

CHAPTER THREE
CRITERIA FOR JUSTICE

THERE HAVE BEEN various criteria proposed to establish some standard whereby distributive justice may be measured. It is clear that the benefits and burdens of living together in society need to be fairly spread so that each man is rendered what is due. Of course, not all things need be borne by everyone: punishment is something that comes under a special category. However, general membership in a community should involve participation of all members in the opportunity to share the goods of society. Someone may wave his right regarding potential benefits of course, but the measure should impose burdens according to the formal principle of justice that like cases be treated alike. Especially in the case of such benefits as property rights it is important to insure that any criterion chosen has the ability to sort out in a reasonable fashion the likely possibilities and consequences of widespread application.

The tendency has been to think that only one criterion is necessary or useful, and this has resulted in lopsided theses wherein every form of distributive justice is measured by the same rule. Formal simplicity is a valuable ideal and can be useful in many areas, but justice is not mathematics, no matter how much proportioning may be involved on occasion. Different rights and duties demand different measures. Since we are concerned with rights to property in land, we

might consider some of the most often cited criteria and explore their applicability to land ownership. It should be remembered though that whatever criterion is chosen, the formal principle of justice must be also present.

Here then is a composite list of a wide variety of suggestions:¹

- (1) To each the same thing
- (2) To each according to his merit or achievement
- (3) To each according to his work or contribution
- (4) To each according to his need or requirements
- (5) To each according to his status or position
- (6) To each according to his contracts or agreements

Each one of the criteria can easily be seen to have some immediate and unquestioned application. The question is, what are the consequences of applying them all to property rights?

We have been arguing that the doctrine of natural rights demands equal consideration and respect in certain

¹J. R. Lucas, On Justice (Oxford: Clarendon Press, 1980), pp. 164-165 n6 gives a list of different criteria that various authors have proposed. See, further, Chaim Perelman, The Idea of Justice and the Problem of Argument (London: Routledge & Kegan Paul, 1963), pp. 7-11; A. M. Honore, "Social Justice," in R. S. Summers, ed., Essays in Legal Philosophy (Oxford: Blackwell, 1968), pp. 66-81; Gregory Vlastos, "Justice and Equality," in A. I. Melden, ed., Human Rights (Belmont, Calif.: Wadsworth Publishing Co., 1970), pp. 76-95; Nicholas Rescher, Distributive Justice (Indianapolis: Bobbs-Merrill, 1966), pp. 73-83; William A. Galston, Justice and the Human Good (Chicago: University of Chicago Press, 1980), pp. 143-191; Scott Gordon, Welfare, Justice and Freedom (New York: Columbia University Press, 1980), pp. 83-114.

fundamental matters. So, (1) 'To each the same thing' deserves hearing in regard to certain basic human rights.² In terms of humanity no distinctions can be drawn among individuals. Young or old, black or white, male or female distribution of select benefits and burdens, rights and duties, must be equal unless we wish to say that 'some persons are more equal than others' in regard to self-preservation. But it should be noted that this does not mean the youngest child or the most ignorant old man must be given the same amount of money, land or other property. It only, though unequivocally, means that the same opportunity—that is, the same bundle or real rights and

²There are many senses of the word 'equality' and disagreement among authors often hinges on the specific meaning that is being implied. Sometimes it is argued that this criterion can be reduced to the 'formal principle of justice' or some form of due process, but there is a distinct difference between the idea of treating like cases alike and arguing that all cases are essentially alike. See, Isaiah Berlin, "Equality" reprinted in his Concepts and Categories (New York: Viking Press, 1979), pp. 81-102. He notes, "Equality is one value among many: the degree to which it is compatible with other ends depends on the concrete situation, and cannot be deduced from general laws of any kind; it is neither more or less rational than any other ultimate principle; indeed it is difficult to see what is meant by considering it either rational or non-rational." (96) Further critiques of the idea of equality are S. I. Bein and R. S. Peters, Social Principles and the Democratic State (London: George Allen and Unwin, 1959), chapter 5, particularly, pp. 114-115; J. R. Lucas, "Against Equality," Philosophy XL (1965): 296-307; Keith Joseph and Johathan Sumption, Equality (London: John Murray, 1979) and the collection of essays in J. Roland Pennock and John W. Chapman, eds., Equality: NOMOS IX (New York: Atherton, 1967).

