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TRESPASS LAW AND TERRITORIALITY:  
A GEOGRAPHIC AND EVOLUTIONARY PERSPECTIVE.

by

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A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF  
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DOCTOR OF PHILOSOPHY

in the Department  
of  
Geography

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## ABSTRACT

Geography has been enriched by borrowing from its neighbours, yet that specially demarked set of social norms that we call the 'law' has been all but ignored in geographic work. This dissertation uses the law, which Oliver Wendell Holmes referred to as a "great anthropological document", as one route to understanding geographic phenomena.

The focus of the study is on human territoriality, which is a key geographic concept because it involves questions of accessibility. A cultural interpretation of this is explored through the medium of the Common Law tort of trespass to land. More than three hundred cases were looked at and this data base was used to reinforce and clarify our understanding of human territoriality in its social context. Both law and human territoriality are seen as significant, but neglected, determinants of the geographic landscape.

One of the more important arguments is that the functioning of a culture can be understood as part of a general process of evolution. The theoretical perspective that is developed provides the themes of 'stability' and 'tension', which are used in the analysis of trespass law. Attention is focused, within this framework, on topics of

geographic interest including environmental cognition, environmental hazards, conflict between the individual and society over access to geographic space, and territorial tensions brought about by invasions of privacy and by industrial pollution.

The work is imbued throughout, not only with an evolutionary perspective on culture that draws inspiration from Darwin, but also with a semiotic view that owes much to the later work of Ludwig Wittgenstein. It is argued that these two cogent approaches to understanding culture are not only compatible but mutually reinforcing. In particular, both necessitate careful consideration of contexts.

The study concludes that finding solutions to the complex questions raised by the geographic focus on location, requires the adoption of a temporal perspective. In this regard an evolutionary paradigm, incorporating both variation and selective environmental pressures, is particularly apposite.



It is interesting to contemplate a tangled bank, clothed with many plants of many kinds, with birds singing on the bushes, with various insects flitting about, and with worms crawling through the damp earth, and to reflect that these elaborately constructed forms, so different from each other, and dependent upon each other in so complex a manner, have all been produced by laws acting around us. These laws, taken in the largest sense, being Growth with Reproduction; Inheritance which is almost implied by reproduction; Variability from the indirect and direct action of the conditions of life, and from use and disuse; a Ratio of Increase so high as to lead to a Struggle for Life, and as a consequence to Natural Selection, entailing Divergence of Character and the Extinction of less-improved forms. Thus, from the war of nature, from famine and death, the most exalted object which we are capable of conceiving, namely the production of the higher animals, directly follows. There is grandeur in this view of life, with its several powers, having been originally breathed by the Creator into a few forms or into one; and that, whilst this planet has gone cycling on according to the fixed law of gravity, from so simple a beginning endless forms most beautiful and most wonderful have been, and are being evolved.

Charles Darwin

Understanding a people's culture exposes their normalness without reducing their particularity.

Clifford Geertz

Can one play chess without the queen?

Ludwig Wittgenstein

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It also gives me great pleasure to acknowledge the patience and thoughtfulness of my wife, Rita; a contribution that prevailed in spite of the working-area territories that I established in one room after the other. She always maintained a congenial and supportive environment. Our children, Marina, Mark, Andrew, and Daniel, also did what they could to be helpful and cheerfully accepted the inevitable constraints.

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## CHAPTER I

### INTRODUCTION

#### Purpose of the Study

The cultural geographer is committed to the theoretical perspective of 'culture' for discerning spatial differentiation, as well as for analysing and understanding landscapes and the regular behaviours associated with them.<sup>1</sup> This particular study is concerned with a cultural interpretation of one small, but nevertheless significant, part of landscape activity, namely human territorial behaviour.

The most general objective is to draw the attention of cultural geographers to the law, especially the Common Law, as a vast treasure-house, a corpus of cultural lore that is not only rich but virtually untapped. The study illustrates something of what the law has to offer and also a way of incorporating it into a geographical study. The achievement of this objective alone would be satisfying.<sup>2</sup>

---

<sup>1</sup>The validity of such a cultural perspective is discussed later in this chapter.

<sup>2</sup>Bora Laskin (Chief Justice of the Supreme Court of Canada) writes, "What I see in your inquiry is a welcome development in the social sciences towards more interdisciplinary work by social scientists who have now discovered the importance of law other than as merely a system of sanctions." Personal Communication, April 5, 1977.

More specifically, the study examines, through the medium of the law of trespass to land and selected cases associated with it, a cultural interpretation of human territoriality.<sup>3</sup> It seeks to reinforce and clarify our understanding of human territoriality, and argues for an increased recognition of its potential significance in geographic work.

Although such an aim has its own validity, the study attempts to go much further and to show how trespass law, as a part of culture, may itself be understood. A theoretical perspective based on evolutionary ideas is presented, and from this is derived a set of guiding statements which are used to analyse human territoriality as it is expressed in the law of trespass to land. The explanatory scheme, therefore, has to do with the functional nature of culture, and in particular the Darwinian-like form of cultural evolution.

The next three sections of this chapter consist of some preliminary remarks on the two concepts of 'territoriality' and 'culture' that are at the heart of this study.

---

<sup>3</sup>There are, of course, other areas of the law that are not unrelated, such as that of Landlord and Tenant, but these are outside the scope of this study.

Implications of the Neglect of 'Territory'  
in Geographic Thought

Geography is a complex and evolving discipline which cannot easily be characterised, but there can be few of its concerns as central as that having to do with the location of things.<sup>4</sup> More particularly the concern is to understand and explain the location of things in terms of their context. In physical geography the questions posed and the environmental relationships that are drawn upon for an explanation have to do with the physical world. In human geography, on the other hand, it is the social environment that is the focus of interest in the explanation of locations.

In the last few decades many human geographers, and especially the locational theorists, have sought explanations of spatial order in terms of impersonal forces such as 'gravity', and the invisible hand of 'distance'. And, indeed, they have not been without considerable success. Yet it is sobering to think how little of the detail of the evolving landscape, including the human behaviour that

---

<sup>4</sup>There are innumerable references to the central importance of location in geographic thought. See, for example, David Lanegran and Risa Palm, *An Invitation to Geography*, (New York: McGraw-Hill, 1973) p. 1. "... the major theme of geography - the study of location."

takes place there, can be confidently predicted by the distance function. For one thing, the idea, so pervasive in geography, that phenomena sort themselves out on the basis of some attraction to a central point, does not take sufficient account of the presence of countervailing forces that may be working to move them apart. Thus, when Bunge suggests that geography's central problem is that of "placing interacting objects as near to each other as possible, or simply, the *nearness problem*", we must remember that optimal solutions may also take the form of placing interacting objects as far away from each other as possible.<sup>5</sup> Indeed, very often the real problem in complex societies is to decide on competing choices. Thus the most glaring oversight in much spatialist work has been the failure adequately to take into account a complex and changing competition for the consumption of geographic space, and the resultant conflict over its control and use. Spa-

---

<sup>5</sup>William Bunge, *Theoretical Geography*. (Lund: Lund Studies in Geography, Series C, No. 1, 1966), p. 33. In defining geography as the science of locations (p. 199), Bunge draws on a long line of German location theorists, including von Thünen, Alfred Weber, Walter Christaller (on central place, and to whom the book is dedicated) and August Lösch. The essential problem was seen as the minimisation of movement between objects. The fact, however, that some people may want to *exclude* such things as gas stations, prisons, shopping-centres, and pulp and paper mills from certain areas turns a relatively simple theoretical problem into a much more complex one in real life.



tialist theory has drawn its strength from emphasising function, and its major weakness is a reflection of both its minimisation of conflict and its atemporal quality.

This 'functionalist' approach of spatialist geographers deals primarily with idealised areas that have indeterminate boundaries and are defined in terms of movement. Cogent as such study of geographic 'fields' has been in explaining locational patterns, it ignores the reality of a world divided into bounded spaces defined in terms of possession, that is to say territories. The control of access to such bounded spaces and the locational proprieties that flow from the differential possession of territory are obviously key determinants in the location of things. To study such 'locating' in a vacuum, where human control over specific geographic spaces is not taken into account, seems to be a most unwise neglect, for it is abundantly obvious that a choice for the location of one thing necessarily entails a discrimination against the location of something else.

Yet impersonal 'geographic laws' that incorporate the distance function have come to be thought of as the ideal against which reality is to be measured. Thus the gravity model, central place theory, and von Thünen's concentric ring land-use model are thought of as ideals

against which the efficient and proper organisation or 'packing' of the landscape should be judged.<sup>6</sup> This is clearly expressed by Richard Morrill when he writes that "if there is an underlying order in human geography it is that man and society try to organise space efficiently, to locate activities and to use land in the 'best' way."<sup>7</sup> From there it is only a short step to seeing the geographer's contribution to human welfare as "understanding and manipulating space and spatial distributions."<sup>8</sup> Understanding is a valid contribution of the geographer but the manipulation, or packing, of space in the name of "efficiency" requires the authority of the wider community, of which geographers are only a small part. The appropriateness of a location for something certainly cannot be decided and enforced by uniform and universal geographic 'laws' (although, of course, geographic models can be of

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<sup>6</sup> Richard Chorley and Peter Haggett go so far as to argue that models, as idealised representations of reality, should constitute the paradigm of geography. See Richard Chorley, and Peter Haggett, eds., *Models in Geography*, (London: Methuen, 1967), Ch. 1.

<sup>7</sup> Richard Morrill, *The Spatial Organisation of Society*, (Belmont, California: Wadsworth, 1970) p. 20.

<sup>8</sup> Ronald Abler, John Adams and Peter Gould, *Spatial Organisation: The Geographer's View of the World*, (Englewood Cliffs, N.J.: Prentice-Hall, 1971), p. 21.

help in reaching a decision). This is somewhat similar to saying that the propriety of the law cannot be decided by Natural Law. In both cases there is an inherent confusion between descriptive and prescriptive laws.<sup>9</sup> Yet David Harvey in his *Explanation in Geography* maintains that "ever since the 'uniformitarian' views of Hutton, geographers have assumed that the phenomena they study are subject to universal laws", and, of human geography, he writes specifically, that:<sup>10</sup>

... a growing number of geographers are willing to examine the phenomena of human geography as if they could be understood in terms of universal laws ... The principle of 'hidden order within chaos' appears in such work as a basic assumption.

Harvey puts his own position unequivocally:<sup>11</sup>

There is every reason to expect scientific laws to be formulated in all areas of

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<sup>9</sup> Montesquieu in the first chapter of *Esprit des Lois*, inquires why it is that, while inanimate things such as the stars and also animals obey "the law of their nature", man does not do so but falls into sin.

<sup>10</sup> David Harvey, *Explanation in Geography*, (London: Edward Arnold, 1969), p. 109.

<sup>11</sup> *Ibid.*, p. 113. See also Ronald Abler, John S. Adams, and Peter Gould, *Spatial Organisation: Geographer's View of the World*. They state that "we think the principles which govern human spatial behavior are generally applicable all over the world" (p. xiii), and they devote considerable space to arguing the case for the view that science is "a supra-individual, empirical, ordering system." (p. 19).

geographic research, and there is absolutely no justification for the view that laws cannot be developed in human geography because of the complexity and waywardness of the subject matter.

But, as Marwyn Samuels pointed out "if there are 'geographical laws' they have yet to appear."<sup>12</sup>

Harvey's suggestion that there is only a difference of emphasis between the explanatory schemes of those such as Bunge and Haggett on the one hand, and Sauer on the other, seems on the face of it to skate too easily over fundamental issues.<sup>13</sup> As a cultural geographer Sauer was more concerned with the place and time specificity of prescriptive norms than universal and descriptive scientific laws. Sauer's approach was not unlike that of the historical school in jurisprudence, which disposed of the idea that immutable and universal rules of law could be discovered by showing that law is relative to time and place and is a product of each nation's culture. There seems no compelling reason to suppose that the search for

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<sup>12</sup>Marwyn S. Samuels, "Science and Geography: An Existential Appraisal", (Ph.D. dissertation, University of Washington, 1971), p. 84. Samuels goes on to point out that "the closest thing to a geographical law appears to be the 'law' of spatial proximity, ... [but] even this 'law' is subject to serious doubt."

<sup>13</sup>David Harvey, *Explanation in Geography*.

geographic laws will turn out to be any more successful.

It is only fair at this point to observe that the implicit recognition of the normative nature of cultural environments grows daily. Positivist luminaries in earlier spatialist thought, such as Brian Berry, William Bunge, Torsten Hägerstrand, Gunnar Olsson and David Harvey, have recently all adopted fresh stances, whereby they demonstrate a more questioning and humanistic concern for a proper spatial order.<sup>14</sup> But welcome as this is, it must still be borne in mind that geographers *qua* geographers have a primary responsibility to explain the world as it exists, rather than to attempt to change it with the implied authority of the discipline.

To understand human expression and order on the landscape we must, at the very least, examine the cultural norms that guide them, and these norms are defined by those who control bounded geographic spaces. The specificity of a social place is thus in large part territorially

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<sup>14</sup> See for example, Brian Berry, "A Paradigm for Modern Geography," and Torsten Hägerstrand, "The Domain of Human Geography," in *Directions in Geography*, Richard Chorley, ed., (London: Methuen, 1974); William Bunge, "The Geography of Human Survival," *Annals, Association of American Geographers*, 63, Sept. 1973, pp. 275-295; Gunnar Olsson, *Birds in Egg*, (Michigan Geographical Publication No. 15, 1975); David Harvey, *Social Justice in the City*, (London: Arnold, 1973).

determined. There are a number of significant implications of such a territorially-based, as opposed to a more universal, study of the appropriateness or inappropriateness of the location of phenomena (whether objects or behaviours). These include a more explicit recognition of conflicts arising from the control and use of space, the easier incorporation of unsorted sets of phenomena into locational study, and an increased attention to geographic problems at the micro-scale. A territorial approach also invites a closer examination of the reciprocal relationship between cultural forms or rules and the physical and social environment (that is to say the context) in which they have their application.

#### Culture and Rules

When geographers use the term 'culture' descriptively they do so usually in the sense of 'a way of life'. What they look for are characteristic regularities in the behaviour of people and in their spatial expression on the landscape; regularities which will show integration within a cultural system and differentiation from other cultural systems. These regularities have a dual role, for they generate behaviour to the extent that people conform to them, and therefore they are explanatory as well as

descriptive.<sup>15</sup> That is to say that the regularities of behaviour within a group constitute its norms (or standards) and at the same time the individual members of the group tend to conform to those norms.<sup>16</sup> They do not follow them mechanistically as though they were some natural law, but humanistically in relation to an ongoing tension between social conventions and individual desire.

Although people are therefore by no means prisoners of tradition, their lives are shaped within the constraints

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<sup>15</sup> Clifford Geertz remarked that, "culture is best seen not as complexes of concrete behavior patterns - customs, usages, traditions, habit clusters - as has, by and large, been the case up to now, but as a set of control mechanisms - plans, recipes, rules, instructions (what computer engineers call "programs") for the governing of behavior." *The Interpretation of Cultures*, (New York: Basic Books, 1973), p. 44. What culture is best seen as, however, will depend on whether it is used for description or explanation. Other than this Geertz's conception of culture appears to be very close to that used in this study.

<sup>16</sup> See, for a discussion of rules in culture, James Spradley, "Foundations of Cultural Knowledge," in *Culture and Cognition: Rules, Maps, and Plans*, James Spradley, ed., (San Francisco: Chandler, 1972), p. 18. The work of Peter Winch, *The Idea of a Social Science*, (London: Routledge and Kegan Paul, 1958) is also pertinent to this discussion. He writes, "that all behaviour which is meaningful (therefore all specifically human behaviour) is *ipso facto* rule governed." p. 52. It is true, of course, that one of the more interesting problems becomes the conformity itself. The evolutionary perspective of the study suggests an answer to this.

of the more authoritative and controlling cultural norms, of which the law is an epitome. These norms are best thought of as fitting into definable social frameworks such as the law itself, or the price system, or on a smaller scale, such institutions as the family, the church, a hospital, or perhaps an English boarding-school. Clearly there are numerous such social frameworks and they overlap in complex ways. Cultures, therefore, are not so much monolithic as pluralistic, analogous in some ways to a variety of games each with its own set of integrated norms and separate objectives. Behaviour in such 'games' is not determined or dictated in detail by the rules, but rather is constrained by them. So, for example, when I play squash I am 'free' to act as I see *fit*, including breaking the rules, although to do that overtly is necessarily to forego the specific, and socially defined, objective of the game itself. Rules, then, do not usually say specifically all the things that we *must* do, but rather what we should not do if a specific objective is to be obtained. Thus to play the 'game' of going to church may require that a man does not wear a hat inside the church, and to play the 'game' of going to the cinema requires that he does not fail to buy a ticket and, just as in church, that he does not behave inappropriately when inside.

Of course, 'rules' may not be a satisfactory way of



explaining why there is a convergence of behaviour in a society in the first place.<sup>17</sup> Other factors include 'human nature', individual reinforcements (in Skinner's sense), and the constraints of the physical and social environment.<sup>18</sup> Nevertheless, although it would be unwise to try to force the notion of a rule into a Procrustean bed which encompasses all behaviour, it is evident that it has a wide and valuable application in cultural explanation.

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<sup>17</sup> H.L.A. Hart in *The Concept of Law*, (Oxford: University Press, 1961), p. 9, uses as an example of rule-governed behaviour a man not wearing a hat in church, and then goes on to argue that going to the cinema once a week is a convergence of behaviour that is *not* required by a rule, and thus is not in effect rule-governed. But I find Hart's analysis not altogether satisfying. Let us substitute, for his example of going to the cinema, going to church once a week. Can it really be said that such convergence of behaviour is *not* required by society, even though as a rule of the society it is much less definite, and the sanctions perhaps weaker, than an explicit rule of law? Cannot going to the cinema each week be thought of as analogous to going to church, even if the pressure to conform to the former norm may, in some societies, be only a pale imitation of the pressure to conform to the latter?

