under such a system might prove overwhelming. With the limitations imposed on the scope of the nuisance doctrine as well as the emergence of the negligence principle, and the riparian doctrine of reasonable use, courts began to strike a balance between competing land uses,
freeing many economically desirable but injurious activities from legal liability if exercised with due care. Thus, in a second stage which crystalized by the middle of the nineteenth century, property law had come largely to be based on a set of reciprocal rights and duties whose enforcement required courts to perform the “social engineering” function of balancing the utility of economically productive activity against the harm that would accrue.

In the two decades before the Civil War, however, one detects an increasing tendency by judges to apply the balancing test in such a way as to presume that any productive activity was reasonable regardless of the harm that resulted. And out of this intellectual climate, a third stage began to emerge which self-confidently announced that there were no legal restraints at all on certain kinds of injurious activities. In a number of new and economically important areas, courts began to hold that there were no reciprocal duties between property owners; that courts would not even attempt to strike a balance between the harm and the utility of particular courses of conduct. While this trend only reached its culmination after the Civil War, its roots nevertheless were deep in an antebellum change in the conception of property. For dominion over land had begun to be regarded as an absolute right to engage in any conduct on one’s property regardless of its economic value. And with this shift in attitudes, judges began to withdraw to some extent from their role of regulating the type and degree of economic activity that could be undertaken, and the mercantilist character of American property law was diluted by an emerging laissez-faire ideology. [p. 74-76]

In this chapter we are concerned only with the substance of the changes in legal rules and concepts during the period of the emergence of Classicism. When we have a full picture of the shift in the map of legal consciousness, we will examine various explanatory hypotheses. Different writers have invoked concrete economic interests, theories or strategies of national economic development, ideas like mercantilism and laissez-faire, belief in the “natural right” of property, and what appeared to be the internal logic of fundamental legal conceptions. It is enough to say that all
of these quite obviously played a part in the emergence of the strategy of autonomy in property law, and that any attempt to explain the evolution of legal thought must recognize the complexity and ambiguity of their interrelationships.

What is important for our present purposes is that liberality, here taking the form of a "reasonableness" test by which judges regulated conflicting land uses, was not an adequate response to the dilemma of autonomy vs. community. Just as liberality seemed to dodge the issues of formality and of the confrontation of sovereign and individual will, it suppressed the problem of autonomy rather than admitting or transcending it. The Classics resolved it at an abstract level through absoluteness; the moderns confront it piecemeal, as did the ante-bellum writers, but without any sense that particular resolutions are more than the contingent outcome of the balancing of local interests.

There is a striking parallel between the emerging ante-bellum ideas of a property owner absolute within the boundaries of his land and of a state absolute within its borders. These two conceptions are the source of the "powers absolute within their spheres" imagery of Classical legal thought. The accomplishment of the later thinkers was to abstract and generalize the fundamental notion, and to show that the entire legal system could be analyzed into a structure of complexly interlocked, everchanging absolutenesses. But before we can take up this process, we must complete our review of the structure of pre-Classical private law thinking by examining the use of the concept of "implied intent" as an alternative to liberality. In the process, we will survey substantive areas of law that underwent a much greater transformation through Classicism than did real property.