duties—is granted to each, no matter whether this reduces the previous opportunities of others or not.³ If a society's population grows, it is unjust to deny opportunities to the new members while continuing them for the others in matters of fundamental importance. This does not mean that certain privileges, such as pension rights, may not be curtailed for newcomers, but it does mean freedom of movement or belief cannot be lessened for one and not the other. Particularly in regard to access to land and the right to work one group cannot be justly favored while another is ignored. Realizing the implications of this point takes some thought, and often it seems that those who do find the results so staggering that equality in any real sense is rejected as unattainable. This may be why no other single criterion seems to receive so much lipservice and so little application.⁴

There may be situations wherein strict equality would be self-defeating. For instance, if a boat starts sinking and there are only enough places in the lifeboats for half the passengers, then some other criterion must be applied, but in extremis conditions are not ordinary and those who

³This condition is seldom observed, it must be admitted. Only recently has attention focused on the obligations to future generations. See, D. Clayton Hubin, "Justice and Future Generations," Philosophy & Public Affairs, 6 (1976): 70-83. Also, Chapter 8 "Property and the Environment," below.

⁴See, Charles Frankel, "Equality of Opportunity," Ethics, 81(1971): 191-211. Amy Gutmann, Liberal Equality (Cambridge: Cambridge University Press, 1980) is a recent attempt to defend classical egalitarianism.

argue that equality is wrong because in extremis it does not work are being disingenuous. Additionally, there are the questions which arise concerning international responsibilities toward one's fellowman. Starvation, dire poverty and extreme misfortune are not hard to find. Does the principle of equality of concern and respect require the well-to-do to sacrifice their surplus or lower their standard of living in order to act justly to all men?⁵ This is a very complicated issue and we cannot enter into it here: but, and this is important, it does seem that the more a given society or community strives to render every one his due within its parameters, the more likely it will be in a position and mood to consider non-members. The rule (1) 'To each the same' must be understood in relation to rule (5) 'To each according to his status or position' which embodies the notion of communal membership, just as in the case of the sinking boat it makes no sense for none to man the lifeboat because all shall not fit.

We may conclude this brief examination of equality with the observation that the conditions or arrangements of the community necessarily establish 'second order' advantages due to the presence of cooperation and mutual orientation. These may be rights and liberties or goods

⁵Peter Singer, Practical Ethics (Cambridge: Cambridge University Press, 1980), pp. 158-81 is one who argues that it does.

and services (some examples are: freedom from fear, increased productive possibilities, money and credit, cultural and artistic opportunities) which cannot be attributed to any one individual but are truly communal contributions. As such they need to be made available equally to all, though again not necessarily in the same quantity but in the same way. It is here particularly that fair measures of taxation must be applied so that those benefiting more easily from these advantages (particularly in the case of economic advantages due to communal presence and services) pay a just proportion of the taxes. This is something we shall discuss in Chapter Seven—"Site Value Taxation."

The second criterion (2) 'To each according to his merit or achievement' offers quite a different measure of distributive justice.⁶ Yet it is one that has always found favor. Not only is there a human need for recognition

⁶There is a lot of literature on the topic, but much of it is at cross purposes because of the varieties of ways in which merit or achievement can be measured. David Miller, Social Justice (Oxford: Oxford University Press, 1976), pp. 83-121 discusses the issues at length. Also Norman Daniels, "Meritocracy," in John Arthur and William H. Shaw, eds., Justice and Economic Distribution (Englewood Cliffs, N.J.: Prentice-Hall, 1978), pp. 164-178. Joel Feinberg, Doing and Deserving (Princeton: Princeton University Press, 1970) is perhaps the best treatment of the various issues involved. In addition, from a sociological perspective see, Daniel Bell, "On Meritocracy and Equality," Public Interest, no 29 (Fall 1972): 29-68.