<sup>18</sup> The mere creation of environments, whether of churches or cinemas or front parlours, calls forth a set of rules for their use, just as the destruction of environments entails the destruction of the norms that fit them, unless such norms find refuge elsewhere. Of course, the unstated premise of a great deal of social planning and design is just this. Newly designed environments are expected to support new norms. There is an article by Alfred Etter "Mathematics, Ecology, and a Piece of Land," which I find easy to associate with this general idea. See *Landscape*, XII, No. 3, (Spring, 1963), pp. 28-31.

This dissertation focuses on trespass law, which forms a part of an especially formal, definite, and highly organised body of rules, the law, deviation from which is punished. So cogent are these rules in constraining and influencing human behaviour, that it seems inconceivable that cultural geographers can describe and analyse landscape patterns without frequent recourse to them. Trespass law, which supports the partitioning and organization of geographic space, is particularly influential, relating as it does to the accessibility of bounded places.

As a system of rules, trespass law has been formulated inductively, through human experience and judgement in innumerable cases, as opposed to the 'deductive' formulation of legislative rules. As such it forms part of what is known as the Common Law.<sup>19</sup> It is a living and evolving law, in the sense that it has grown enormously and continues to grow as new circumstances and conflicts require judges to declare what the law is and has been.

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<sup>19</sup> The various uses of the expression 'Common Law' are referred to by Glanville Williams, *Learning the Law*, 6th edn., (London: Stevens, 1957), p. 24. He describes it as a "chameleon phrase". The English Common Law, administered by the King's courts, was originally contrasted with the ancient customary laws which varied from place to place and were administered in each locality. Subsequently, as local jurisdictions declined, it came to mean judge-made law and was later contrasted with both statutory law and equity.

It is also a stable and conservative law, tending often to rigidity as a result of the doctrine of precedent whereby the declarations of law are largely irrevocable, except by a higher court. In order to keep some sort of fitment or harmony with changing conditions various devices for reforming the law have been used. These include legal fictions, equity and legislation.<sup>20</sup> This notion of culture as rules which guide behaviour and which, although stable and persistent, are subject to change in conformity with changed circumstances, seems entirely legitimate and unremarkable, yet some aspects of it have not gone without challenge, as we shall see.

Comments on the Notion of Culture  
as Superorganic

The idea that culture is superorganic has been construed as an unwarranted and untenable reification, whereby culture is wrongfully separated from the individual and made to seem unduly autonomous (*sui generis*). The present study views culture as a system of rules, of which the law is one set, and clearly these rules are in an

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<sup>20</sup> In a classic passage Sir Henry Maine wrote: "These instrumentalities seem to me to be three in number, Legal Fictions, Equity and Legislation. Their historical order is that in which I have placed them." *Ancient Law*, (Boston: Beacon, 1963; first published in 1861), p. 24.

important sense supra-individual. More than this, the evolutionary perspective used in this study has obvious superorganic implications. It is necessary therefore to ensure that the approach adopted is neither misunderstood nor indefensible.

The notion of culture as a system of things which, for specific purposes, can be studied apart from the individuals who constructed it, is evident in the writings of Karl Marx, Herbert Spencer, and Emile Durkheim. Spencer, who coined the term 'superorganic', used it as essentially equivalent to 'social', something that, as the word itself implies, was beyond the biological individual.<sup>21</sup> This idea of culture was given added impetus as a result of an essay published by A.L. Kroeber in 1917.<sup>22</sup> In this he seeks to justify the not unreasonable proposition that culture and heredity operate in distinguishable ways. Although Kroeber expressly states that human beings are not only and wholly the products of history, he does suggest that the role of the organic individual is a very limited one. Subsequently, this view was most strongly urged by Leslie A. White.

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<sup>21</sup> *International Encyclopedia of the Social Sciences*, 15, 1968, p. 124.

<sup>22</sup> A.L. Kroeber, "The Superorganic", *American Anthropologist*, 19, 1917, pp. 163-214.

For him culture was "a class of things and events dependent upon symboling, considered in an extrasomatic context."<sup>23</sup> Using language as a surrogate for culture, White quite rightly argues that although languages have no existence without human beings, linguistic science proceeds as if mankind did not exist.<sup>24</sup>

Despite opposition to the idea of culture as a superorganic phenomenon, it was stated as recently as 1976, that:<sup>25</sup>

Among professional anthropologists, the past three decades have seen increasing acceptance of this concept and its implications, but explicit rejection continues on the part of those who hold what we have called idealistic views of culture. It is not difficult to demonstrate, however, that the explicit rejectors are often implicit acceptors in the sense that their procedures of study accord with the view of culture as a superorganic entity.

Even more strongly, it is suggested that, "if fruitfulness is accepted as a judgement of validity, this concept must be

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<sup>23</sup> *International Encyclopedia of the Social Sciences*, 3, 1968, p. 548. See also Leslie A. White, "The Concept of Culture", *American Anthropologist* 61, 1959, pp. 227-251.

<sup>24</sup> *International Encyclopedia of the Social Sciences*. Ibid.

<sup>25</sup> Frederick C. Gamst and Edward Norbeck, eds., *Ideas of Culture: Sources and Uses*, (New York: Holt, Rinehart and Winston, 1976), p. 35.

judged as valid. In the entire range of studies of modern cultural anthropology, implicit use of the concept has been the rule."<sup>26</sup>

The continuing hostility to the idea of culture as something beyond the individual (and implicitly this would seem to include a hostility to existing morality) is perhaps better understood in the context of the contemporary emphasis in most western societies (the United States in particular) on individualism. "Without exception [the various forms of individualism] take the view that society is an alien intrusion, an exogenous force imposed on people from without that necessarily stultifies and inhibits human development".<sup>27</sup> To put this yet another way we can say that the western democratic ideology emphasises personal freedom and the active participation of the individual. In this context it is easy to see how environmentalists, such as Ellsworth Huntington, and behaviourists, such as B.F. Skinner, are considered *bêtes noires*. Indeed, it is here that the real core of the superorganic

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<sup>26</sup> Ibid., p. 36.

<sup>27</sup> See the comments of Robert Hogan in Wispe and Thompson "The War Between the Words: Biological Versus Social Evolution and Some Related Issues", *American Psychologist*, May, 1976, p. 364.

problem is to be found, the idea, anathema to many, that man is a puppet of his culture.

Thus it is, for example, that Clifford Geertz insists that culture is not a power but a context.<sup>28</sup> But what is a context, if not the significant and functional relations between things? Surely the idea that one thing acts upon another, and in this sense has power over it, goes to the heart of what we mean by context. Geertz maintains that code is not a determinant of conduct, but if not then the word 'code' is shorn of much of its usual meaning.<sup>29</sup> It seems that those, like Geertz, who oppose the superorganic idea do so because they want to locate a source of variation (freedom) at the level of the individual, and they fear that determinants of any kind preclude this. If this is indeed so, it is a fundamental error. For while the selective pressures of environments are ultimately determinant, the raw material on which such selection operates is variable, being either randomly created or planned, and therefore the direction of human and cultural development remains both open and

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<sup>28</sup> Clifford Geertz, *Interpretation of Cultures*, p. 14.

<sup>29</sup> *Ibid.*, p. 18.

pluralistic.<sup>30</sup> It is, after all, the essence of Geertz's own contextual approach that symbols *fit* together, that in making sense they are dependent on the given circumstances. It is therefore difficult to see why a semiotic approach to culture should not be compatible with a deterministic model of adaptive fit.

A recent dissertation in geography specifically criticises the superorganic idea as it has been received in American cultural geography.<sup>31</sup> Much of what is said there is acceptable. The general proposition that most cultural geographers have been careless in their definition and use of culture seems fully justified. The alternative interactionist methodology that is proffered, which focuses on the role of individuals in social interaction, and implies that man is essentially an active and free agent who can re-define his world, is laudable. It is a perspective that includes a humanistic criticism of unduly positivistic and environmentalist positions, and thus

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<sup>30</sup> 'Environment' is used throughout this study to refer to the cultural environment as well as the physical. See John Dewey, *Logic, The Theory of Inquiry*, (New York: Holt, Rinehart, and Winston, 1966), Ch. 3, entitled "The Existential Matrix of Inquiry: Cultural".

<sup>31</sup> James Duncan, "The Superorganic in American Cultural Geography: A Critical Commentary", (Ph.D. dissertation, Syracuse University, 1977), Ch. 1.



indirectly of the worst aspects of the social *status quo*. As such it is not dissimilar to criticisms put out by the Frankfurt school of critical social theory, phenomenologists, and humanist Marxists. It is a way of looking at the world which rightly draws attention to the importance of values and meanings, and the worth of the socialself. In attacking methodological individualism and methodological holism, the study draws welcome attention to the intermediate scale that focuses on small group situations, and in emphasising social interaction in geographic settings it adopts the currently popular ecological framework for analysis.<sup>32</sup>

With specific regard to cultural geographers, it is argued that the world they describe is "a world in which the individual is largely absent, consensus prevails, deviance is ignored; it is a world untouched by internal conflict."<sup>33</sup> Such strictures against the conservative bias of a functionalist view of order are well-deserved. Much

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<sup>32</sup>Methodological individualists discount the importance and status of social wholes and methodological holists discount the role of individuals. The argument between them appears somewhat futile, rather like two architects disputing the relative importance of a building's structure and the materials used.

<sup>33</sup>Duncan, "Superorganic in American Cultural Geography: A Critical Commentary," p. 213.

more attention should indeed be paid to the detailed analysis of individuals interacting in localised situations. This, however, does not entail acceptance of the accompanying contention that "the superorganic notion of culture is a metaphysical notion that is basically non-operational," which cannot "be shown to have any value as an explanatory principle in any specific empirical study."<sup>34</sup>

The attack that is made on the ontological status of culture (which it is claimed is the prime objective of the study) is less than persuasive. In the end it becomes a fine philosophical argument, in which one is entitled to ask such follow-up questions as, if culture does not exist as something separately identifiable are we also to say that 'supply and demand' and 'meanings' have no ontological status? And why should redefining culture as a set of social contexts, as we are urged to do, improve its ontological status?<sup>35</sup> At best it is an elusive (and positivistic) task to examine the existence of something. At worst it is quite unrewarding, and the criticism of the superorganic seems seriously misdirected at this point.

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<sup>34</sup> Ibid., p. 109.

<sup>35</sup> Ibid., p. 221.

Questions of explanatory utility do not rest on questions of ontology.<sup>36</sup>

The more important and realistic task, which is largely adopted in the study, is the examination of the use of the superorganic notion of culture. Following Geertz's thinking (and before him Wittgenstein), the appropriateness or inappropriateness of this use must be looked at in the particular circumstances. Sometimes it will be a reasonable and justifiable strategy to consider culture as something autonomous (*sui generis*) and even deterministic. For example, it can be used to refer to complex systems of cultural control mechanisms which have a certain momentum and logic of their own, as Jacques Ellul and Herbert Marcuse have cogently demonstrated.<sup>37</sup>

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<sup>36</sup> The belief that they do seems to have inspired the question, "why after all should one attempt to explain human phenomena in terms of non-physical phenomena when one wouldn't dream of trying to explain natural phenomena in this way?" Ibid., p. 5.

<sup>37</sup> Jacques Ellul, *The Technological Society*, (New York: Vintage Books, 1964); Herbert Marcuse, *One Dimensional Man*, (Boston: Beacon Press, 1964). The idea that the law somehow hovers over us and transcends the everyday vagaries of life may not be palatable, but in the end it really comes down to a question of the appropriate emphasis in the particular circumstances. I do not think that it would be difficult to swallow the suggestion that our lives are shaped within the constraints of those authoritative and controlling norms that we call 'the law'.

Of course, this can be carried too far, and the tendency to adopt a unilineal approach as opposed to a multilineal one, thereby minimising the significance of localised contexts, can properly be faulted. But questions about an elusive ontological status are not very helpful in deciding whether a concept is either useful or likely to survive. The argument should be switched to the methodological plane. In this regard, it is my view, that when carefully used, the superorganic notion of culture is a valuable one that complements other approaches and helps us to understand the world around us.

#### Organisation of Study

No study of breadth can pretend to be informed by expertise in all areas. It is all too easy for the writer to bruise other men's flowers in his travels. I can only say that I have tried to tread as carefully as I can. In some cases the physical limits of the study itself have made it impractical to explore an idea in as much detail as would have been ideal. But, more than that I am acutely conscious of the conflicting need when reaching out to also hold back in the face of the world's relentless complexity, variability, subtlety, and frequent incomprehensibility. Despite this there is ample justification at this time in geography for going out on a limb, albeit cautiously, in

order to get a broader view.

It is also necessary to caution the reader on the use of law in this study. The dissertation is not about the law as such. Instead the law is used as a source of data that is taken to represent an Anglo-Saxon cultural conception of territoriality. Although the examples that are drawn from the law of trespass to land are not confined to any particular political jurisdiction, they are always from within the Common Law tradition.<sup>38</sup> As such they are part of a diffuse, but continuous, cultural realm. More than three-hundred trespass cases were looked at, and although the selection of cases used in the study was a personal one, it is not unfairly representative.<sup>39</sup> Nevertheless, the richness of available material did at times threaten to present a logistical problem. In this regard

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<sup>38</sup> The English cases, which are predominant in the study, are more useful for comment on the development and basic principles of the law. North American cases are sometimes more fertile when it comes to understanding some of the modern tendencies. The use of case examples from different jurisdictions is usually avoided by lawyers, but providing that the jurisdictional limitations are borne in mind, there is no reason for social scientists to be similarly deterred.

<sup>39</sup> Although, inevitably, relatively few cases are focused on in the analysis, this is justified by the fact that reported cases incorporate precedent. They therefore represent (to varying degrees) a continuous line of judicial thinking.

it needs to be said that the Common Law is an extraordinarily under-exploited source of material which could be used much more by cultural geographers. It can be likened to an enormous cluttered attic filled with factual material and concepts, many of which have geographical relevance. The careful sifting and accreditation of facts, the determination of significance, and the application of culturally distilled wisdom in the form of precedent, cry out for analysis. The combination of legal rules and the detailed, particularist, methods of the Common Law are especially appealing to those cultural geographers who favour a semiotic approach to their work.

An additional, and very considerable, advantage of using the data provided in law libraries is that it is perhaps the closest that we can come to a laboratory-like study of ordinary, everyday, human behaviour. For those who are sceptical of the veridicality of behaviour in traditional laboratory settings, this offers a most welcome alternative.<sup>40</sup> It also avoids the ethical questions

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<sup>40</sup> See Harold M. Proshansky, "Environmental Psychology and the Real World", *American Psychologist*, April, 1976, pp. 303-310.

that arise from naturalistic experiments.<sup>41</sup>

The focus of the study is on human territoriality as this is expressed in the Common Law tort of trespass to land. Chapter Two surveys the literature on territory and identifies some of the more prominent characteristics of the concept. A sharp distinction is drawn between territory and the socially-constructed idea of property. The significance of territory as a geographical concept is evaluated. The setting of the stage is completed in Chapter Three by an examination of the law of trespass to land, including an outline of its historical background. Certain parallels are drawn with the characteristics of territory identified in Chapter Two, especially with regard to the significance of 'possession' which lies at the heart of what we mean both by territory and the law of trespass to land.

A theoretical perspective of cultural evolution is developed in Chapter Four which draws inspiration from

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<sup>41</sup> See Irwin Silverman, "Nonreactive Methods and the Law", *American Psychologist*, July 1975, pp. 764-769. In discussing some of the ambiguities in the law Silverman writes: "Laws are enacted in response to existent conditions of society, and I doubt that the Common Law regarding trespass, harassment, disorderly conduct, or criminal negligence anticipated the coming of psychologists with a naturalistic research bent." p. 769.

Darwin. The work of the sociobiologists, especially the recent work on the evolutionary problem of altruism, is seen to be helpful in the development of this perspective. The arguments, however, are by no means primarily biological, on the contrary they are greatly influenced by the pre-eminent work of Ludwig Wittgenstein on meaning. Wittgenstein's later work is interpreted in such a way that it is not thought to be inconsistent with an evolutionary point of view. Indeed, it is suggested that not only is it compatible with such a viewpoint, but that the two together are mutually reinforcing.

The framework that emerges is used to analyse the law of trespass to land in Chapters Five and Six. These chapters revolve around the themes of stability and tension, respectively. In the former the emphasis is on the problem of a certain and predictable environment, and the analysis focuses on cognition and hazards. The latter focuses on two fundamental tensions which seem to pervade all cultures. The first of these is the tension that inevitably arises in human interaction as a result of separately identified interests. The second is the tension that accompanies change.

Finally, in Chapter Seven, within the context of the spatial framework provided by territories, the compatibility of the evolutionary and semiotic approaches, both with the



study of culture, and with understanding the fact and significance of man-made geographic variations, is discussed. The study concludes that finding solutions to the complex questions raised by the geographic focus on location, requires the adoption of a temporal perspective. The evolutionary paradigm not only incorporates such a perspective, but also goes a long way towards providing a theory of landscape.<sup>42</sup>

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<sup>42</sup>The evolution of culture is implicit throughout this study. Such a perspective recognises that all thought is a selected combination and recombination of existing elements, together with an inevitable degree of variation. Therefore many of the ideas that are commented on will have a long history. If this is not always referred to, it is because the emphasis is on the utility of ideas rather than their origins.

## CHAPTER II

NATURE AND GEOGRAPHICAL SIGNIFICANCE  
OF HUMAN TERRITORYLiterature

Writing in 1971, Jean Gottmann made the statement that "amazingly little has been published about the concept of territory, although much speech, ink, and blood have been spilled over territorial disputes."<sup>1</sup> Although he was referring primarily to national territories, his words are true of the notion of territory in its broadest sense.

The geographic record in this regard is a dismal one, the more so when one fully recognises that territory is a key geographic concept because it involves accessibility and thus location.<sup>2</sup> Not only has there been very little written on the concept of territory by geographers, but also what has been written has usually been derivative, in the sense that it has applied existing ideas of territory to

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<sup>1</sup>Jean Gottman, *The Significance of Territory*, (Charlottesville: University Press of Virginia, 1973) p. ix.

<sup>2</sup>In the words of Thomas Saarinen: "Territoriality appears to be a key concept for geographic study of environmental behavior." Thomas F. Saarinen, "Perception of Environment", *Annals of the Association of American Geographers*, Vol. 59, No. 1, (Washington, D.C.: Association of American Geographers, 1969), p. 12.

geographic problems rather than developing geographic understanding of the concept itself or assessing its impact on current geographic theory.<sup>3</sup> Apart from Gottman's book on *The Significance of Territory*, which is confined to the national scale, the most comprehensive general commentary on territoriality by a geographer is that of Edward Soja in a 1971 A.A.G. Resource Paper under the title of "The Political Organisation of Space."<sup>4</sup> Soja does not incorporate new material but rather attempts to transfer conclusions about animals into the realm of political geography. This is a suggestive, but not effective, argument.<sup>5</sup> The review

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<sup>3</sup> See for example: Edward W. Soja, "The Political Organisation of Space", *Commission on College Geography Resource Paper No. 8*, (Washington, D.C.: Association of American Geographers, 1971); G.B. Norcliffe, "Territorial Influences in Urban Political Space: A Study of Perception in Kitchener-Waterloo", *The Canadian Geographer*, XVIII, 4, 1974; David Ley and Roman Cybriwsky, "Urban Graffiti as Territorial Markers," *Annals*, Association of American Geographers, Vol. 64, 4, 1974; Emanuel Maier, "Torah as Movable Territory," *Annals*, Association of American Geographers, Vol. 65, 1, 1975 (strong criticism of this article was made in a Commentary in the *Annals* of March 1976); John C. Everitt, "Community and Propinquity in a City", *Annals*, Association of American Geographers, Vol. 66, 1, 1976.

<sup>4</sup> Gottman, *Significance of Territory*, p. ix; Soja, "Political Organisation of Space."

<sup>5</sup> Gottman, referring specifically to Soja, writes (p. 1): "Some geographers have tried to transfer, somewhat hastily, conclusions about animals into the realm of political geography."

of the literature is also limited, so that it is difficult to see where the paper adds anything of substance to existing knowledge or alternatively extends the geographic conception of territory, other than to the extent that it draws needed attention to a most important geographic idea. Surprisingly, in general, the material on territoriality in works on political geography is weak and almost non-existent.<sup>6</sup>

At the smaller urban scale of territory, Douglas Porteous' book *Environment and Behavior: Planning and Living Life*, published in 1977, is an interesting and useful book by a geographer.<sup>7</sup> But here again the material

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<sup>6</sup> See for example: Lewis M. Alexander, *World Political Geography*, Second Edition, (Chicago: Rand McNally & Co., 1963); Saul B. Cohen, *Geography and Politics in a World Context*, (New York: Random House, 1963); W.A. Douglas Jackson, *Politics and Geographic Relationships*, (Englewood Cliffs, N.J.: Prentice-Hall, 1964); Harm J. DeBlif, *Contemporary Political Geography*, (London: John Wiley & Sons, Inc., 1967); G.R. Crone, *Background to Political Geography*, (London: Museum Press Limited, 1967); Charles A. Fisher, ed., *Essays in Political Geography*, (London: Methuen & Co. Ltd., 1968); J.R.V. Prescott, *The Geography of State Politics*, (London: Hutchinson & Co. (Publishers) Ltd., 1968); Roger E. Kasperson and Julian V. Minghi, eds., *The Structure of Political Geography*, (Chicago: Aldine Publishing Company, 1969) p. 71: They state that territoriality is a fundamental notion in political geography and they define it as the "propensity to possess, occupy, and defend a particular portion of space." But although they give the concept of territory more attention than the other works cited, it is still inadequate in terms of their own assessment of its importance.

on territory is no more than a short and lively presentation of existing ideas, and it adds little to the discussion of territory in Irwin Altman's *The Environment and Social Behavior*, published earlier in 1975.<sup>8</sup> In short, while any geographic material which directs our attention to the concept of territory is welcome because of the very paucity of such material, it has so far failed to increase substantially the geographer's knowledge and understanding of territory, or to generate an application of the concept and a theoretical perspective that are useful geographically. It is unlikely that these aims will be achieved overnight, and in any case real progress will require much more concerted geographic attention to the topic of territory than hitherto.

Of the literature on territory outside of geography itself, that dealing with animal territory is substantial, but it does not concern us directly here. The works dealing with human territory, or which are closely related to it, can be conveniently divided into three major groups. Firstly, there are those that have to do with the nation-

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<sup>7</sup> J. Douglas Porteous, *Environment and Behavior: Planning and Everyday Urban Life*, (Reading, Massachusetts: Addison-Wesley, 1977).

<sup>8</sup> Irwin Altman, *The Environment and Social Behavior*, (Monterey, California: Brooks-Cole, 1975).

state and the notion of sovereignty. Although seldom referring specifically to detailed ideas of territoriality, this literature is concerned with remarkably analogous concepts and forms of behaviour. It is also similar to the interest of the specialist in political geography in which "territory appears as a material, spatial notion establishing essential links between politics, people, and the natural setting."<sup>9</sup> A great deal of energy has been exercised in the field of political philosophy over the problem of what constitutes sovereignty. More practical concerns of political science and international relations have had to do with boundary disputes and the control of resources within a national territory.

The value of the term territory for political and legal use at this large scale is "to designate a portion of geographical space under the jurisdiction of certain people" and coincidentally to draw attention to the separation from other territories under different jurisdictions.<sup>10</sup> In

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<sup>9</sup>Gottman, *Significance of Territory*, p. ix; Soja, "Political Organisation of Space", also maintains that territoriality provides an essential link between society and the space it occupies, primarily through its impact on human interaction and the development of group spatial identities.

<sup>10</sup>Gottman, *Significance of Territory*, p. 5.

Gottman's opinion the significance of territory at this level has evolved considerably in the past, due in part to technological progress which "freed people from their tight bonds to the nourishing soil and gradually increased the mobility of people and goods."<sup>11</sup> Paradoxically he sees this loosening of the bond between people and land as increasing the significance of the partitioning of space, that is of territory. As he correctly points out "territorial sovereignty became an essential expression of the law, coinciding with effective jurisdiction."<sup>12</sup> Authority, in other words, came to depend more and more on spatial control as opposed to the paramount allegiance to a personal sovereign. It is interesting to take these observations of Gottman a little further, and to see the evolution of the nation-state with its territorial boundaries as arising in response to a rapid reduction in the friction of distance, and the concomitant desire for man-made boundaries to replace the crumbling barriers of both distance and terrain between cultural and racial groups. There is a wealth of material in the literature of international law, interna-

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<sup>11</sup> Ibid., p. 3.

<sup>12</sup> Ibid., p. 4; Ian Brownlie, *Principles of Public International Law*, (Oxford, 1966), states (p. 107): "Ultimately, territory cannot be distinguished from jurisdiction for certain purposes". This is true at the level of the state, but it can be distinguished at other levels, as will be argued.

tional relations, political philosophy, and political science that has to do with territory at this largest of all scales. It parallels in many respects the discussion that will follow, but, interesting as it is, it is beyond the scope of this work.

A second broad category of territorial literature, and perhaps the best known, revolves around a major controversy as to whether human territorial behaviour is largely innate or 'instinctive', or whether on the contrary it is primarily learned. This reflects an ongoing and pervasive controversy in the social sciences as to the respective explanatory merits of nature and nurture. The weight of common sense and current knowledge suggests that human territorial behaviour is a result of both our biological and cultural make-ups working together. But the controversy is an important one in so far as territory is linked to aggression in the literature (which is not unusual), for the implications for a peaceful world are clearly very different if on the one hand we find that aggression is 'natural' and on the other hand if we find that it is learned and thus cultural. This problem has spawned an interesting and valuable, although inconclusive, literature in which the names of Ardrey and Lorenz on the one side and Montagu on the other, first come to mind.<sup>13</sup> Contrary to such arguments, however, the better view is that territory



and its associated behaviour is a mechanism for the preservation of order and reduction of conflict rather than a cause of it. As Sommer argues, territoriality and dominance behaviour are both processes that limit aggression "because an individual either refrains from going where he is likely to be involved in disputes or ... engage[s] in ritualised dominance-subordination behavior rather than in actual combat."<sup>14</sup> He quotes approvingly Victor Hugo's declaration, "Every man ~~a~~ property owner, no one a master."<sup>15</sup> This belief that territorial behaviour reduces conflict should not be misunderstood as necessarily endorsing the institution of private property, which was one of the objectives of Ardrey, as the sub-title to his book, *The Territorial Imperative: a Personal Inquiry into the Animal Origins of Property and Nations*, indicates. In fact the

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<sup>13</sup> Robert Ardrey, *African Genesis*, (London: Collins, 1962); *The Territorial Imperative*, (New York: Atheneum, 1966); *The Social Contract*, (New York: Atheneum, 1970); *The Hunting Hypothesis*, (New York: Atheneum, 1976); Konrad Lorenz, *On Aggression*, (London: Methuen, 1967, first published in Vienna in 1963); Ashley Montagu, *The Nature of Human Aggression*, (New York: Oxford University Press, 1976). See also for an attack on Ardrey's position, Alexander Alland, *The Human Imperative*, (New York: Columbia University, 1972).

<sup>14</sup> Robert Sommer, *Personal Space: The Behavioral Basis of Design*, (Englewood Cliffs, N.J.: Prentice-Hall, 1969), p. 12. However, Porteous, in *Environment and Behavior*, continues to link territoriality with aggression.

<sup>15</sup> *Ibid.*, p. 12.

point will be made shortly that property is not at all the same thing as territory.

Ardrey accepts the connection between biological and cultural adaptation, but for him biological laws give rise directly to human laws. For example, he comments on the extraordinary legal support among predominantly Anglo-Saxon cultures for the sanctity of the home. "While cultures may differ, the sanctity of the home has a widespread acceptance, and among predominantly Anglo-Saxon cultures has legal support verging on the shocking."<sup>16</sup> He describes the English case of *R. v. Hussey* in 1924 as follows:<sup>17</sup>

Mr. Hussey, with his family, rented a room from a landlady named Mrs. West. She claimed that she gave him oral notice to leave. He refused, claiming that it was not a valid notice, and barricaded his door. Mrs. West and her friends armed themselves with hammer, chisel and poker, and succeeded in breaking a panel of the door. He fired, wounding her friend, a Mrs. Gould. He was convicted at the Old Bailey of "unlawful wounding". He appealed. He was set free. The decision rested on an old tradition in English law that in self-defense you have no right to use force unless you retreat, but "that in defending his home he need not retreat..., for that would be giving up his house to his adversary."

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<sup>16</sup> Ardrey, *Hunting Hypothesis*, p. 126.

<sup>17</sup> *Ibid.*, p. 126.

As additional support ~~he~~ cites a New York case in 1914 in which Benjamin Cardozo wrote the opinion of acquittal, including the following:<sup>18</sup>

It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways a fugitive from his own home ... Flight is for sanctuary and shelter if not sanctuary is in the home.

Ardrey quotes approvingly the conclusion of Dean Peter Brett of the University of Melbourne's law school that there is little doubt that the legal conclusions rested simply on our subconscious acceptance of the biological animal law known as the territorial imperative.

There are other extracts from the law that are not cited by Ardrey but which could have been referred to. For instance, in Semayne's Case, as early as 1604, the proposition was laid down that:<sup>19</sup>

the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose ...

This is the basis of the classic passage by the Earl of

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<sup>18</sup> Ibid., p. 127.

<sup>19</sup> Semayne's Case (1604), 5 Co. Rep. 91a, 77 E.R. 194.

Chatham in the time of George III:<sup>20</sup>

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter - the rain may enter - but the King of England cannot enter - all his force dare not cross the threshold of the ruined tenement.

It is tempting to see from all this the direct biological and behavioural connection that Ardrey points to. Cultural geographers, however, are well poised to examine more critically such an implicit claim to historical and spatial similarities, and to re-emphasise the variety of human cultures and the plasticity of human territorial behaviour. Some tentative support for such a position can be found in Edward Hall's statement about his cultural work with Arab subjects that, "to date, I have been unable to discover anything even remotely resembling our own legal concept of trespass."<sup>21</sup> My own experience of the Samoan culture leads me to believe that its conventional territorial behaviour would not fit easily, if at all, into the trespass conceptions of western culture. Indeed property divisions in Apia, the capital of Western Samoa, are known as 'European land' and distinguished as such from the more traditional Samoan

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<sup>20</sup>Quoted in *Southam v. Smout* [1963] 3 All E.R. 104, p. 107.

<sup>21</sup>Edward T. Hall, *The Hidden Dimension*, (New York: Doubleday, 1969), p. 163.

'territories'. In such cases, as Gottman pointed out, authority and jurisdiction are identified with personal relationships rather than with territories, a division that is in some ways suggestive of Maine's distinction between status and contract.<sup>22</sup>

Nonetheless we cannot dismiss too easily the biological explanation of territorial behaviour. One of the most noteworthy of recent developments in this general area occurred with the publication in 1975 of Edward Wilson's *Sociobiology: The New Synthesis*.<sup>23</sup> This has been of such outstanding significance as to have been extensively reviewed and commented on and to have sparked an intense and at times acrimonious debate.<sup>24</sup> According to Wilson the role of sociobiology is to place the social sciences within a biological framework, and to construct and test theories

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<sup>22</sup> Henry Sumner Maine, *Ancient Law*, (Boston: Beacon Press, 1963; first published in 1861). Maine distinguished the law in a kin organised society from that of a territorially organised society on the basis of a progression from a concern with status to that of contract.

<sup>23</sup> Edward O. Wilson, *Sociobiology: The New Synthesis*, (Cambridge, Mass: Harvard University, 1975).

<sup>24</sup> See for example the attack in the *New York Review of Books*, November 1975, by a specially formed group of the 'Science for the People' organisation based in Boston, and the similar doctrinal attack in the *New Scientist*, Vol. 70, May 1976, by the 'Science as Ideology Group of the British Society for Social Responsibility in Science.'

about the underlying hereditary basis of social behaviour. This is not unlike the structuralism of Chomsky and Levi-Strauss. Wilson draws attention to the challenging argument in current sociobiology that the underlying emotion of altruism in human behaviour is the consequence of genetic endowment.<sup>25</sup> The significance of these developments in sociobiology will be considered later, but it is important at this stage to point out that Wilson himself readily recognises the primary role of culture when he writes:<sup>26</sup>

An essential change of gear in the emergence of man of course, was when cultural evolution became more important than biological evolution, a change which occurred perhaps about 100,000 years ago. As a result it seems clear that human social evolution is more cultural than genetic.

Although our knowledge is at present very inconclusive it seems relatively safe to say, in the light of such authorities as Wilson, that the principal way that man's behavioural adaptation occurs is through culture. Such

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<sup>25</sup> Inspired by egalitarian principles, P'etr Kropotkin (1842-1921) had long before opposed Darwinian notions of "struggle" and "survival of the fittest" with the conception of "mutual aid". His principal thesis was that sociability is as much a law of nature as conflict, and that the fittest were those most adept at cooperation.

<sup>26</sup> Edward Wilson, "Sociobiology: A New Approach to Understanding the Basis of Human Nature," *New Scientist*, Vol 70, May 1976, p. 343.

culture may be rooted in biology, but it also frees man from strictly genetic controls over his behaviour, and indeed in order to survive at all in a rapidly changing world human beings must adjust to the complex environments in which they find themselves, largely through culture. We can conclude then, that in researching human territorial behaviour it is time to move beyond the simpler biological analogies of animal territoriality, as espoused by Ardrey and others, in the same way that geographers have already moved beyond simple plant analogies in human ecology.

A closely related but nevertheless subsidiary controversy to the major one surrounding the relative merits of natural and cultural explanations of territory, dominance, and aggression, has to do with the similarities and differences between men and animals. The perspective of this study is that the emphasis on these differences is unhelpful in understanding and explaining human behaviour. That does not mean to say, of course, that the extraordinary qualitative difference between animal behaviour and human culture is not readily recognised, and accorded its due wonderment and awe. What is at issue is the best approach to the explanation of all forms of behaviour, and it is felt here that this explanation will be derived from a process that is common in some respects to both natural and cultural forms of behaviour, and which can be simply described as 'evolutionary' in its

narrower sense. Such a perspective obviates the need to discuss, in detail, the relative merits of the two sides of this controversy in the literature relating to territory, for it incorporates both views into an evolutionary framework. Man's evolution, in the words of Alex Comfort, can be usefully thought of as a logical three-tier sequence, each tier faster because *less random* than the one before. "His evolution, if we start from scratch and hot gases, was first physical, then organic, then cultural."<sup>27</sup>

The difficulty of reconciling animal and human behaviour, however, cannot be disposed of too easily for it pervades our thinking. Indeed it becomes a central problem in defining culture itself. It has been said, for example, that, "it is essential to the concept of culture that instincts, innate reflexes, and any other biologically inherited forms of behaviour be ruled out".<sup>28</sup> One writer characterised such exclusiveness as the "ideological function of culture" which was "to preserve traditional Christian-Cartesian views of human uniqueness".<sup>29</sup> Indeed a

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<sup>27</sup>Alex Comfort, *Nature and Human Nature*, (London: Penguin Books, 1966), p. 13. This is very similar to the hierarchy of phenomena identified by Alfred Kroeber. The controversy surrounding this was commented on in Chapter One.

<sup>28</sup>E. Adamson Hoebel, *The Law of Primitive Man*, (New York: Atheneum, 1968; first published in 1954).



feature of early definitions of culture was the attempt to distinguish human and animal behaviour. It was said that human behaviour is learned rather than genetically transmitted, but the obvious fact that animal behaviour could also be learned required a modification that took into account the method of transmission of learning. Thus a common definition of culture during the period from 1920-1950 was "learned behavior, *socially* transmitted, and the concrete products of such behavior."<sup>30</sup> But even this refinement does not dispose of the problem, for it is highly questionable whether a rigid distinction can be maintained on this basis at all. Edward Wilson argues persuasively that "culture, aside from its involvement with language, which is truly unique, differs from animal tradition only in degree."<sup>31</sup> He quotes one particularly remarkable series of events witnessed by biologists of the Japanese Monkey Centre in which a troop of monkeys learned to wash potatoes and to separate wheat from sand by throwing it into the sea so that the grains would float.<sup>32</sup> Even the uniqueness of

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<sup>29</sup> John H. Moore, "The Culture Concept as Ideology", *American Ethnologist*, 1, 1974, p. 537.