as Simone Weil points out,⁷ there is great value in rendering each man his due according to his merits. So long as we desire excellence we must acknowledge it. That virtue was arete—excellence—for the Greeks is significant, as is the etymology of 'aristocratic': government by the best. Unfortunately, intrinsic worthiness of individuals is hard to discover. Thus it is that justice goes by appearances. And so merit becomes achievement, individual deeds. This makes this criterion (2) close to the next (3) 'To each according to his work or contribution', but we can distinguish the two if we think of achievements in terms of non-productive activities. Nobel Prize winners clearly fall into this category, as do fairly chosen occupants of Professorial Chairs and holders of Honorary Degrees. Military awards, but not rank, also should be given for achievement. A general, in fact, need not have more medals than a private, for talent as a strategist or commander

⁷She writes: "Honor is a vital need of the humal soul. The respect due to every human being as such, even if effectively accorded, is not sufficient to satisfy this need, for it is identical for every one and unchanging; whereas honor has to do with a human being considered not simply as such, but from the point of view of his social surroundings. This need is fully satisfied where each of the social organisms to which a human being belongs allows him to share in a noble tradition enshrined in its past history and given public acknowledgement.

For example, for the need of honor to be satisfied in professional life, every profession requires to have some association really capable of keeping alive the memory of all the store of nobility, heroism, probity, generosity, and genius spent in the exercise of that profession." Simone Weil, The Need for Roots (New York: Harper & Row, 1971), pp. 19-20.

does not require heroism so much as ability.

That achievement should merit economic benefits is not so certain. The difficulty arises from the very nature of achievement. Properly speaking it is something extra ordinary. It goes beyond the requirements of one's job or task. And though there may be many who work for recognition, recognition should be awarded only when special accomplishment is attained. Doing one's duty is self-rewarding and we destroy the value of 'To each according to his merit or achievement' if honors are lightly given. In the same light when the award is economic, then it becomes part of criterion (3) or perhaps a combination of (4) and (5). Achievement may merit status or position, such a Professorial Chair or research appointment, and they in turn probably demand different needs or requirements, i.e. leisure for study and research, library facilities and laboratories. But when this is all translated into a higher salary or some other economic benefit, confusion arises. Property rights to use and manage, rather than for possession and transmissibility, are appropriate rewards for achievement. This is one reason why the abolishment of hereditary peerage by Parliament was a good thing. A life peer can justly receive his reward for achievement without creating difficulties with criterion (5) 'To each according to his status or position'.

The third criterion (3) 'To each according to work or contribution' is of great importance in relation to property rights, and above all in relationship to control of land.

We shall be turning our attention to the 'Labor Theory of Property Acquisition' shortly, but here we can clarify some of the underlying considerations that must be confronted.⁸ The terms 'work' and 'contribution' are, as we already said, to be interpreted in their economic or productive aspects. Thus they may be physical or mental in form, but they must be productive in nature. In most cases productivity is relatively easy to measure. And this is one of the advantages of this criterion. Its objectivity and general quantifiability makes comparison between like cases a simple matter. But, unfortunately, it is not as simple as some people's calculations suggest. It is always essential to distinguish between those factors of production which are related to labor and those which are related to capital and land. Every one knows that machinery increases productivity. Hence one cannot compare the productivity of labor without discounting the element of capital. This does not mean that we wish to encourage inefficient productive practices and measure productivity minus capital improvements. What it does mean though is that just as it is essential to take

⁸See, in addition to works cited in note 1, Michael A. Slote, "Desert, Consent, and Justice," Philosophy & Public Affairs 2 (1973): 323-347 and the critique by Christopher Ake, "Justice as Equality," Philosophy & Public Affairs 5 (1975): 69-89. Also, Alan Zaitchik, "On Deserving to Deserve," Philosophy & Public Affairs, 6 (1977): 370-388

into account the factor of capital when comparing different situations so also is it essential that we account for the contribution that different sites make toward production. Land is a primary factor in production, and like its partner labor it can contribute more or less to the level of productivity in a given endeavor. We have already made mention of this fact and its importance in the Introduction. Here we need to see its implications for measuring and applying criterion (3).