<sup>30</sup> Gamst and Norbeck, *Ideas of Culture*, p. 6, italics added.

<sup>31</sup> Wilson, *Sociobiology: The New Synthesis*, p. 168.

<sup>32</sup> *Ibid.*, p. 170. See also "The Social Order of Japanese Macaques", *Scientific American*, 235, 4, 1976, pp. 96-107.

language itself, the supposed distinguishing characteristic of humans *par excellence*, is disputable, despite Wilson's categorical statement above to the contrary; especially if we include in the idea of language less clearly patterned, nonverbal codes. By combining even a few 'linguistic' signs with an infinite number of contexts it is quite conceivable that some animals use 'languages' creatively.<sup>33</sup> Recent work with chimpanzees at the University of Oklahoma has shown that they have the capacity to use symbols.<sup>34</sup> At the very least these arguments blur the distinction between human and animal behaviour, and they suggest that we proceed with caution and avoid placing too much reliance on claims of uniqueness.

Furthermore, how is one *in practice* to distinguish between biological and social inheritances in patterns of human behaviour such as territoriality? The rise of sociobiology has shown how acute this problem is. It now seems quite possible that general biological principles govern human social behaviour and social organisation. As Wilson says, "socialisation ... is not the cause of social behavior

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<sup>33</sup> Wilson, *Sociobiology: The New Synthesis*, p. 192. Beatriz Lavandera, "Context, Meaning, and the Chomskyan Notion of Creativity", *American Anthropologist*, 79, 1977, p. 641.

<sup>34</sup> See Eugene Linden, *Apes, Men, and Language*, (New York: Penguin, 1976).

in the ultimate genetic sense. Rather it is a set of devices by which social life can be personalised and genetic individual fitness enhanced in a social context."<sup>35</sup>

The difference, therefore, between animal and human behaviour is more one of degree than kind and it no longer seems helpful to expend energy defining culture in terms of either its uniqueness to man or in terms of its separation from biologically inherited forms of behaviour. The concept of culture, therefore, has to allow for both a limited application to animal behaviour and for the genetic capacities and inclinations which, if the sociobiologists are right, may be significant determinants of what we call cultural behaviour. At the same time, the geographer's interest in the concept of culture is still likely to remain focused on spatial variations of behaviour. What this all means, therefore, in terms of territoriality, is that if we are to have a fuller understanding of its existence and expression we must look to both the evolutionary strategies of nature, which result from blind variation and selective environmental pressures, and the adaptive strategies of man, which result in part from conscious variation.

A third category of writings deals with territory at

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<sup>35</sup>Wilson, *Sociobiology: The New Synthesis*, p. 382.

a relatively small scale and focuses on human behaviour in cultural, usually urban, settings.<sup>36</sup> Much of this work is concerned with personal territories at a very small scale indeed. The best current overview of this literature, and the work which most closely approaches the concerns of this study, is Irwin Altman's, *The Environment and Social Behavior*, published in 1975.<sup>37</sup> This book also has the merit of a very extensive list of references. One of the main characteristics of this literature is that territory is seen as a medium of communication. Thus E.T. Hall gives territoriality a prominent place among the ten primary message systems which he regards as vital modes of human communication.<sup>38</sup>

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<sup>36</sup> For example, Edward T. Hall, *Hidden Dimension*; Robert Sommer, *Personal Space*; Albert E. Scheflen, *Human Territories: How We Behave in Spacetime*, (Englewood Cliffs, N.J.: Prentice-Hall, 1976); Norman Ashcraft and Albert E. Scheflen, *People Space: The Making and Breaking of Human Boundaries*, (New York: Anchor, 1976); J. Douglas Porteous, *Environment and Behavior*; Thomas F. Saarinen, *Environmental Planning: Perception and Behavior*, (Boston: Houghton Mifflin, 1976).

<sup>37</sup> Altman, *Environment and Social Behavior*.

<sup>38</sup> Edward T. Hall, *Silent Language*, (New York: Fawcett, 1959).

### Characteristics of Human Territoriality

Animal territoriality is a well-established idea, but human territoriality less so. For one thing we are reluctant to slide too easily from animal to human behaviour, and for another it is readily apparent that human territorial behaviour is a very much more complex process than animal behaviour, and one that changes with time and circumstances. Not the least of these complexities is the great variety of scales of human territory and their overlapping nature, ranging as they do from a seat on a bus to a nation-state. Related to this difficulty is the problem inherent in the wide variation in numbers of people bonded to a particular territory, extending as it does from the individual, through a community, to the population of a state. As if all this does not deter us sufficiently the functions that human territories serve seem to be, in contrast with those of other animals, extremely complex and often very subtle.

Yet despite these obvious dissimilarities there are a number of themes common to both animal and human territoriality in the various definitions, as is shown in Table 2. Firstly, and most obviously, there are repeated references to places or geographical areas. Secondly it is invariably implied and often stated explicitly that these geographic areas are delimited in some way. Thirdly, these

Table 2

Definitions of TerritorialityAnimal Definitions

Burt (1943): Territory is the protective part of the home range or area around the home site over which the animal normally travels.

Hediger (1950, 1961): Territories are geographical areas where an animal lives and from [sic] which it prevents others of the same species from entering. Territorial areas are used for many functions, such as feeding, mating, and rearing of the young. They are often demarcated by optical, acoustical, and olfactory means. Thus they are areas that are rendered personally distinctive and that are defended against encroachment.

Carpenter (1958): Territoriality is conceptualized as a high-order, complex behavioral system expressed in spatial-temporal terms. It involves individuals or groups defending an area and ranges from preventive quasi-aggressive responses to actual fighting. It occurs in the service of some 30 functions including proper spacing of a population, breeding control, reduction of sexual fighting, security, and defense.

McBride (1964): Territories are fixed geographical areas that are maintained and defended against intrusion by other members of the same species and are important in mating, feeding, and nesting behavior. They may be permanent or seasonal and they may change in size.

Human Definitions

Stea (1965): Territorial behavior reflects the desire to possess and occupy portions of space and, when necessary, to defend them against intrusion by others.

Sommer (1966): A territory is an area controlled by a person, family, or other face-to-face collectivity. Control is reflected in actual or potential possession rather than evidence of physical combat or aggression - at least at the human level.

Pastalan (1970): A territory is a delimited space that a person or group uses and defends as an exclusive preserve. It involves psychological identification with a place, symbolized by attitudes of possessiveness and arrangements of objects in the area.

Sommer (1969), Sommer and Becker (1969), Becker (1973), and

Becker and Mayo (1971): Territories are geographical areas that are personalized or marked in some way and that are defended from encroachment.

Goffman (1963): Territories are areas controlled on the basis of ownership and exclusiveness of use - for example, "This is mine," and "You keep off."

Lyman and Scott (1967): Territoriality involves the attempt to control space. Territories can be public, home, interactional, and bodily. Encroachment can take the form of violation, invasion, or contamination, and defensive reactions can involve turf defense, insulation, or linguistic collusion.

Altman and Haythorn (1967), Altman, Taylor, and Wheeler (1971), and Sundstrom and Altman (1974): Territoriality involves the mutually exclusive use of areas and objects by persons or groups.

Altman (1975): Territorial behavior is a self/other boundary/regulation mechanism that involves personalization of or marking of a place or object and communication that it is "owned" by a person or group. Personalization and ownership are designed to regulate social interaction and to help satisfy various social and physical motives. Defense responses may sometimes occur when territorial boundaries are violated.

Source: Irwin Altman, *The Environment and Social Behavior*, 1975. Altman's own working definition has been added to the original table.

areas are controlled, possessed, or 'owned'. Fourthly there are consistent references to the protection or defence of a territory. This latter quality implies an exclusive use of territory.

For the purposes of this study human territory will be defined as a delimited geographical area that a person, group, or society, possesses, uses, and defends, and to which access is regulated. Territoriality is the behaviour which is characteristic of territories. The key words derived from the definition are possession, boundaries, and defence. Their key nature is supported by Hediger's definition of territory as "an area which is first rendered distinctive by its owner in a particular way and, secondly, is defended by the owner."<sup>39</sup> Boundary markers of some kind and defensive behaviour are in fact the two most potent indexes of territory. The marking of boundaries by both animals and man is a primary method by which territories are communicated. Where no marker is laid territorial areas may be delimited by the display activities of the occupant. In the case of human territories boundary markers are not of consistent types and sometimes seem to be absent altogether. Yet the effectiveness of the markers of human territories,

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<sup>39</sup> See Heini Hediger, *Wild Animals in Captivity*, (London: Butterworth, 1950).



whether conventional boundary expressions on the landscape or instead more subtle delimitations, is attested to by the infrequency of territorial intrusions in everyday life. This is very necessary, for where there are ambiguities in the coding of territories disputes are likely to occur.

The single most effective test of a territorial situation is an intrusion, for this will trigger a defense, a behaviour which is likely to get more pronounced the more the intruder penetrates to the core of the territory. The immediate purpose of this defense is to retain possession of an area, that is to say to preserve control over its use. The rationale behind this is probably rooted in the doctrines of Neo-Darwinian evolution. In any case the benefits to the individual (or self-serving gene) of regulating access to geographic space, of allowing into that space what the individual determines is good and excluding what it determines is bad, has a very obvious beneficial function. Indeed we can think of the 'packing' of geographic landscapes as based on the accumulation or maintenance of 'goods' and the exclusion or extinction of 'bads'. The test of territoriality, then, is defense, and the objective of territorial possession is exclusion. As to what constitutes possession itself we can do no better than look at the cultural interpretation of this epitomised in the

Common Law, and this will be dealt with in the following chapter.

One of the simplest and most useful categorisations of territory that has been developed is that dealing with the distinction between private and public territory.

Altman, for example, following a sociological distinction, describes three types of territories: primary, secondary, and public. Primary territories are relatively exclusive and permanent, and central to our everyday lives, such as a home. Secondary territories are less so, although there is usually some feeling of in-group exclusivity, as in neighbourhood bars, gang turfs, and private clubs. Public territories are characterised by temporary occupation.

Lyman and Scott (1967) described public territories as "those areas where the individual has freedom of access, but not necessarily of action."<sup>40</sup> They include such places as playgrounds, beaches and parks. The distinction between private and public places is usually unambiguous and it is also one recognised in the Common Law.<sup>41</sup> Secondary territories, however, are by their very definition transitional and thus relatively ambiguous. A private car and a public

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<sup>40</sup> S.M. Lyman and M.B. Scott, "Territoriality: A Neglected Sociological Dimension," *Social Problems*, 15, 1967, p. 237.

<sup>41</sup> See the discussion of this in Chapter Five.

bus are easily recognised for what they are, but a taxi less so. A decision in the Supreme Court of Canada in February, 1978, makes this point quite clear.<sup>42</sup> A police officer's unmarked car is not a public place the Court said, in quashing the conviction of a Vancouver woman charged with soliciting for prostitution. Justice Wishart Spence, writing the 9-to-0 decision, said the police car was a private place over which the officer had sole control. Therefore, the appellant could not be convicted of soliciting in a public place. More will be said on the categories of public and private space in Chapter Five.

Unfortunately there are relatively few other key words or categorisations in the literature that merit extended discussion here. This is partly the result of the paucity of both the general literature on human territorial behaviour and specific empirical research. And this in spite of the fact that a useful beginning was made in the sociology of the 1920's and 1930's in the descriptive territorial analyses of urban gangs, and street, and neighbourhood groups.<sup>43</sup> Although these early analyses set the

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<sup>42</sup> *Debra Hutt v. The Queen*, (February 7, 1978), Supreme Court of Canada.

<sup>43</sup> R.E. Park, E.W. Burgess, and R.D. McKenzie, *The City, Chicago*, (Chicago: University of Chicago, 1925); F.M. Thrasher, *The Gang*, (Chicago: University of Chicago, 1927);

stage and demonstrated the potential value of the concept of territory they did not develop a theoretical framework for its use which could have spurred further study. The result has been that "work on territorial behavior lay fallow until the 1960's" and the few dozen empirical research studies that there are on human territoriality have been largely done in the past decade or so.<sup>44</sup> This small volume of research may well be related to the great difficulty that there is in creating laboratory or simulation situations of territoriality.<sup>45</sup> For one thing territories usually take a relatively long time to develop and for another they cannot be properly studied when divorced from their normal contexts. Altman suggests that this accounts for the infrequency of studies occurring between the descriptive observations of early sociologists and the research of the last ten years or so. He finds support for this view in the argument that researchers during this time were "very laboratory oriented and [operated] out of a philosophical system holding that scientific advances would best be made if phenomena were studied in the controlled and

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H.W. Zorbaugh, *The Gold Coast and the Slums*, (Chicago: University of Chicago, 1929).

<sup>44</sup>Altman, *Environment and Social Behavior*, p. 126.

<sup>45</sup>Ibid., p. 128.

rigorous setting of laboratories."<sup>46</sup> Researchers of today, in his opinion, are more tolerant of alternative methodological strategies.

### Evolutionary Basis

Animal territoriality is by now a well-established behavioural phenomenon. Many animals, "including nearly all vertebrates and a large number of the behaviorally most advanced invertebrates, conduct their lives according to precise rules of land tenure, spacing, and dominance."<sup>47</sup> In what has been described as a perceptive review of the evidence, Edwin Wilmsen (1973) showed that human hunter-gatherer societies follow very similar basic strategies to other mammalian species.<sup>48</sup> In the case of animals other than man, it has been authoritatively said that these basic rules of territorial behaviour "are enabling devices that raise personal or inclusive genetic fitness."<sup>49</sup> It is not necessary to decide here whether such a conclusion can be

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<sup>46</sup> Ibid., p. 128.

<sup>47</sup> Wilson, *Sociobiology: The New Synthesis*, p. 256.

<sup>48</sup> E.N. Wilmsen, "Interaction, Spacing Behavior, and the Organisation of Hunting Bands," *Journal of Anthropological Research*, 29, 1, 1973, pp. 1-31. Quoted in Wilson, *Sociobiology: The New Synthesis*, p. 565.

<sup>49</sup> Wilson, *Sociobiology: The New Synthesis*, p. 256.

properly extended to man, but the parallel is unquestionably suggestive of this. Beyond that there is no conclusive empirical evidence one way or the other that human territoriality has been genetically selected for and the issue must remain for the time being not proven.

There is, however, a most satisfying and persuasive theoretical explanation of the evolutionary basis of territoriality. An account of this has been given by Richard Dawkins and the following synopsis draws on his work.<sup>50</sup> Dawkins' arguments revolve around the 'language' of single genes, but for convenience he treats individuals as selfish machines programmed to do whatever is best for their genes as a whole. Natural selection, according to Dawkins, favours those genes which control their survival machines in such a way that they make the best use of their environment, including the best use of other survival machines. This requires, in effect a complex, if unconscious, cost-benefit calculation. J. Maynard Smith, in collaboration with G.R. Price and G.A. Parker, have used Game Theory to express these calculations.<sup>51</sup> Maynard

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<sup>50</sup> Richard Dawkins, *The Selfish Gene*, (New York: Oxford University, 1976). See especially Chapter 5. This is a fascinating and seminal book. The account that follows is drawn largely from Dawkins but because of its conciseness cannot possibly do justice to his argument. The original book and its appropriate bibliography should be referred to for a more detailed explanation.

Smith introduced the intriguing concept of an *evolutionary stable strategy*. A 'strategy' is a pre-programmed behavioural policy and the example Dawkins gives is: "Attack opponent; if he flees pursue him; if he retaliates run away." An evolutionary stable strategy or ESS is defined as a strategy which, if most members of a population adopt it, cannot be bettered by an alternative strategy and this is demonstrated mathematically. In other words once it has evolved it cannot be bettered by any deviant individual.

Now if we apply this idea to territoriality we have the following subtle and elegant explanation. Let us first assume that our survival machines are rivals, competing for a mate, or food, or suchlike. In any dispute it will usually be the case that one contestant arrives at the place of contest before the other. We will call them 'resident' and 'intruder' respectively. Let us assume to begin with that there is no practical advantage attached

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<sup>51</sup>J. Maynard Smith, "Game, Theory and the Evolution of Fighting," in J. Maynard Smith, *On Evaluation*, (Edinburgh University, 1972); "The Theory of Games and the Evolution of Animal Conflict," *Journal of Theoretical Biology*, 47, 1974, p. 209-221; *The Theory of Evolution*, (London: Penguin, 1975); "Sexual Selection and the Handicap Principle," *Journal of Theoretical Biology*, 57, 1976, p. 239-242; "Evolution and the Theory of Games," *American Scientist*, 64, 1976, p. 41-45; J. Maynard Smith and G.A. Parker, "The Logic of Asymmetric Contests," *Animal Behavior*, 24, 1976, p. 159-175; J. Maynard Smith and G. R. Price, "The Logic of Animal Conflicts," *Nature*, 246, 1973, p. 15-18.

to being either a resident or an intruder. Then an ESS would evolve based on the asymmetry itself. This could be 'if you are the resident, attack; if you are the intruder, retreat,' or it could just as easily be the alternative strategy. As soon as a majority of individuals is playing one of these two conditional strategies, any deviant from it would be penalised. In short each contestant on average, with such a strategy, wins half the disputes and loses half. He will never be injured and will not waste valuable time in fighting. A rebel on the other hand who always attacks and never retreats will win when his rival is an intruder, but will run a grave risk of injury when his opponent is a resident. It can be shown, according to Dawkins, that on average he will have a lower pay-off than individuals who allow disputes to be settled by the arbitrary convention of the ESS. Other strategies by the rebel would come out even worse.

In real life as Dawkins says, truly arbitrary asymmetries of this sort probably do not exist. Territorial residents are likely to have practical advantages over intruders, such as a knowledge of the area. Intruders may also arrive out of breath! An even more fundamental reason is that the reverse strategy, 'intruder wins, resident retreats' would require constant and pointless moving around. It follows that the commonly observed



behaviour in nature of the residential possession of a geographic space and the appearance of 'territorial defence' would be the ESS that would naturally develop.

### Geographic Extent and Significance of Territory

Virtually all geographic space is territorial. Non-territorial space such as the High Seas and Outer Space are neither settled nor as yet greatly differentiated and because of this not normally studied by geographers.<sup>52</sup> Within the territorial space there are sometimes ambiguities with regard to actual possession. As a rule such ambiguities increase away from the core area and find maximum expression on the territorial boundaries.<sup>53</sup> Canada has a problem in this regard along its northern boundary and regular air and naval patrols in this area are designed to ensure a presence, an *animus possidendi*. International Law recognises the importance of effective occupation in

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<sup>52</sup>An interesting and lengthy article by lawyers, which is relevant to geographic interest in the possession and use of the resources of Outer Space, is that by Myres S. McDougal, Harold D. Lasswell, Ivan A. Vlasic, and Joseph C. Smith, "The Enjoyment and Aquisition of Resources in Outer Space", *University of Pennsylvania Law Review*, 111, 5, 1963, p. 521-636.

<sup>53</sup>'No-mans-land' is an example of a formalised and unpossessed zone that is instituted in order to reduce border conflicts between hostile states.

determining the possession of a territory. In recent years Britain landed troops on the small uninhabited island of Rockall off its Western coast, and thus asserted its possession of the island.

The patterns and extent of such territories constantly shift through time largely in response to changing configurations of power. Imperialism at the larger scale, and the accumulation of landed estates by individuals at the smaller scale, have historically represented a diffusion of human power and energy across the landscape. Territories at one scale are nested within those at another, and each may wax and wane in patterns that are independent of the other. Thus private property in Canada is nested within provincial territories, and these again within the national one. Exclusive control accompanies each scale of territory, in the sense that each permits the exclusion of some things and the regulation of access within certain limits. It could therefore be said that the Provinces and private owners of land each have residual sovereignties.

Although shifting through time, such conventional territories are usually relatively permanent. Some territorial behaviour, however, is also associated with temporary territories. These are usually micro-scale, and indeed as a general rule it could be said that the smaller the territory the more temporary it is likely to be.

Classrooms, hotel rooms, and a seat in the bus, are examples of such transient territories. The same evolutionary stable strategy would apply as to territories of longer duration. Although the possession is transient and short-lived, and indeed not usually recognised as amounting to possession in the Common Law, these micro-territories are associated with behavioural characteristics that are similar to the territorial behaviour associated with the larger territories.

The idea of 'jurisdiction' has been linked to the idea of temporary territories. The often quoted paper of Roos, "Jurisdiction: An Ecological Concept", is an example of this.<sup>54</sup> Roos describes the territorial setting on a ship but he finds that not all shipboard spatial behaviour can be dealt with in terms of territoriality and personal space. He uses the term 'jurisdiction' ~~to~~ cover much of this residual behaviour, and argues that jurisdictional, like territorial, behaviour has the social function of helping to order shipboard life. By jurisdiction he means the *temporary defense of space*, generally, as he says, for a specific, instrumental purpose and not because the space

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<sup>54</sup> Philip D. Roos, "Jurisdiction: An Ecological Concept", *Human Relations*, 21, 1968, pp. 75-84.

'belongs' to its defenders.<sup>55</sup>

Although the potential value of the concept of jurisdiction in the analysis of spatial control is considerable, it must be adequately distinguished from the notion of territory. Unfortunately, Roos, while stating that a systematic distinction would be convenient, not only fails to make it but (apart from the addition of the word temporary) effectively identifies one with the other. More than that, his analysis engenders some very striking confusion, as when he uses the term jurisdiction to refer to both temporary territoriality (behaviour) and temporary territory (place). Perhaps, however, the best example of this confusion is his description of a temporary territory (which by his account is also a jurisdiction) as a professor holding "office hours which are regular within a term but vary from term to term." It is not at all easy to see what is meant here, but it seems clear that a professor's office is his territory, an area that he possesses and to which he regulates access, and not a temporary territory such as a seat in a bus. The activity of 'office hours' is merely one of the *uses* to which the office territory is put. And

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<sup>55</sup> He distinguishes another type of jurisdiction, "the defense of some object or commodity which involves at most an instrumental attempt to secure the surrounding space". This distinct usage will not be taken up here.

even if it were a temporary territory there would be no value in describing it as something else, namely a jurisdiction.

Similarly, the janitor does not establish a temporary territory when he comes in to clean an office, as Roos claims. For one thing the janitor does not normally have an *animus possidendi*. What has happened is that the janitor has been given what amounts to a licence to go into the office for the specific purpose of cleaning it. It is the same with the electronic technicians on the ship described by Roos, who must enter the radarmen's territory in order to repair equipment. They do not create a temporary territory in the radar room, but rather have a licence that gives them access for a specific purpose, in the same way that a ticket to a football game or a theatre can be considered a licence, but not as creating an estate in land.<sup>56</sup>

The essence of a licence seems to be that access is granted for a specific purpose by the authority of the person in possession. A jurisdiction on the other hand is essentially a right of access for a specific purpose demanded by a higher authority - a concomitant of the nested

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<sup>56</sup> Common Law trespass to land faces just these sort of problems and clarifies them as will be seen in the next chapter.

set of territories that have already been referred to. Thus the right of a public utility to have a gas meter read on private property at an appropriate time, or the right of a fire-department to put out a fire, or of a policeman to arrest a felon on private property, are jurisdictional rights. They are not, however, territorial rights, that is to say rights of possession. A landlord, for instance, has a jurisdiction over a tenant's suite but he does not have possession of that suite. To give a more homely example, my children's rooms are their territory, and they may grant access to each other or to their friends for specific purposes (they may, as it were, give them a licence), but my wife and I retain a jurisdiction. The difference between these terms, which are potentially useful analytical tools, is by no means always clear-cut, and indeed it invites a more prolonged discussion than is practical here. Some general support for their use can, however, be garnered from the discussion of trespass law in the following chapters.

The preceding discussion has established the widespread extent of territory and its far reaching implications. These implications are particularly significant in geography. Spatial order and the location of things is a function of the accessibility of places, and the accessibility of a place is determined and regulated by its occupant or

occupants. It follows that the concept of territory and the actual practice of territorial behaviour are of fundamental significance in geographic explanation. Hitherto location theory has virtually ignored the implications of territories, despite the obvious competition for, and restrictive control of, space.

Not only is territory an important but neglected notion in economic geography, it is also a key concept in cultural geography. For at the heart of the cultural geographer's interest is spatial and temporal variation on the landscape, and the concept of territory helps to explain this. Historically, spatial variation was primarily a function of *geographic separation* and the accompanying cultural drift, constrained, of course, by local environmental conditions. Thus cultural anthropologists were interested above all in relatively isolated societies, in primitive and faraway peoples, and regional geographers such as Vidal de la Blache were at their best when dealing with rural areas and localised economies.

For anthropologists, particularly, the onslaught of modern civilisation brought with it a sense of urgency, for "even in remote parts of the world ways of life about which nothing was known were vanishing".<sup>57</sup> Similarly, Vidal de la Blache regretted "the dissolution of the

traditional, rural, local, regional pattern of life".<sup>58</sup> Improved forms of transportation and communication, particularly after the Industrial Revolution, brought revolutionary changes in geographic accessibility, bringing us ever closer to McLuhan's "global village". The friction of distance between places was reduced, and ideas and innovations diffused more and more easily across the landscape. Those cultural elements that were now less suited to the changed conditions withdrew in a process of reverse diffusion or were extinguished in the competition for survival, leaving behind on the landscape a cultural palimpsest. Thus it was that the accessibility of places reduced regional variations in culture and increased the tendency towards a mass culture.<sup>59</sup> Seminal writers such as Jacques Ellul have lamented this tendency, and Ellul in particular regretted the ever-widening control of 'technique', wherein variety succumbed to efficiency, to the one best way of

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<sup>57</sup> Margaret Mead, *Blackberry Winter*, (New York: Simon & Schuster, 1975), p. 147.

<sup>58</sup> E.A. Wrigley, "Changes in the Philosophy of Geography", in *Frontiers in Geographical Teaching*, eds. Richard J. Chorley and Peter Haggett, (London: Methuen, 1965) p. 10.

<sup>59</sup> Nevertheless, although regional variations have diminished, it can be argued that cultural variations have increased at the micro-scale as specialisation has increased.



doing something.<sup>60</sup>

As physical obstacles to movement were overcome, including the obstacle of distance itself, so humanly constructed barriers, in the form of territorial boundaries, became more significant. Control over geographic space and the regulation of access to it increasingly became the sustainer of cultural variation. Rapidly improving mobility and technological progress correlated with the rapid evolution of the national state and of a variety of institutions with statutory jurisdictions over territory, indications perhaps of a felt need to retain separateness and identity. This was also a time when open land was enclosed in Britain and the concept of private property developed markedly. Increased emphasis on personal and group sovereignty over land may be seen, therefore, as a response to technological improvements in transportation and communication, together with similar pressures brought to bear on geographic space by a rapidly growing population. In short, cultural variation is increasingly a function of man's regulation of access to geographic space, and less and less a result of physical isolation. Thus, for example, Canadians seek their identity and cultural differentiation

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<sup>60</sup> Jacques Ellul, *Technological Society*.

by reducing the accessibility of Canada to foreign corporations, and to advertisements and television programmes emanating from the United States. And similarly the Québécois seek their identity by a separatist movement. The preservation of native cultures in northern Canada is enhanced by similar actions designed to reduce access of non-indigenous cultural elements. Regulations control cable and satellite television inputs into the region, and some effort is made to assess the effects on native cultures of the development of northern resources and the building of oil and gas pipelines. Native Indian culture, enfeebled on the whole by geographic division, is nonetheless preserved to some degree by the inaccessibility of reservations. In the same sort of way North and South Korea, and West and East Germany, drift apart in their ways of life as a direct result of relatively impermeable man-made boundaries. For while ideas and innovations circulate easily within a territorial system, the man-made boundaries between one system and another inhibit circulation.

Cultural variation on a micro-scale follows the same principles. Schools, hospitals, and prisons are defended spaces where access is carefully regulated. A set of norms is enforced, and inappropriate behaviours, and objects, and indeed people, are excluded. Each such territory is bounded and coincides with an identifiable micro-

culture each with its own recognisable 'language'. On a smaller scale still, families occupy territorial spaces - their homes - and the set of norms they adopt are different from those adopted by other families. Thus the very existence as well as nature of 'culture', at whatever spatial scale, is intimately bound up with territorial behaviour; with the possession of geographic space and the norms that flow from this spatial control. Territory is therefore a key concept in understanding cultural variation, and one that is likely to become increasingly so. As a result, the different spatial sets of norms will be more and more closely identified with territorial patterns. It follows that the appropriateness or inappropriateness of the location of something, whether material thing or specific behaviour, will also be territorially based. Subsequent chapters on trespass law will make this point clearer, but before moving on to these it is essential that the notion of territory be distinguished from that of property.

### Property

The concept of property is analogous in many ways to that of territory and can be considered a surrogate for it in certain contexts, but it is not at all the same thing. Both concepts may have to do with a similar set of relationships or bond between a person and his land, but the

idea of property extends much more easily than does territory to cover a wide variety of objects and even ideas, such as those embedded in copyrights and patents.<sup>61</sup> Anglo Saxon law thus recognises these 'ideas' as property, together with other such non-material things as mortgages, shares and bonds. These legal extensions of the term property to cover things without material existence as such, and thus obviously without spatial extent, are far removed from what we usually understand by territory.

Property also has a characteristic not common to the notion of territory whereby it is often treated as a commodity to be bought and sold, where in other words the nature of the bond is not of the quality that it is in the case of territory. Thus Ely states that "by property we mean an exclusive right to control an economic good."<sup>62</sup> In many cases this is indeed true, but it is not necessarily so. A leasehold, for example, is a property right, but it may be a condition of that lease that it cannot be assigned

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<sup>61</sup>Altman, *Environment and Social Behavior*, tries to extend the idea of territory to cover these things, and in doing so confuses the idea of property and territory. It is difficult to see any advantage in, or need for, such an extension.

<sup>62</sup>Richard T. Ely, *Property and Contract in Their Relation to the Distribution of Wealth*, (New York: MacMillan, 1914), pp. 101-102.

or sublet. Such a property interest, therefore, could not be sold. Furthermore, property is not necessarily a commodity of economic value, as is the case, for example, with the material in my waste-paper basket. It is important, then, to distinguish between property as a scarce commodity, and as therefore having economic value, and that aspect of property that implies a relation of belonging analogous to the relationship implied in territoriality. Property relations therefore cannot be distinguished from other human relations solely on the basis of their economic characteristics. At the same time these economic characteristics are common to property and quite foreign to what we usually understand by territory.<sup>63</sup> Since a great deal of emotion surrounding the use of the word 'property' has to do with this economic aspect of its meaning, it is of some importance that its inapplicability to the concept of territory, *qua* territory, is made clear.

A concept that is closely related to that of property is 'ownership', and an analysis of this idea points up other distinctions that must be made.<sup>64</sup> It is clear

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<sup>63</sup> Ardrey, *Territorial Imperative*, fails to bring out these and other important distinctions in his "personal inquiry into the animal origins of property and nations."

<sup>64</sup> Confusion can all too easily arise by using the word 'ownership' when defining territoriality as Goffman does in Table 1.

that territories, such as a home, can be owned so that a territory and legal ownership may coincide and the statement "keep off, this is mine", is applicable to both.

However, the ownership of something and territorial possession frequently do not coincide. A tenant in an apartment building, for example, has possession of his suite and it will properly be considered his territory although he does not own it. Similarly, a person's office may be his territory, although again he does not own it. Ownership, therefore, may be divorced from territorial possession and thus from actual control. The significance of this in our society was made especially clear by the classical study of Berle & Means in 1932.<sup>65</sup> They showed by extensive research that there is a fundamental cleavage between the ownership and control of property.

In examining the break up of the old concept that was property and the old unity that was private enterprise, it is therefore evident that we are dealing not only with distinct but often with opposing groups - ownership on the one side, control on the other - a control which tends to move further and further away from ownership and ultimately to lie in the hands of management itself, a management capable of perpetuating its own position. The concentration of economic power separate from ownership has, in fact, created economic empires

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<sup>65</sup>A.A. Berle and G.C. Means, *The Modern Corporation and Private Property*, (New York: Commerce Clearing House, 1932).

... regulating owners to the position of those who supply the means whereby the new princes may exercise their power.<sup>66</sup>

Economic power, in terms of control over physical assets is, according to Berle & Means, responding to a centripetal force and becoming more and more concentrated in the hands of corporate managements. At the same time, beneficial ownership is centrifugal, becoming more and more dispersed.

This gives us the clue to the most fundamental difference between the ownership of land and territorial possession. The former is essentially socially constructed and more specifically *de jure*, whereas the latter is essentially *de facto*.<sup>67</sup> There is considerable evidence to support the view that actual physical possession and the physical control of territory has evolved, through the

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<sup>66</sup> Ibid., p. 124. The authors conclude that the modern corporation should be operated not solely in the interests of the shareholders or of the managers, but rather in the interests of the community.

<sup>67</sup> Thus Jeremy Bentham wrote: "We shall see that there is no such things as natural property, and that it is entirely the work of law...Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases." See his *Theory of Legislation*, reprinted with introduction and notes by C.K. Ogden, (London: Routledge and Kegan Paul, 1931). Ch. VIII.

To put this graphically we could say with Felix Cohen, that property is that to which the following label can be

medium of culture, into the conception of 'ownership', which because it is socially constructed can become more and more abstract and separate from possession itself.<sup>68</sup> There are obvious benefits to a society in the flexibility this would bring about.

The same sort of cultural evolution is apparent in the development of the concept of property itself. Like ownership it also is essentially a social construction, and its development too is marked by an increasing abstraction and distance from the material possession itself. Thus as J.C. Smith has pointed out, in primitive law, archaic law, and initially in the Common Law, control over land

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attached:

"To the world:

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

Signed: Private Citizen  
Endorsed: The State"

"Dialogue on Private Property", *Rutgers Law Review*, IX, 2, 1954, pp. 357-387.

<sup>68</sup> The separation can become so extreme that the law will no longer recognise ownership. In the case of land, for example, if the ownership and possession are separated for a long period of time, and there is no intervening claim to possession by the owner nor acts that could be interpreted as such a claim, the legal ownership may pass by prescription to the occupant. There is an analogous situation in International Law whereby a State's 'ownership' of land, or at least the claim to it, cannot be separated too far from effective occupation.



amounted merely to physical possession, rather than any legal conception of ownership.<sup>69</sup> The words used to connote property usually meant the equivalent of physical possession or the taking of possession, and the disputes over property were not over ownership but possession. Thus, for example, in a dispute regarding a cow, the claimant would grasp the animal by the ear and swear it had been stolen from him. Smith points out that a nearly identical procedure existed in such diverse cultures as the Babylonian, Greek, Continental Saxon and Welsh.<sup>70</sup> A further demonstration of this empirical, as opposed to abstract, concept of

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<sup>69</sup>The following comments on the concept of property are based on the discussion by J.C. Smith, "Law and Radical Change,": in *Law, Growth and Technology*, ed. D.N. Weisstub, (Cuernavaca, Mexico: Centro Intercultural de Documentacion, 1972).

<sup>70</sup>If this is so it is suggestive of a remarkably universal structure in law. There is more evidence of such a structure and the possible logic behind it. For example, it appears to be universal that the ownership of a newly born calf is vested in the owner of the cow that gave it birth and not in the owner of the land on which it was born, nor the owner of the food that the cow ate during its pregnancy, nor the bull that sired it. For all of these relations lead to uncertainty and the law is opposed to uncertainty. Thus the Laws of Manu, which are some 4,000 years old and may be the oldest legal code in existence, state: "should a bull beget a hundred calves on cows not owned by his master, those calves belong solely to the proprietors of the cows: and the strength of the bull was wasted." *Institute of Hindu Law; or, The Ordinances of Manu*, 3rd edition, translated and edited by S.G. Grady, (London: W.H. Allen, 1869), p. 198.

property in the Common Law is given by the method of conveying land. Both parties would come onto the land and one would hand the other a twig or a piece of turf, or something similar, to symbolise the transfer of possession.<sup>71</sup> Gradually this relatively straightforward relationship of physical possession between the possessor and the thing possessed shifted to the modern conception of ownership, whereby property is conceived of as a set of relations between people with regard to an object.