Since property rights in land assure men access to various sites and their different benefits, if we are to fairly apply this criterion, we must balance the advantages of one site against the others in determining productivity. Of course, like cases must be treated alike, and so because one site is especially productive for certain endeavors, we do not compare it to other sites useful for entirely different endeavors. But the point remains: as our first criterion (1) 'To each the same thing' necessitates that we do not unwarrantedly discriminate among individuals regarding fundamental rights, so if this third criterion (3) 'To each according to his work or contribution' is to be grounded in justice, the right to work must not be unequally burdened. This means that those who have access to the better sites in a community must bear a greater burden of support to community. Since part of the productivity of the endeavor is directly attributable to the natural or communal advantages, these must be restored to

the commonweal since they are not the result of individual labor. Taxation is the political means whereby this may be accomplished. How the tax may be fairly determined can wait until further, but that the commonweal justly deserves this portion of the productivity is as clear as the principle that no one should be denied the fruits of his labor.

In order that there is no confusion about this, it must be emphasized that such a tax would not discourage productivity but quite the contrary. Economic efficiency should be rewarded. We do not want to lower productivity on any of the sites or in any activity, but instead raise and reward it. What better means is there than insuring men the full measure of their contribution? Taxes must be paid to support the community, and if those who benefit more by advantages that the community has given them do not contribute their fair share, then the burden will unjustly fall on others who are less able to pay. In consequence injustice will be done and the community will suffer.

Property rights are negative in rem rights protected by corresponding duties, but they are also granted by the community with the understanding that each member of the community owes certain duties to the community. We need not enter into an extended discussion of taxation and property rights here in order to make our point: viz., once we accept the principle that a man deserves to receive the full measure of his contribution in any cooperative

effort, we also accept the principle that he should not receive what others contribute.

Sometimes it is argued that contribution is difficult to assess because modern modes of production disguise the value of a particular individual's labor to the final product.⁹ But if we look at the question from a broad perspective, we can see that this problem is not as intractable as it appears. Aside from the question of marginal productivity, it is clear that generally speaking wages in given occupations average out. Naturally, some persons will be paid more and some less even when their levels of productivity are equal, but as an overall rule wages are determined by averaging the general level of productivity in a particular job. It may be unfair, in stricto sensu, to pay everyone the average since some will contribute more and others less, but when we consider that the level of productivity of all is increased by the presence of cooperation and the division of labor, then we can feel more at ease about averaging the wages paid. In modern industrial societies no individual's level of productivity is completely

⁹See, Miller, Social Justice, pp. 106-18; Galston, Justice and the Human Good, pp. 146-150 and James C. Dick, "How to Justify a Distribution of Earning," Philosophy & Public Affairs 4 (1975): 248-272. We avoid any discussion of 'surplus value' or alienated labor here. For a brief treatment see, Robert L. Heilbroner, "The Labor Theory of Value Revisited," Dissent 27 (1980): 91-99; also, Roger Alcala and Sidney Morgenbesser, "Surplus Value: The Oft Neglected Argument," Social Research 46 (1979): 282-290.

independent of others. The kinds of tools that are available, the sources of energy that are plentiful, the modes of transportation that is handy—all these things influence the degree of productivity which an individual may achieve. Indeed, only in the very rare case when someone discovers an entirely new product can we discount these factors. Moreover, we must in all fairness recognize that individual productivity varies throughout a given period, and few are satisfied with jobs paid according to the piece. Therefore, averaging becomes necessary.

As David Miller and others have noted, it is easier to formulate this criterion negatively than positively. That is, we can more easily say, those who contribute nothing deserve nothing in return, than we can say, 'To each according to his work or contribution'. This becomes very clear in the case of those who control land but make no contribution towards production other than renting the site to an entrepreneur. Without doing anything, they are able to reap a portion of the product of labor merely because of their right to property.