The differing emphasis is of fundamental importance in understanding what property has come to mean. It is now

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As Cohen ("Dialogue on Private Property", p. 368) said, "this particular rule of property law that the owner of the mare owns the offspring has appealed to many different societies across hundreds of generations because this rule contributes to the economy by attaching a reward to planned production; it's simple, certain, and economical to administer; it fits in with existing human and animal habits and forces; and appeals to the sense of fairness of human beings in many places and generations." So it is that in Common Law if you sow on another's land the crop belongs to the landowner, and the Laws of Manu agree: "they, who have no property in the field, but having grain in their possession, sow it in soil owned by another, can receive no advantage from the corn, which may be produced." p. 198. Again for the same reasons of certainty and the avoidance of conflict, the Common Law recognises the fact of possession rather than ownership of property as giving a right to exclude a trespasser.

<sup>71</sup> For a more detailed discussion of this, see Frederick Pollock and Frederic Maitland, *The History of English Law*, (Cambridge: University Press, 1923), p. 85.

not so much the object itself as the bundle of legal relations, which entitle one to certain rights of use. Clearly this more abstract conception of property opens up a wide range of new relationships between people and environments. It represents a cultural development which brings more flexibility to human relations, for the concept of property can be given any content that conforms to social need and social policy. This is an example of how the evolution of a culture facilitates a more complex interaction between man and his environment. Geographers are already well aware of the similar point that resources are created by society. They are perhaps less conscious of the fact that the value of any property, tangible or intangible, lies in the permissible patterns of behaviour enforced by the institutions of the state.

A concomitant of this socially constructed 'property', is its increasing regulation by the State. The view propounded by Blackstone that property is the "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individuals in the universe," becomes less and less real.<sup>72</sup> He writes:<sup>73</sup>

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<sup>72</sup> Sir William Blackstone, *Commentaries on the Laws of England*, 15th Edition, (Oxford: Clarendon Press, 1809), Book II, Chapter 1, p. 2.

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

The facts, on the contrary, are that "the absolute right of property would result in the dissolution of society."<sup>74</sup>

Society must of necessity limit the rights of any one individual, and it does this by the law of eminent domain, by taxation, by prohibition on public nuisances, and by jurisdictional powers of various kinds. These jurisdictional powers very much affect our understanding of human territories, as has already been intimated, and help to distinguish them sharply from animal territories.

At this stage one is easily left with the feeling that property is, as Veblen described it, "the most ambiguous of categories." Certainly a great deal has been said, and could be said, about this concept.<sup>75</sup> It is enough,

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<sup>73</sup> Quoted in Cohen, "Dialogue on Private Property", p. 362.

<sup>74</sup> Von Jhering, quoted in Cohen, Ibid.

<sup>75</sup> For an indication of some of the material available see *Readings in Jurisprudence and Legal Philosophy*, by Morris R. Cohen and Felix S. Cohen, (New York: Prentice-Hall, 1951), Chapter 1, Property.

however, to have shown some of the more important convergences and divergences in meaning between property and territory, and thus to create an awareness of potential areas of confusion and ambiguity.<sup>76</sup> More importantly, the de-reification of property and its increasing abstraction is likely to have also loosened human territoriality from its probable animal origins and objectives. So that the development of the concept of property as a set of social relations and the development of human territoriality, have both evolved as culture itself has evolved. In the following chapter, aspects of this development of human territoriality that are associated with private property are examined through the medium of Common Law trespass to land.

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<sup>76</sup> It is tempting to launch into a discussion of the various reasons for condemning or justifying the institution of private property, but in so far as territory has been distinguished from property and especially from the economic aspects of it, this is not appropriate. It is worth remarking, however, that territory and power are closely related ideas, and that it is one of the central themes of this study that landscapes owe much to their territorial organisation, which effectively regulates access to them. This is not only true of the more permanent human expression on the landscape it is also true of the transient expression of behaviour itself.

## CHAPTER III

## COMMON LAW TRESPASS TO LAND

In this chapter the cultural aspects of territoriality will be looked at as they are expressed in the Common Law tort of trespass to land, and it will be found that these are readily identifiable with the characteristics of territorial behaviour outlined in the previous chapter.<sup>1</sup> The objective will be to describe and comment on this specific interpretation and cultural elaboration of territorial behaviour in order to provide a basis for the more detailed analyses in later chapters.<sup>2</sup>

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<sup>1</sup>Of course, this is not to presuppose that human territorial behaviour is innate in the way that animal territorial behaviour appears to be. Nevertheless, to the extent that the cultural codification of territoriality corresponds to the fundamentals of the 'natural' territoriality described in the previous chapter, the assumption of a common evolutionary force is strengthened. But this is still, at best weak evidence and not too much reliance should be based on the correlationship.

<sup>2</sup>More detailed information on trespass law can be found in the following textbooks: G.F. Clerk and W.H. Lindsell, *Clerk & Lindsell on Torts*, First Supplement to 14th edn., (London: Sweet & Maxwell, 1977); John G. Fleming, *The Law of Torts*, 5th edn., (Sydney, Australia: The Law Book Co. Ltd., 1977); G.H.L. Fridman, *Introduction to the Law of Torts*, (Toronto: Butterworths, 1978); R.F.V. Heuston, *Salmond on the Law of Torts*, 17th edn., (London: Sweet & Maxwell, 1977); Lewis Klar, ed., *Studies in Canadian Tort Law*, (Toronto: Butterworths, 1977); Allen M. Linden, *Canadian Tort Law*, (Toronto: Butterworths, 1977); William

The type of territory that will be dealt with is a specific category recognised by the law. It will be called 'legal space' and it is comprehensive in the sense that it constitutes all of the territory of the national state. It amounts to all those parcels of land that are legally bounded and owned in some way. All legal space is territorial space, but as territory it belongs to the possessor, who may be, but is not necessarily, the owner.

Legal space is perhaps the most important geographic category of territory, other than that of the national state itself. It is at this scale that many of the important and detailed decisions regarding access are made, contributing greatly to the sorting out of artifacts and behaviour in geographic space. Within the separate legal spaces are the micro-territories, wherein the placement

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L. Prosser, *Handbook of the Law of Torts*, 4th edn., (St. Paul, Minn: West Publishing Co., 1971); W.V.H. Rogers, *Winfield and Jolowicz on Tort*, 10th edn., (London: Sweet & Maxwell, 1975); Harry Street, *The Law of Torts*, 5th edn., (London: Butterworth, 1972).

*Halsbury's Laws of England* is also useful. This is the most widely used law encyclopedia in Common Law countries, and one of the best general research tools in a law library. The primary authority cited in *Halsbury's* is English, but English case law is persuasive authority in Common Law countries. Throughout *Halsbury's Laws* there are volumes entitled Canadian Convertor. These volumes serve as a bridge between English decisions as cited in *Halsbury's* and Canadian case law.

of small things, the detailed decoration of geographic space, and everyday behaviour are arranged. Legal space is of such import to the state that it is carefully regulated. Micro-territories on the other hand, nested as they are within the legal space, are regulated by the rules or norms of the person or persons in effective possession of the larger legal space.<sup>3</sup> Thus the state endorses legal space and ensures a sufficient degree of sovereignty in the possessor to regulate that space and maintain control over it, whereas micro-territories are endorsed and supported by the possessor of the legal space.<sup>4</sup>

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<sup>3</sup> Community or neighbourhood territories as referred to by Melvin and Carolyn Webber, "Culture, Territoriality and the Elastic Mile", *Papers of the Regional Science Association*, 1964, amongst others, are relatively weak and ambiguous territories at a larger scale. Nevertheless, certain types of intrusions, whether of ethnic groups or new land developments, may trigger strong territorial reactions.

<sup>4</sup> Thus my children's bedrooms are their territory, subject to the jurisdiction of my wife and myself. They are not, however, territories of sufficient importance to be specifically endorsed as such by the state. Instead they are supported as territories by the rules or norms of the residual sovereignty in the household. Both legal space and micro-territories are clearly social territories, in the sense that the power associated with them is socially derived rather than based on an individual's raw physical strength. Without the support of the law I have no real power over my property, and my children have no real power over their rooms without the support of the rules of the household. Very little power in the modern world derives from the individual *per se*; it is essentially a social phenomenon.



Power in a society (that is to say socially derived power as opposed to raw physical power) is closely related to this concept of legal space. But people who have power in one legal space, such as a school, factory, or home, do not necessarily have it in other legal spaces. Power in other words is place oriented.

In endorsing these legal spaces and supporting a residual sovereignty, the state is faced with the task of regulating the complex situations of everyday life and of setting down rules that allow the arrangement to function properly.<sup>5</sup> These rules, in the Common Law, emerge from experience, they evolve inductively from the decisions made in the particular circumstances of an actual conflict. Yet there is a controlling logic to the utilisation of this experience, the logic of 'function', and this will be examined and clarified through an evolutionary perspective in the following chapter.<sup>6</sup>

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<sup>5</sup> A culture acts as a model for the individual's behaviour, in much the same way as when we play better squash or soccer if we learn from watching other people's play. Underlying such visible models of cultural life are the invisible constraints of rules.

<sup>6</sup> Justice Holmes, writing in 1899, said that "the life of law has not been logic; it has been experience." A more apt axiom for the arguments in this dissertation is that the life of the law has been the inevitable logic of experience. This does not imply, as will be thought, a 'positivist' stance nor a belief in unidirectional

### Historical Development

The development of trespass law is marked by both an increasing sophistication in the social regulation of raw conflict, and a constant struggle to prevent the logic of function (or experience) from being too rigidly constrained by socially constructed categories. This latter problem is one that we shall meet again, but in a nutshell it is the problem of the requirements of certainty in social relations coming up against the functional requirements of adaptive change.

Originally, about the end of the twelfth century, 'trespass' meant any wrong, the same meaning that it still bears in the traditional version of the Lord's Prayer.

Most of these wrongs were dealt with by local courts, but if a breach of the peace or a royal interest was involved they could be heard by the King's courts. But such pleas of the crown were exceptional and there is no conceptual unity among them, other than the jurisdictional.<sup>7</sup>

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development. On the contrary, variation is an *essential* part of the overall argument, as will be seen.

<sup>7</sup> The most interesting and authoritative documentation and explanation of the rise of trespass and case is that by S.F.C. Milsom in "The Rise of Trespass and Case", *Historical Foundations of the Common Law*, (London: Butterworths, 1969). Milsom's work is relied on in the following account.

At first the King's peace was a personal thing rather than a social abstraction, and indeed it died with the King, so that wrongs committed in one reign could not be taken up in another. Gradually the concern with the King's own protection was extended to servants and friends, and perhaps widened to cover church festivals, or particular places such as the King's highway, or where the King himself was. Later still it was extended, as a matter of policy, to constitute what we would call the royal criminal law. In short what made something a breach of the King's peace was not the intrinsic quality of the act, but rather the person involved, the character of the place, or the time of year.<sup>8</sup>

Gradually the phrase *contra pacem regis* was inserted merely so that the plaintiff could ensure the beneficial consequences of having his grievance heard by a royal court.<sup>9</sup> By the turn of the 13th century the phrase *vi et armis*, which had been used sporadically until then and was especially common in cases involving the invasion of land, became an almost invariable addition

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<sup>8</sup> Ibid., p. 246.

<sup>9</sup> *Contra pacem* carried *capias* and outlawry, which were not available in trespass writs without it. *Capias* was a writ, usually addressed to the sheriff, by which process was issued against an accused person.

to trespass writs. As Milsom describes it "Glanvill's breach of the peace [had] sunk to a pair of incantations put in to get the dispute into a royal court."<sup>10</sup> The result of these formalities was that throughout the middle ages it was very difficult to know what the true complaint was about. Whereas *contra pacem* had once been meaningful, with the jurisdictional consequence that it came before a royal court, now cause and effect were reversed by stretching *contra pacem* in order to bring cases under royal jurisdiction.<sup>11</sup>

In time other cases, where *contra pacem* could not be even fictitiously alleged, were more freely admitted to the royal courts. Trespass *vi et armis* came in time to be seen as a distinct form of action, and other writs came to be regarded as belonging to the action upon the special case.<sup>12</sup> Milsom argues that a distinction that had been of purely jurisdictional importance became a "senile mischief",

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<sup>10</sup> Milsom, "Rise of Trespass and Case", p. 248.

<sup>11</sup> Ibid., p. 250.

<sup>12</sup> Actions upon the special case were actions based on the particular circumstances, rather than the bare event as in trespass *vi et armis*. Today all torts (as well as the law of simple contract) are the products of 'case' with the exception of detinue (wrongful detention of goods) and trespass *vi et armis*.

whereby lawyers looked for *facts* that signalled which category was appropriate. Trespass thereby became an entity with identifiable factual properties, and it was naturally assumed that those properties depended on the only common factor of *contra pacem*. The distinction between trespass and case became therefore that between direct and consequential injury, between the actual event itself and the state of affairs from which the damage indirectly flowed. In Milson's opinion "the jurisdictional artificialities of the middle ages had been harmless: their rationalisation in the eighteenth century and after did grave damage."

There are two matters that arise out of this development which demand comment. Firstly there is the problem of inertia that is brought about by legal categories. Modern tort law has been greatly influenced by the old categories of legal claim, or the form of action as they are usually called. The rules governing these forms of action were very strict and although they were abolished in the 19th century, they still have a considerable effect. As Maitland said, "the forms of action we have buried, but they still rule us from their graves."<sup>13</sup> At the

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<sup>13</sup>Frederick William Maitland, *The Forms of Action at Common Law*, (Cambridge: University Press, 1936), p. 296.

time of Henry III it was the practice to have a distinct writ for each main type of claim. Each claim or form of action had its own procedure and substantive law. If the plaintiff brought the wrong type of claim he would lose the case. This "hardening of the arteries" of the legal system was a barrier to its continuing adaptation to changing conditions. Statutory changes in the nineteenth century, however, make the form of action more-or-less immaterial today.<sup>14</sup> As Lord Atkin said, referring back to Maitland's epigram: "when these ghosts of the past stand in the path of justice, clanking their medieval chains, the proper course for the judge is to pass through them undeterred."<sup>15</sup> Be this as it may, the vanished forms of action have left their mark, so that when we talk of trespass today we mean a wrong that would have been remedied by the writ of trespass in the eighteenth century. It is clear from this account of the historical development of trespass law that rigid categorisation (and thus predictability in the law) comes into conflict with the need for

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<sup>14</sup> After some relief was introduced in 1832, forms of action were theoretically abolished by the Common Law Procedure Act, 1852. This was replaced by the more comprehensive provisions of the Judicature Act which came into operation in 1875.

<sup>15</sup> *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1941] A.C. 1, p. 29.

adaptive change.

The second issue that arises from Milson's view of the historical development is an important one for relating trespass to land to the idea of territory. For the question is, was the historical development of trespass law merely an unfortunate accident of history, as Milson argues, or did it on the contrary have a certain logic to it? Unfortunately it is beyond the scope of this work to pursue this important argument in detail, but I would want to maintain that the category of trespass *vi et armis* has evolved in the Common Law, and has persisted as such, in conformity with a logic of territorial behaviour which is eminently functional and in no sense mischievous. In the case of trespass to land, Milson's critical comments seem inapplicable. It is otherwise, however, with trespasses to the person and to chattels which, although not our concern here, are also recognised by lawyers. In this regard it is interesting to note that there is some evidence that these latter trespasses are being incorporated into the traditional actions upon the case, and thus becoming ever more distinguished from the category of trespass to land.<sup>16</sup>

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<sup>16</sup> *Letang v. Cooper* [1965] 1 Q.B. 232. A man in a car unintentionally ran over the legs of a sunbather and it was held that trespass to the person, which technically in terms of the old forms of action did not require

In summary then, trespass to land has emerged as a very distinct and persistent category of law, and one which we shall see has characteristics that closely parallel the territorial ones that were outlined in the previous chapter.

### Three-Dimensional Nature of Territory

Spatialist geographers, *qua* spatialists, are invariably entrapped within a two-dimensional world. Yet it is a three-dimensional world that people relate to in real life, and it is this world that trespass law must come to terms with. Unfortunately, although legal space is usually clearly partitioned on the ground, the limitations above and below the ground are relatively ambiguous.

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intentionality, would not lie as a distinct action. In the case of trespass to land it is submitted that it generally remains true that, as long as the trespass was voluntary and direct, it does not matter whether it was intentional or unintentional (although, of course, it may affect the measure of damage). For an unevenly argued contrary view see Joseph Eliot Magnet, "Intentional Interference with Land," *Studies in Canadian Tort Law*, L. Klar, ed., pp. 287-323. One advantage of the present trespass to land action is that the onus is on the defendant to explain what occurred, rather than on the plaintiff. It would, in many cases, be difficult for the injured plaintiff to prove the defendant's intent (i.e. "that the defendant was substantially certain that the interference would result from his actions." Magnet, "Intentional Interference with Land," p. 295, footnote 24.)



In general it can be said that an unauthorised entry beneath the surface of land at whatever depth is a trespass. Since there is relatively little activity under the surface of the earth this does not usually amount to a problem. A lot of the nineteenth century cases that dealt with such issues revolved around coal mining. Thus in *Bulli Coal Mining Co. v. Osborne* [1899] it was held actionable to tunnel into adjoining land in order to exploit a coal seam.<sup>17</sup> In this century similar problems arose over the recovery of oil and it is not permissible to slant drill into a neighbouring oil zone without the authority of the occupier.<sup>18</sup> It should be noted, however, that the possession of the surface land can be severed from that of the subsoil, as by granting mineral rights, so that in such cases trespass actions could literally be maintained in different strata.<sup>19</sup>

Although the law with respect to such mineral

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<sup>17</sup> *Bulli Coal Mining Co. v. Osborne* [1899] A.C. 351.

<sup>18</sup> See the comment by Allen H. Barr, "Oil and Gas: Liability and Damages for Underground Trespasses", *California Law Review*, 27, 1939, pp. 192-201.

<sup>19</sup> The *Strata Titles Act* in British Columbia, and similar statutes elsewhere, as well as leasehold arrangements, permit the air space above the surface to be held in the same sort of way.

rights seems to have settled on a boundless possession beneath the surface there are reservations. Territorial possession requires effective control, and the theory of 'effective control' was indeed adopted in a case concerning the maintenance of a sewer 150 feet below the surface.<sup>20</sup>

The problem was again met head on in a Kentucky case where the defendant owned land containing the entrance to a cave which he had developed into a tourist attraction.<sup>21</sup> The cave lay below the land owned by the plaintiff at a depth of about 350 feet, and he successfully claimed for an account of the receipts from its exploitation. A strong dissenting judgement, however, expressed the 'territorial' view that the surface owner possesses only those things beneath the surface which he can subject to his control, and it was said that "no man can bring up from the depth of the earth the Stygian darkness and make it serve his purposes, unless he has the entrance to it."<sup>22</sup>

The extent of possession of the air space over land

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<sup>20</sup> *Boehring v. Montreal* [1931] 254 N.Y.S. 276. This idea of effective control is very prominent in determining the legitimacy of territorial authority in international law.

<sup>21</sup> *Edwards v. Sims* [Ky. 1929] 24 SW 2d. See especially the beautifully written judgement of Logan, J.

<sup>22</sup> *Ibid.*, p. 619.

is more controversial. Despite the well-known legal maxim *cujus est solum eius est usque ad coelum et ad inferos* the courts would not apply it literally to make all invasions of air space into trespasses.<sup>23</sup> For one thing it would be quite impractical for aviation, and indeed there are usually statutes to cover this. The cases establish that in practice there is no wider proposition than the eminently territorial one that the air above the surface is possessed in law, in so far as its use is linked to the use of the surface itself.<sup>24</sup> There is therefore no inherent restriction on the height of buildings, other than specific building or zoning restrictions.

Much of the case law on this topic is concerned with the very practical questions that arise from parts of buildings and the branches of trees that overhang an adjacent property. In a proper territorial spirit the law treats these differently. The direct invasion by man-made

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<sup>23</sup>Whose is the soil, his it is, even to heaven, and to the middle of the earth. The maxim was called a "fanciful phrase" in *Wandsworth Board of Works v. United Telephone Co.* [1884] 13 Q.B.D. 904, 915 (Brett, M.R.). Its origin is traced by Bouvé, "Private Ownership of Air Space," *Air Law Review* (1930), p. 232; and Hackley, "Trespassers in the Sky", *Minnesota Law Review* 21, (1937), p. 773.

<sup>24</sup>The English cases are discussed in detail by Richardson, "Private Property Rights in the Air Space at Common Law," *Canadian Bar Review* 31, (1953), p. 116; and Hackley, "Trespassers in the Sky", p. 773.

projections constitutes trespass which is actionable *per se*. Branches of trees, however, that grow naturally over an adjoining property are treated as consequential rather than direct encroachments and do not constitute trespass, even in cases where the trees were planted.<sup>25</sup>

The great variety of invasions by artificial projections, including a swinging crane,<sup>26</sup> advertising signs,<sup>27</sup> electric cables,<sup>28</sup> the overlap of a wall,<sup>29</sup> and the many examples in the older cases of projecting build-

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<sup>25</sup>The correct remedy for overhanging branches is in nuisance. There is a privilege to abate the nuisance by cutting back the branches. See *Lemmon v. Webb* [1894] 3 Ch. 1, [1895] A.C.1; *Davey v. Harrow Corporation* [1958] 1 Q.B. 60; a case which is difficult to reconcile with this position is that of *Simpson v. Weber* (1925) 41 T.L.R. 302, where a Virginia Creeper on a wall was treated as a trespass.

<sup>26</sup>*Wenterton v. R. Costain* [1970] 1 W.L.R. 411.

<sup>27</sup>*Kelsen v. Imperial Tobacco Co.* [1957] 2 Q.B. 334.

<sup>28</sup>*Baker v. City of Adelaide* [1900] S.A.L.R. 29; *Wandsworth Bd. of Works v. United Telephone Co.*

<sup>29</sup>*Williamson v. Friend* (1901) 1 SR (N.S.W.) (Eq.) 23, 27; *Laylor v. Johnston* [1905] V.R.L. 714 (Ventilation Pipe). Notice, however, that if a fence encroaches due to the action of weather, that is to say if it is consequential rather than direct, no action lies: *Mann v. Saulnier* (1959) 19 D.L.R. 2d 130 (there is comment on this in *Modern Law Review*, 23, p. 188).

ings, well illustrates the enormous range of functions that human territoriality, unlike animal territoriality, serves. The case of *Kelsen v. Imperial Tobacco Co.* [1957] illustrates this point very well.<sup>30</sup> The problem arose from the situation of an advertisement sign of Imperial Tobacco. This sign which was about twenty feet long projected some eight inches into the air space above the plaintiff's one-storey tobacco shop which he leased. When Imperial Tobacco cut down on his cigarette quota he asked them to remove the sign. The dispute over the quota was subsequently settled and the plaintiff allowed the sign to remain. Later, further disputes over the supply of cigarettes arose and the plaintiff brought an action for trespass, which he won. The function of the 'defence of space' in this case was not so much to obtain recompense for a direct injury to the plaintiff, occasioned by the small boundary incursion, as it was to act as a lever to apply commercial pressure.<sup>31</sup>

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<sup>30</sup> *Kelsen v. Imperial Tobacco Co. Ltd.*

<sup>31</sup> The plaintiff wrote to the defendants saying: "Since the sign reading 'Players Please' above our shop can only act as a magnet to draw people in, we feel that this is more than unfair and we must ask you to be good enough to remove it as soon as possible as it would help us considerably in having not to refuse so many people per day and making the life of our staff a little easier." *Kelsen v. Imperial Tobacco Co. Ltd.*, p. 346.

More transient incursions into air space also seem to be trespassory, although the authority for this is not wholly conclusive. In the case of *Ellis v. Loftus Iron Co.* a horse on one side of a fence bit and kicked a mare on the other side and this was held to constitute trespass.<sup>32</sup> Less certain are those decisions that deal with the firing of bullets over land. In an 1815 case Lord Ellenborough made a distinction between a shot which strikes the soil and is a trespass, and one that is fired *in vacuo* without touching anything and is not actionable unless it constitutes a nuisance.<sup>33</sup> But in a Tasmanian case, where a cat that was perched on a shed was shot, the court seemed to regard all entry upon air-space from adjacent land as trespassory, although they admitted the difficulty of reconciling this with the reasonably free use of air-space by aircraft.

These ambiguities in the cases can be interpreted as resulting from a conflict between the "old sophistry, that the owner of the surface is the owner of everything

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<sup>32</sup>*Ellis v. Loftus Iron Co.*, (1874) L.R. 10 C.P. 10.

<sup>33</sup>*Pickering v. Ruld*, (1815) 4 Camp. 219. This was followed in *Clifton v. Bury* (1887) 4 T.L.R. 8.

from zenith to nadir"<sup>34</sup> and the question of effective possession, which is consistent with what we understand as territory.<sup>35</sup>

### Possession

The wrong of trespass to land consists of the act of (1) entering upon land in the possession of the plaintiff, or (2) remaining upon such land, or (3) placing or projecting any material object upon it - in each case without lawful justification.<sup>36</sup>

The idea of possession, which lies close to the heart of what we mean by territory, is one of the most crucial notions in the law of trespass to land. In the case of territory, possession denotes an exclusive control of a geographic area, and in trespass law it refers to essentially the same thing, with the very important rider that in trespass law the possession is protected by

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<sup>34</sup>Fleming, *The Law of Torts*, p. 42-43.

<sup>35</sup>The cliché that possession is nine-tenths of the law is some indication of its importance.

<sup>36</sup>Heuston, *Salmond on the Law of Torts*, 16th edn.

society.<sup>37</sup>

The main reason for the social protection of the possession of land (and, indeed, the possession of other

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<sup>37</sup> Many writers have attempted to analyse the concept of possession in the law, a concept which has always had a "strange fascination" for lawyers. There is less of this conceptual analysis now as the arguments of such philosophers as Wittgenstein have filtered down to legal writers. Thus Hart argued that their task should be to *describe the use* of a concept rather than define it. [H.L.A. Hart (1954), 70 L.Q.R. 37]. In the law 'possession' has many applications and in different parts of the legal system it is used for different purposes so that the rules that have developed around it vary. Once again, we see the conflict between a theoretical logic which ensures consistency of use and hence predictability, and the demands of convenience and flexibility in particular cases. Although, therefore, it is not correct to say that "possession is a fact to which the law attaches certain consequences," it is nevertheless still true that in a sense possession, like territory, is a fact that preceded the law. For further selected reading see: R.W.M. Dias, *Jurisprudence*, (London: Butterworths, 1964), Ch. 12; D.R. Harris, "The Concept of Possession in English Law," in *Oxford Essays in Jurisprudence*, A.G. Guest, ed., (Oxford: University Press, 1961); Oliver Wendell Holmes, *The Common Law*, Mark DeWolfe Howe, ed., (Cambridge, Mass: Harvard University Press, 1967), Lecture VI; Albert Kocourek, *Jural Relations*, 2nd edn., (Indianapolis: Bobbs-Merrill, 1928); George W. Paton, *A Text-Book on Jurisprudence*, 4th edn., G.W. Paton and David P. Derham, eds., (Oxford: Clarendon Press, 1972), Ch. 22; Frederick Pollock, *An Essay on Possession in the Common Law*, Parts I and II, (Oxford: Clarendon Press, 1888); Sir J.W. Salmond, *Salmond on Jurisprudence*, 7th edn., (London: Stevens and Hayne, 1924) Chs. 13 and 14.



things) is that it preserves the peace.<sup>38</sup> Interference with possession inevitably invites violence, and probably has always done so. In the case of property it is also a practical thing to protect possession, for the burden of proving a flawless title to every person who disputed it would have been patently unjust. Therefore, possession of land is regarded by the law as well-founded unless a superior title is shown to exist. In the case of trespass law, the trespasser has to show this title in himself or in someone by whose authority he acts. It is not acceptable to show that the superior title resides in a third party.

The tort of trespass, therefore, turns upon interference with another's possession of land, rather than title. This 'possession' is built upon the notion of physical control, that is of the relation of persons to land. But once the law arose to protect such possession

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<sup>38</sup> Felix Cohen brought home the natural order of things when he asked a student to imagine himself as a reasonable wolf in a society consisting of wolves and sheep, "Now suppose you had to decide whether to kill a sheep yourself or to take mutton out of the jaws of other wolves who have made a kill. Let's assume, in spite of Kipling, that the wolves are not concerned about law or ethics. What considerations might lead you to respect the first occupancy of your fellow wolves and to go out after your own mutton?" Felix Cohen, "Dialogue on Private Property," p. 386.

by rules it concentrated on the relation between persons (with respect to land), rather than with the relations between persons and land. Therefore, there are anomalous cases where a person in full physical control in fact is denied possession in law, and where a person who does not have physical control at all is accorded all the rights of possession.<sup>39</sup>

A trespass is actionable only at the suit of the person who is in possession of the land. This includes the person entitled to immediate and exclusive possession. Since this is essentially a tort having to do with the violation of the right of possession and not with the violation of the right of property, a landlord cannot sue for trespass to land occupied by his tenant; such an action can be brought only by the tenant.<sup>40</sup> Indeed the Court of Appeal in England has held that "a person may have such a right of exclusive possession of property as will entitle him to bring an action for trespass against the owner of

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<sup>39</sup> Thus the doctrine of trespass by relation, whereby a plaintiff who has a right to possession but was not in actual possession, is nevertheless deemed to have such possession (a legal fiction) relating back to the time when he first acquired the right.

<sup>40</sup> But it is otherwise with the common areas in an apartment building.

that property but which confers no interest whatever in the land".<sup>41</sup> The mere use of land, however, without the exclusive possession of it would not be sufficient to found an action of trespass. Thus, usually, a lodger or boarder does not have possession of his room and cannot therefore sue in trespass for any disturbance of his use of it.<sup>42</sup> In deciding whether in fact he had exclusive occupation it would be relevant whether he had an outdoor key and whether he could bar access to the rooms.<sup>43</sup> A guest at a hotel, or in a private house would almost certainly not have exclusive possession, nor would the user of a seat in the theatre or in a railway carriage. On the

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<sup>41</sup> *Aircraft Wagons, Ltd. v. Smith*, [1951] 2 K.B. 496, at p. 501. This and similar cases have to do with statutory tenants under British Rent Acts. In *National Provincial Bank Ltd. v. Ainsworth* [1965] A.C. 1175, the House of Lords unanimously held that a deserted wife had no proprietary interest in the matrimonial home, but only a personal right. Lord Upjohn stated that she could bring proceedings against trespassers because she had exclusive occupation. Again in *Harper v. Charlesworth* (1825), 4 B. & C. 574 at p. 591, it was said that a plaintiff who could not rely on possession under his lease because it was in fact void, had "actual possession ... sufficient to entitle the party possessing it to maintain trespass against persons who have no title at all, and are mere wrongdoers."

<sup>42</sup> Maule, J., in *Lane v. Dixon* (1847) 3 C.B., p. 784, suggested that the lodger in an inn has a mere "easement" of sleeping in one room, and eating and drinking in another.

<sup>43</sup> *Ibid.*, p. 776; *Monks v. Dykes* (1839), 4 M & W 567.

other hand, a purchaser of a standing crop that can be removed from the land, may acquire by the purchase sufficient possession to bring an action of trespass for any damage done.<sup>44</sup> And so may the grantee of a legal interest in land, such as an easement or *profit à prendre* like a fishery or right to cut timber. It is clear that the law, on the whole, consistently applies the concept of exclusive possession to those circumstances which the non-legal literature would define as territorial and similarly refuses to apply the concept to situations which would be described as non-territorial. In general, however, it seems to limit this application to what has been called legal space and leaves the regulation of micro-territories, such as the rooms in a house or a seat on the bus, to those who control the legal space. On the face of it, this would seem to be a practical and efficient strategy.

Although, therefore, we can say that after

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<sup>44</sup>The crucial point seems to be whether the possession is sufficiently exclusive. Obviously it is not consistent with the purchase of a growing crop to have cattle on it or other farm activities taking place there and the possession is therefore intended to be exclusive. In *Hill v. Tupper* (1863) 2 H & C, 121, the plaintiffs had a concession from a canal company for the exclusive right of keeping pleasure boats for hire, but they were unable to maintain an action of trespass because, in effect, the exclusive right did not amount to an *exclusive occupation* of the geographic area.

hundreds of years the notion of the exclusive possession of land is relatively well settled in the law and corresponds fairly closely with what we understand by human territoriality, it does continue to exercise the thinking of judges. This is particularly so where quite new sets of environmental circumstances arise. A particularly interesting case that touches on this whole question of changing conditions is that of *Harrison v. Carswell* which was decided by the Supreme Court of Canada with Chief Justice Laskin presiding in 1975. The reported summary of facts is as follows:<sup>45</sup>

The respondent, an employee of a tenant in a shopping-centre complex, was participating in a lawful strike against her employer which involved her and others peaceably carrying placards and distributing leaflets in front of the premises of her employer on a common sidewalk in the shopping-centre. The appellant, owner of the shopping-centre, told the respondent picketing was not allowed in the shopping-centre and requested she move to a public sidewalk. Her refusal to do so resulted in charges being laid, one for each day she picketed.

It was held 6 to 3 with Judge Laskin amongst others dissenting, that Mrs. Carswell, who was picketing, was trespassing when she refused to leave the shopping-centre after having been requested to do so. The following are the reported summaries of the judgement of Mr.

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<sup>45</sup>*Harrison v. Carswell*, [1975] 6 W.W.R. 673.

Justice Dickson for the majority and of Chief Justice Laskin for the dissenters. Mr. Justice Dickson argued that:<sup>46</sup>

On the authority of *Peters v. The Queen* (1971), 2 C.C.C. (2d) 339 n, 17 D.L.R. (3d) 128 (Can.), the owner of the shopping-centre had sufficient control or possession of the common areas, notwithstanding the unrestricted invitation to the public to enter upon the premises, to withdraw his invitation to enter, and the respondent's failure to withdraw as requested made her a trespasser. It is not the role of the Court in carrying out its judicial function to embark on a consideration of the respective values to society of the right to property and the right to picket. If the right to picket is to be paramount to an individual's right to the enjoyment of his property, it is for the Legislature to change what the court has traditionally recognised as a fundamental freedom.

Chief Justice Laskin argued the opposite view as follows:<sup>47</sup>

The decision in *Peters v. The Queen* is not in law or in fact a controlling authority for a case which comes to the Court, not upon specific questions of fact, but upon the larger and more difficult area of balancing existing legal principles against changing social and economic situations. The principles of the law of trespass based upon the unjustified invasion of another's possession must be adjusted, as the need arises, to reflect changing situations; the introduction into our lives of shopping-centres

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<sup>46</sup> Ibid., p. 673.

<sup>47</sup> Ibid., p. 673.

requires a review of those legal principles and the creation of new principles. On examining the present situation the proper approach is to acknowledge that members of the public who enter shopping centres are privileged visitors whose privilege is revocable only upon misbehaviour or unlawful activity. The respondent, in addition to being a member of the public, was carrying out a legally recognised right, namely, the right to picket peacefully during a lawful strike. The rights of the landlord in relation to other persons must vary according to the degree of possession exercised over his land.