The fourth criterion (4) 'To each according to his need or requirements' has a strong appeal, for it emphasizes the fact that there are certain minimum levels of livelihood that must be maintained if there is to be any society at all. It is not necessary to read this criterion as a form of charity or benevolence instead of a form of justice since there can be no charity without fulfilling the demands of

justice first. This simple truth is sometimes forgotten.¹⁰ On the other hand, need cannot be the criterion for measuring certain distributions: Joel Feinberg offers the obvious example of grades on examination.¹¹ What we must first settle is what needs or requirements are primary, and then we can determine if, and when, distribution should be based upon need.¹²

¹⁰It is interesting to note that the famous formula of Marxism—"From each according to his ability, to each according to his needs"—was only deemed applicable to the higher phases of communistic society. Cf. Marx and Engels, Selected Works (London: Progress Pub., 1968), pp. 323-5. In conformity with this both the 1936 and 1977 constitutions of the USSR refer only to work, not need, as a principle of distributive justice. In the 1936 constitution it is put as follows (in article 12): "Work in the U.S.S.R. is a duty and a matter of honour for every able-bodied citizen, in accordance with the principle: 'He who does not work, neither shall he eat.' . . . The principle applied in the U.S.S.R. is that of socialism: 'From each according to his ability, to each according to his work.'" And in the 1977 constitution (in article 14): "The labor of Soviet people, free from exploitation, is the source of the growth of public wealth and of the well-being of the people and of the people and of every Soviet citizen. . . In accordance with the principle of socialism: 'From each according to his abilities, to each according to his work,' the state supervises performance and consumption." Cf. Constitution (Fundamental Law) of the Union of Soviet Socialist Republics (1936) (Moscow: Progress Publishers, 1969) and Review of Socialist Law 4 (1978): 57-84. Constitution adopted October 7, 1977.

¹¹Feinberg, Doing and Deserving, p. 59. This is, of course, one illustration of the importance of criterion (2) 'To each according to his merit or achievement.'

¹²For a discussion of the various ways in which fundamental needs are understood, see Human Needs and Politics, edited by R. Fitzgerald (Sydney: Pergamon, 1977). It is significant that none of the contributors offers access to land as a fundamental need. Generally, needs are viewed in terms of income, health, job, etc. All these things are important but clearly they are secondary.

In discovering man's fundamental needs, we find ourselves returning to the first criterion (1) 'To each the same,' for the formal principle of justice demands that we have no basis for treating individuals differently as individuals. We must take some other factor(s) into consideration in order to distinguish special individual needs. For instance, health is a fundamental human requirement, and all men should be accorded the same right to medical services, but certainly we want to grant special privileges to those very ill or very poor. (Today, unfortunately, it often seems that we grant special privileges only to those who are very rich.) Equally, the right to personal security belongs to all men, but we will probably still give greater protection to famous or threatened individuals. (And, again, we often overlook the old or the poor or the weak too readily.) Whatever fundamental human needs we isolate, we find that circumstance and position (which involve criteria (2) and (5) as well) necessitate our distributing benefits and burdens unequally in numerous cases.

In addition, when we apply the formula 'To each according to his need' we must establish some hierarchy of needs in their order of importance. Otherwise, we will be back at the beginning. In this way we can also give men reasonable warning or guidance (as the case may be) as to which needs will be acknowledged and in what order. There is a tendency to confuse the notion of needs with desires. What someone may feel is a legitimate need may be only a

strong subjective desire or unnecessary dependency. It may be fine to supply soldiers with cigarettes when possible, but it would be more than foolish to substitute them for medical supplies or ammunition. Once we go beyond bare minimum physical requirements for survival, disputes inevitably arise about what constitute essential needs and what are merely individual desires. This becomes especially acute in discussions of property rights.

Fortunately, for our purposes we shall be able to avoid such controversies. Too often the assumption is made that a particular level of income properly defines the minimum level necessary for subsistence. In actual fact such an assumption is false and misleading. Since income is only a relative measure of purchasing power, and since it bears no real relationship to any other criteria of justice, it cannot be used as a basis for determining the bare minimum need.¹³ Even translating income into actual goods and services does not solve the problem. After all, it is

¹³Of course, it might be maintained that speaking about 'income' is merely shorthand for talking about fundamental needs, but what we hope to show is that liberty rests on independent access to land, and that unless there are widespread rights to property in land 'income' is a poor measure of individual freedom or security. In addition, schemes of redistribution confront the same questions that property rights in land must address, e.g. What should be the basis for transfers of wealth? Work or contribution? Need or requirements? Contract or obligations? And what form of taxation or redistributive measures should be employed? Income tax? Sales tax? Property or capital gains tax? For an overview of the problems involved, see Colin D. Campbell, ed., Income Redistribution, (Washington, D.C.: American Enterprise Institute, 1977).

important to remember that human needs are not merely physical in form. Certainly one primary human need is independence, and when we try to translate fundamental human needs into dollars and cents without determining if such a procedure really discloses the underlying requirements, we wind up creating the illusion that merely by providing adequate amounts of goods and services (from whatever source) we have dealt with man's need to support himself and family.

If criterion (3) emphasizes that work should be rewarded and idleness discouraged, in the same light criterion (4) emphasizes that there is a fundamental human need to work, to contribute, as well as to receive.¹⁴ The whole purpose of freedom is to give men the opportunity to fulfill their potential (however narrowly it may be construed.) Anything which would deny them that opportunity must be seen as a denial of fundamental human rights. And since access to land is essential for independence, it becomes clear that some form of land tenure must be

¹⁴Recognition of this need has remained less than desirable, for despite all the talk about 'creativity' the true dignity of labor is not widely respected. For an attempt to explore the value of work, see Edwin G. Kaiser, Theology of Work (Westminster, Maryland: Newman Press, 1966). Three recent papers have offered arguments in support of the right to work: Hillel Steiner, "The Natural Right to the Means of Production," Philosophical Quarterly, XXVII (1977): 41-49; James W. Nickel, "Is There a Human Right to Employment?," Philosophical Forum, X (1978-9): 149-169; and Lawrence C. Becker, "The Obligation to Work," Ethics, 91 (1980): 35-49.

recognized which gives all the equal possibility to occupy land. Land is the source of all wealth. From it we get everything that we use or value in the material world: food, clothing, fuel, shelter, metal, or precious stones. We live on the land and from its bounty. In the end our bodies will return to the soil. There can be no denial that availability of land is a primary human need. And it is easy to see that whatever principles of distribution are applied to land tenure, they will affect all aspects of our social, economic, and political lives.

Hence, it becomes undeniable that property rights in land must be established so that everyone has the opportunity to work and support oneself and family with as much independence as possible. Just as security of one's person and the integrity of one's mind are primary human rights, so also is the opportunity to be financially independent a primary economic right. Few other needs can take precedence over this, if we wish to live in a liberal society. No amount of welfare payments can substitute for this need. It is a basic requirement for human dignity.

With criterion five (5) 'To each according to his status or position' we meet an entirely different measurement of justice. Some would hastily argue that in a democratic society such a criterion of distributive justice is unacceptable, but closer examination of the issue reveals that there are certain situations in which such a principle would be useful and fair. Alf Ross reminds us that "the logical

correlate of the demand for equality is the demand for unlike treatment of that which is unlike when measured by the presupposed yardstick of evaluation."¹⁵ As we have already noted in the discussion of criterion (1) 'To each the same,' we are part of society, and thus we have particular duties and responsibilities according to the roles we fulfill in society. This applies to marriage, professional life, and one's political responsibilities. Few question tax advantages given to those rearing children or caring for elderly parents. Likewise age is often used—both for young and old—as a means for distributing benefits and burdens. Similarly we may even have sex criteria as with the draft.

Class distinctions need not be invidious. What makes them so is the fact that they tend to promote privilege. And when such distinctions are based upon secondary human traits such as sex, color, ethnic background, or other characteristics, then we can rightfully take exception. The criterion of status or position can never overrule the primary obligation to recognize equals as equals. The real problem arises in determining what common element establishes the equality asserted: $.5 = \frac{1}{2}$ in terms of quantity, but they are obviously different modes of notation. Equality is always a third party to any two things. And just as we must

¹⁵ Alf Ross, On Law and Justice, trans. by M. Dutton (Berkeley: University of California Press, 1959), p. 271.

acknowledge what is common within any equation of equality, so we must acknowledge what is unique. Thus we must recognize status or position in many cases.

In relation to property rights in land, it might be thought that status should play some, albeit minor, role. Certainly we do not want to reestablish a landed aristocracy, but we might want to encourage some land uses.¹⁶ For example, we might suggest granting farmers special considerations because of their status or position as producers. Yet such an approach would be complex and unnecessary. If there is a need for farmers to have special privileges regarding their land holdings, then we can employ criterion (4) without introducing the question of status. This will avoid creating a new series of property rights classifications.

Henry Sumner Maine's now classic observation that "the movement of the progressive societies has hitherto been a movement from Status to Contract" (his emphasis)¹⁷ leads us to the sixth and last criterion (6) 'To each according to his contracts or agreements.' Certainly we cannot underestimate the importance of this criterion of justice in both history and theory. As a matter of fairness,

¹⁶That there is a long tradition of land use controls in American history that cannot be denied. See, Harry N. Scheiber, "Property Law, Expropriation, and Resource Allocation by Government, 1789-1910," Journal of Economic History, 33 (1973): 232-251. Further discussion and references on this issue are found in Chapter Eight, "Property and the Environment," below.

¹⁷Henry Sumner Maine, Ancient Law (Boston: Beacon

it seems essential that contracts and agreements are upheld in law, just as we expect people to keep their promises. Whenever someone is allowed to unilaterally alter the terms of his contract or agreement, he is exercising a liberty or utilizing an immunity but not asserting a right or power. Thus it is natural that the law has tended to limit or eliminate privileged status which grants such liberties or immunities to individuals or classes.

But in order for contract to be meaningful, there must be freedom. Freedom of contract has become a slogan, and yet it is a very important concept in any political and legal system.¹⁸ Granting full legal rights to all—with the exception of minors or insane persons—has been the goal of modern democracies. Some have erected a whole theory of justice on the basis of this criterion. For them contractual obligations, or entitlements, are the most fundamental factors in determining who owes what to whom. As a matter of ordinary, routine distribution of wealth, this approach

Press, 1963), p. 165.

¹⁸Three essential works on contract are: A. W. B. Simpson, A History of The Common Law of Contract (Oxford: Clarendon Press, 1975); Lawrence M. Friedman, Contract Law in America: A Social and Economic Case Study (Madison: University of Wisconsin Press, 1965) and P. S. Atiyah, The Rise and Fall of Freedom of Contract (Oxford: Clarendon Press, 1979). The slighter work by Grant Gilmore, The Death of Contract (Columbus: Ohio State University Press, 1974) is also useful. Finally, Morton J. Horwitz, "The Historical Foundations of Modern Contract Law," Harvard Law Review, 87 (1974): 917-956 provides a brief overview of some of the extralegal considerations of modern contract law.

may work in a significant degree. But in terms of discovering the foundations of distributive justice, it is woefully inadequate. We must know far more about the conditions under which contracts are arrived at before we can justify the contractual conditions themselves. The famous statement of Mr. Justice Stone in his dissent in Morehead v. Tipaldo (1936) illustrates the point all-too-vividly: "There is a grim irony in speaking of the freedom of contract of those who, because of their economic necessities, give their services for less than is needful to keep body and soul together."¹⁹

Moreover, the freedom that property rights guarantee gives rise to the possibilities of public duty. Especially in a democracy if we want all to participate in the public realm, we must establish the conditions under which this is made practical. This is one reason why Jefferson was so insistent upon securing access to land for every member of the community and basing voting privileges upon ownership of land. It signalled to him a commitment to the public good. This same idea is outlined by R. H. Tawney in his commonplace book, dated April, 1913:

People want rights—freedom, in order that they may perform duties. The hardship of the wage-earner is not simply that he has insufficient food and housing, but that he is deprived of the means of performing certain primary duties, care of home, wife and family, direction of the

¹⁹298 U.S. 587 (1936)

industry by which he lives, a share in the public life. Hence the way of freedom is also the way of duty.²⁰

Clearly rights to property ground other rights and they, therefore, protect and encourage the performance of duties. As we have also already seen in Chapter Two, rights and duties are correlatives: contracts merely spell out specific agreements among the contracting parties that are legally enforceable. Contracts may create other rights and duties, but man's fundamental rights and duties do not rest upon expressed contracts, except metaphorically as when we speak of the 'social contract' theory of the state.²¹

In terms of property rights, there is a tendency to forget the past regarding the origin of initial holdings of land while on the other hand to constantly insist upon the past agreements that may have been made regarding subsequent contractual matters. No amount of persuasion can convince the objective observer that original entitlements are traceable to actual contractual agreements. The convenient fiction of a 'social contract' notwithstanding,

²⁰R. H. Tawney, Commonplacebook, edited by J. M. Winter and D. M. Joslin (Cambridge: Cambridge University Press, 1972), pp. 56-57.

²¹Robert Nozick's Anarchy, State, and Utopia (New York: Basic Books, 1974) is the most recent attempt to establish a system of property rights based on the idea of freedom of contract, but, as several critics have noted, he does not provide initial justification for man's original entitlements nor does he offer sufficient criteria for measuring the validity of subsequent contractual obligations. See, especially, Hillel Steiner, "A Libertarian Quandary," Ethics, 90 (1980): 257.

there is no final appeal to contract as a means for determining just distribution of property, most especially property in land.²²

And so we may safely conclude that (6) 'To each according to his contracts or agreements' deserves a place in any complete theory of distributive justice, but it cannot—any more than the other five criteria—satisfy us as a comprehensive measure of fairness or equity.

Having examined these criteria, we can draw some conclusions regarding necessary principles of distributive justice and property rights in land.

First, justice demands that every individual be given an equal chance. This means in concrete terms that all are given the same fundamental consideration in order to meet basic needs. Discrimination among individuals regarding fundamental matters is completely unacceptable. Both criterion (1) 'To each the same thing' and criterion (2) 'To each according to his needs or requirements' remind us of the fact that in respect to minimums no one can justify

²²Victor John Yannacone, Jr., "Property and Stewardship—Private Property Plus Public Interest Equals Social Property," South Dakota Law Review, 23 (1978): 71-147. "No individual or corporation can be considered the absolute owner of property that has become vested with a substantial public interest, since, if we trace any claim of title back far enough, we find that title was originally in the sovereign, which in the United States, is the People, collectively. Although most of the public land has come in the 'ownership' of private individuals and corporations, such property is still subject to reclamation by the people as the need arises." (p. 118)

preference. All have the same right to live. And since man is one: his nature and needs are common. In relation to property rights: access to land, to space in which to live and work, is a universal and unalterable requirement for human beings. Hence, distributive justice must establish a method whereby all are guaranteed sufficient space, even if this means that some individuals who have more than enough now are forced to occupy less in the future.

Second, we must encourage productivity, discourage speculation and protect efficiency. (2) 'To each according to his merit or achievement' and (3) 'To each according to his work or contribution' are not opposed in essence. They compliment one another. If we reward excellence, then we are bound to increase productivity and decrease speculation. Moreover, the greater men value their work, the more likely they are to take the pains necessary to improve its quality. If some can live off the efforts of others by gambling or speculating, then society will soon discover the effects in terms of widespread unwillingness to work and rampant idleness. Additionally, conservation will suffer when land is held merely for high speculative gain. Shortsightedness always overlooks the future interests of society as a whole. Justice, however, takes the long view; it seeks the best solution for yesterday, today, and tomorrow.

Third, social stability must be supported wherever possible. A true system of distributive justice will not

upset the status quo or violate contractual agreements unless absolutely necessary. Hence, we must look for a way to institute reform without causing revolution. This will encourage us to seek support in established tradition and legal precedent. Of course, there has been a constant evolution of the notion of property rights and land law in the Anglo-American Common Law, and we will need to promote further development. But, aside from that, there is still a strong basis for change in the very fundamental conceptions of the law itself. As often happens, certain accepted ideas have been forgotten or lost in the growth of law over the centuries. We must bring them to light again and apply them to the contemporary scene. Criteria (5) 'To each according to his status and position' and (6) 'To each according to his contracts or agreements' are not as opposed as Maine would have us believe.