The case raises a lot of interesting questions regarding the control and use of a particular category of geographic space. One of these, which both judges emphasised, has to do with the degree of possession necessary to sustain trespass. Mr. Justice Dickson thought that there was sufficient control for possession of the common areas. Chief Justice Laskin on the other hand, argued that the principles of the law of trespass based upon the unjustified invasion of another's possession must be adjusted as the need arises to reflect changing situations, and that the rights of the landlord in relation to other persons must vary according to the degree of possession exercised over the land. This difference of opinion reflects a fundamental philosophical division of the law between positivist and non-positivist lawyers. The majority in this case, and indeed most English and Commonwealth judges, are positivists interpreting the law as they find it and,

although they do inevitably create law, the declared emphasis is on following it rather than creating it.<sup>48</sup> In the United States on the other hand, judges tend to be freer of precedent and to weigh more openly the balance of interests involved, and this is the position favoured in this case by Chief Justice Laskin.<sup>49</sup> To put this yet another way we can view the difference of opinion as a perennial conflict between those who wish to stick with the logic of the law as it has evolved (with all the advantages of the culturally distilled wisdom that this can be expected to enshrine, together with the very real cultural need for predictability in human relations), and those who prefer to emphasise the need for adaptation to changing

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<sup>48</sup> Lord Denning is the most obvious exception in Britain.

<sup>49</sup> This point is explicitly made by S.C. Coval and J.C. Smith in "The Supreme Court and a New Jurisprudence for Canada", *The Canadian Bar Review*, 53, p. 819. Coval & Smith, implicitly supporting Laskin's view of *Harrison v. Carswell*, argue that such decisions should be based on the ordering of public goals (i.e. picketing versus private property) already implicit or explicit in the law. This ingenuous suggestion, however, begs the question of how one is in practice to interpret this objectively and certainly in specific contexts.

It is interesting to note that in the American case of *Shop & Corp. v. Tanner*, 92 S.Ct. (1972), 2719, it was held that the distribution of handbills in the mall of a private shopping-centre is not constitutionally protected by the first amendment when the purpose of handbilling is unrelated to the shopping-centre's operations.



environmental conditions.

The *Harrison v. Carswell* case raises the important issue for the study of territoriality of whether there are substantial differences in degrees of possession according to the particular category of place; and if so how is one to measure the degree of effective 'presence' and control; and what are the implications of these differences? The arguments of Chief Justice Laskin suggest that there are at least substantial and discernible differences between 'private' and 'public' places.<sup>50</sup> Certainly the degree of possession appears to have substantial behavioural effects. Areas which are not sufficiently 'possessed' in some way are subject to more vandalism and are the location of more assaults than areas for which people feel responsible and which they oversee.<sup>51</sup> Ley and Cybriwsky have observed

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<sup>50</sup> Public and private places will be considered in more detail in Chapter Five. A useful introductory article is Sidney N. Brower, "The Signs We Learn to Read," *Landscape*, 15, 1, 1965, pp. 9-12. For some comments on private space see, J. Douglas Porteous, "Home: The Territorial Core", *The Geographical Review* 66, 4, 1976, pp. 383-390. The question of the appropriate status of Indian reservations is discussed by Imre Sutton, "Sovereign States and the Changing Definition of the Indian Reservation", *The Geographical Review*, 66, 3, 1976, pp. 281-295. A similar concern is expressed by J.C. Smith, "The Concept of Native Title", *University of Toronto Law Journal*, 24, 1, 1974, pp. 1-16.

<sup>51</sup> Oscar Newman, *Defensible Space*, (New York: MacMillan, 1972).

this phenomenon in Philadelphia where cars are more readily vandalised when parked adjacent to vacant lots than when parked opposite an occupied house.<sup>52</sup> The graffiti that urban gangs use to mark their territorial or 'turf' boundaries<sup>53</sup> are graphic indications of the virtual abandonment of the actual possession of a public space. The concomitant of this is that 'neighbourhoods' and 'communities' function better as such, the more that people feel that they belong to a place and that it belongs to them - the greater, in other words, their degree of possession of a geographic area.<sup>54</sup> Effective possession thus comes down to intent, to the *animus possidendi* of the classical

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<sup>52</sup> David Ley and R. Cybriwsky, "The Spatial Ecology of Stripped Cars", *Environment and Behaviour*, 6, 1974, pp. 53-67.

<sup>53</sup> See Ley and Cybriwsky, "Urban Graffiti as Territorial Markers", pp. 491-505.

<sup>54</sup> See Webber, "Culture, Territoriality, and the Elastic Mile."

It may well be that concepts such as 'community' and 'neighbourhood' are based not so much on actual communication and social interaction, as often thought, as they are on the common and exclusive possession of something. The norm of 'groupness' of sharing, indeed of culture, flows from the sense of belonging, of a common bond with something, that is to say a common exclusive possession. It may even be a genetic norm. See Nigel Calder, *The Human Conspiracy: The New Science of Social Behaviour*, (New York: Viking Press, 1976) p. 120 ff.

analyses of possession, and the effective control that flows from this intent'.

In the case of *Carswell v. Harrison* we are in effect seeing how the social development of the concepts of ownership and property has affected the concept of territoriality, in the sense that it has led to a distancing of the person or persons deemed to be in possession from the facts that would constitute an actual effective possession. It is this 'distancing' which leads to the whole problem of 'degrees of possession', and which thus makes the analysis of human territoriality that much more complex. Large-scale suburban shopping-centres and their corporate ownership, having very limited 'presence' in the 'public' areas and effectively no exclusive occupation, represent a set of new conditions, that no longer fit well into the old categories.

Other changes on the landscape produce similar strains. Railways traverse back and forth, dangerous machines and other things are placed on the land, and the result of this is that society becomes concerned with the *quality* of possession. Occupiers of property are then required to act with a *common humanity* towards trespassers, although trespassers are still not accorded the same duty

of care as those lawfully on a property.<sup>55</sup>

It is clear then, that possession is an intricate and sophisticated social concept that is constantly being adapted and qualified through the Common Law to meet the needs of a complex and ever-changing set of environmental (including social) conditions. It nevertheless continues to rest on the fundamentals of territorial behaviour.

#### Territorial Intrusions<sup>56</sup>

The invasion of possessed space can range from outright warfare to mere visual intrusion. Outright warfare is beyond the constraints of a particular society's rules and is dealt with at the level of international law and politics, or by a physical counterforce. Visual intrusions may amount to an invasion of privacy, but like warfare they too lie beyond the criteria that constitute trespass to land. Between these two extremes any direct invasion of legal space is a trespass, unless it is justified in law.

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<sup>55</sup>More will be said about this in Chapter Five.

<sup>56</sup>The following account of territorial intrusions in trespass law, draws on statements of law and examples from the leading text books on trespass law, including those listed in this chapter, [footnote 2].

As Blackstone put it:<sup>57</sup>

Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close; the words of the writ of trespass commanding the defendant to show cause *quare causum querentis fregit*. For every man's land is in the eye of the law enclosed and set apart from his neighbour's; and that either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal invisible boundary, existing only in the contemplation of the law, as when one man's Land adjoins to another's in the same field.

Resistance to such invasions served, through the action of trespass, a variety of functions. In origin, as we have seen, trespass was a remedy for forcible breaches of the King's peace. In other words it was aimed against acts of intentional aggression. Society was reinforcing territorial rights and providing sanctions against aggressive interference with these, with the objective of maintaining public order. It is consistent with such a policy that occupiers themselves may use no more force than is reasonably necessary to remove a trespasser from land who has entered peaceably.<sup>58</sup> With the development of the

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<sup>57</sup> Blackstone, *Commentaries on the Laws of England*, (reprint of the 1803 edn.), p. 209. The more usual expression to describe trespass is *quare clausum fregit*, which can be translated as "wherefore he broke the close".

<sup>58</sup> *Herrings v. Stoke Poges Golf Club Ltd.* [1919] 1. K.B. 720 (C.A.).

idea of land ownership, as opposed to mere possession, the action was used to settle boundary disputes, to quiet title and also to prevent the acquisition of easements by prescriptive user, although it is more likely today that a declaratory judgement would be used to determine a disputed title. This proprietary aspect, together with the paramount necessity of preventing breaches of the peace, account for the rule that the plaintiff is not required to prove material loss. As Fleming says, "the temptation for the occupier to resort to violence in response to a flagrant violation of his boundary was not lessened by the absence of pecuniary loss."<sup>59</sup>

Nevertheless, the recovery of pecuniary loss is also a distinct function of trespass law. This function diverges from the territorial function just outlined and is much more analogous to the rest of tort law where the objective is essentially the recovery of damages. The strict liability that accompanies the law of trespass to land is therefore not in harmony with the modern policy in tort law of requiring intent or negligence (i.e. fault) in order to sustain an action. The growing debate and uncertainty of the law in this area is primarily due to these two

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<sup>59</sup> Fleming, *supra* note, 4th edn., p. 37. This is a quote that Robert Ardrey would appreciate!

identifiably different functions of trespass law which are nevertheless all too often intertwined in practice.

It is because of what I will call the territorial function of trespass law, that a trespass by mistake is not excused. In practice whether a trespass was a mistake or not is not 'traversable' or knowable, and besides the territorial occupier is not likely to be less stimulated in his *initial* response by a mistaken trespasser than by one who has trespassed deliberately. The maintenance of the peace requires that the onus be placed on those who move about not to make mistakes. Therefore a person who strays off a footpath by mistake commits a trespass, as does someone who delivers goods by mistake to the wrong address and leaves them there.<sup>60</sup> It does not even matter that the defendant honestly thought that the land was his own. Thus in the 17th century case of *Basely v. Clarkson*, the defendant, in mowing grass on his own land, by mistake mowed the grass on the plaintiff's adjoining land and was liable for trespass.<sup>61</sup> An involuntary act, however, as where a person is himself forced over a boundary or where "a licensee [takes] a startled and unpremeditated

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<sup>60</sup> *Turner v. Thorne* (1959) 21 D.L.R. (2d) 29.

<sup>61</sup> *Basely v. Clarkson* (1682) 3 Lev. 37.

step of a few inches outside the licensed area" an encroachment that was "wholly inadvertent and involuntary" would not amount to trespass.<sup>62</sup> Inevitable accident is also probably an acceptable defence.<sup>63</sup>

The slightest crossing of the boundary is sufficient, such as putting one's hand through a window or sitting upon a fence.<sup>64</sup> Indeed it has been said that "every invasion of property, be it ever so minute, is a

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<sup>62</sup> *Smith v. Stone* (1647) Style 65; *Braithwaite v. South Durham Steel Co. Ltd.* [1958] 1 W.L.R. 96.

<sup>63</sup> Clerk and Lindsell, *Clerk and Lindsell on Torts*, p. 761.

<sup>64</sup> R.F.V. Heuston, *Salmond on the Law of Torts*, 16th edn. p. 38. The crucial significance of crossing the boundary was highlighted in the extraordinary criminal case of *R v. Collins* [1972] 2 All E.R. 1105, of which Lord Justice Davies said, "were [the facts] put into a novel or portrayed on the stage, they would be regarded as being so improbable as to be unworthy of serious consideration and as verging at times on farce." Briefly, the facts were as follows: A naked young man climbed up a ladder to a young girl's bedroom. She, thinking it was her boyfriend, beckoned him in and they had sexual intercourse. She then discovered her mistake and the young man was charged. The case turned on whether he was a trespasser and knew this, and therefore whether he was inside or outside the window at the moment when the complainant beckoned him in.



trespass."<sup>65</sup> Although still strictly true this "theoretical severity" is seldom exploited in practice. In earlier times even trivial deviations may well have led to a breach of the peace, but today there is not only greater respect for the law but also a greater tolerance of small intrusions. In a complex urban society a great deal of such trespassing is perhaps unavoidable and certainly substantially harmless, and is recognised as such. As Winfield and Jolowicz put it, "nobody except a churl would drag into court a person who takes a short cut across his meadow without doing any visible injury to it."<sup>66</sup>

The strict liability of trespass law and the rule that a mistake of fact or law is no defence makes it unnecessary to clearly mark boundaries, although in many cases it is obviously a wise precaution to do this. There is no apparent consistency in the type of boundary markings used and not infrequently there are no visible markings at all, yet the effectiveness of territorial markers, whether

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<sup>65</sup> *Entick v. Carrington* (1765) 19 State Trials 1029, 2 Wils. K.B. 275, p. 1060. It does not even seem to be necessary to cross the boundary at all, providing that there is some physical contact with it, so that "if a single stone had been put against the wall it would have been sufficient." *Gregory v. Piper* (1829) 9 B. & C. 591.

<sup>66</sup> See Rogers, *Winfield and Jolowicz on Tort*, 10th edn., p. 300.

visible and conventional or merely consisting of subtle interpretations, is borne out by the relative infrequency of territorial intrusions in everyday life. It has been suggested that it would be particularly useful to analyse these "artefacts where the signals have been transferred from the human body to an object which is used in a territorial context."<sup>67</sup>

The most common form of entry into the territorial space is by a person, but it is equally trespass to throw things onto someone's land or place things there, or to allow cattle to stray on to it. The foreign matter that is propelled into physical contact with the plaintiff's land may perhaps be "anything having size or mass, including gases, flame, beams from search lights and mirrors, but not vibrations."<sup>68</sup> Thus, in many American blasting cases damage caused by flying rocks fell within the action of trespass, but damage caused by vibrations or the shock of the explosion fell within the action of nuisance (formerly

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<sup>67</sup> R. Martin, "Concepts of Human Territoriality," in P. Ucko et al, eds., *Man, Settlement and Urbanism*. (London: Duckworth, 1972), p. 443; quoted in Ley and Cybriwsky, "Urban Graffiti as Territorial Markers," p. 504.

<sup>68</sup> See Street, *Law of Torts*, 5th edn., p. 64.

one of the categories of action on the case).<sup>69</sup> The policy thinking behind this seems to be that it would otherwise lead to undesirable restrictions on the use of land, for trespass is categorical and nuisance makes allowances for reasonable use.

This brings us to one of the most significant requirements for all invasions of land if they are to constitute trespass, and one that closely resembles the essence of territoriality. For trespass is concerned with the protection of possessed land from physical intrusion, and it is not concerned with the protection of other interests, such as an enjoyment of the property free from other annoyances. Such annoyances may constitute the tort of nuisance which is more capable of adjusting the different interests of landowners than the relatively inflexible remedy of trespass. Thus trespass is the remedy for forcible (in the sense of physical interference) and direct invasions of land, and other torts are remedies for injuries which were neither forcible nor direct, but instead consequential. So to plant a tree on someone's land without

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<sup>69</sup> See Gregory, "Trespass to Negligence to Absolute Liability," *Virginia Law Review*, 38, 1951, p. 359; William H. Helferich, "Comments - Blasting in New York: A Reappraisal of the Trespass-Vibration Distinction," *Albany Law Review*, 33, 1969.

proper authorisation is a trespass, but if the roots or branches of a planted tree on adjoining land grow over someone's land it is not a trespass but a nuisance. "To throw stones upon one's neighbour's premises is the wrong of trespass; to allow stones from a ruinous chimney to fall upon those premises is the wrong of nuisance."<sup>70</sup>

Similarly, where a man fixes a spout to drain away water from his house and it discharges on the plaintiff's land it is consequential rather than a direct injury and thus not trespass.<sup>71</sup> The distinction is of great importance, but occasionally the difficulty of drawing the line between the two concepts of 'direct' and 'consequential' injury shows up in the cases. A good example is the case of *Gregory v. Piper*, where it was held that rubbish which was placed near the plaintiff's land and rolled onto it by natural forces was trespass, probably because it appeared inevitable that this would happen as a result of its placement.<sup>72</sup>

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<sup>70</sup>Heuston, *Salmond on the Law of Torts*, 16th edn., p. 42.

<sup>71</sup>*Reynolds v. Clarke* (1725) 2 Lord Raym, 1399.

<sup>72</sup>*Gregory v. Piper*, p. 591. This is not easy to reconcile with *Southport Corporation v. Esso Petroleum Co. Ltd.*, [1954] 2 Q.B. 182, 195 (Denning L.J.) where oil discharged from a ship and carried by the tide to the plaintiff's

It is also trespass to remain on land after the authority to do this is terminated. Property and propriety thus may go hand in hand. So that if you are invited to a friend's house to a meal and then fall out with him and you are asked to leave and refuse to do so, you are a trespasser. In short, if you abuse the purpose for which you are permitted to be on the land in the first place you become a trespasser.<sup>73</sup> Thus in *Harrison v. Carswell* picketing in a shopping-centre was considered improper by the owner of the centre and when the picketer refused to leave she was a trespasser.<sup>74</sup> This is, of

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foreshore was held to be consequential rather than direct, and thus not trespass. This was supported in the appeal [1956], A.C. at pp. 242, 244, (Lords Radcliffe and Tucker). Yet it might still be trespass if the physical interference was inevitable as in a case where the oil was deliberately placed so that it must carry to the foreshore: [1953] 3 W.L.R. 773, 776-777, (Devlin J.); [1954] 2 Q.B. 182, 204 (Morris, L.J.).

<sup>73</sup> There is a rule of 'trespass *ab initio*' whereby entry under the authority of the law that is abused as such, is cancelled retrospectively so that the plaintiff would be entitled to recover damages for the entire period of entry and not just the wrongful part of it. The abuse must, however, be a positive act and not a mere omission. *Six Carpenters Case* (1610) 8 Co. Rep. 1466. The rule was originally designed as protection against oppressive use of authority and may still be useful as such. It was disapproved of in *Chic Fashions (West Wales) Ltd. v. Jones* [1968] 2 Q.B. 299.

<sup>74</sup> *Harrison v. Carswell*.

course, consistent with the territorial need to maintain control over a possessed geographic area.

An interesting series of cases have arisen over the improper use of a highway. In English law a highway is land considered to be in the possession and ownership of the adjoining landowner, subject to the rights in respect of the surface that are enjoyed by a highway authority and to the public right of way. Therefore, if a person misuses a highway, that is to say if he uses it for purposes that are not "reasonably incident to its user" as a highway, the act will be a trespass. In the case of *Harrison v. Duke of Rutland* the plaintiff went onto the highway, the soil of which was vested in the Duke, with the avowed objective of disrupting the Duke's grouse drive, but he was prevented from doing so by the gamekeepers.<sup>75</sup> The plaintiff then brought an action for assault against the Duke, who counter-claimed in trespass. Since it was clear that the plaintiff had not been using the highway for the purpose of passing or repassing, but solely for interfering with the grouse shoot, it was held that the plaintiff's use of the highway was a trespass. In *Hickman v. Maisey* the plaintiff had possession of the soil under a highway, of

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<sup>75</sup> *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142.

which the adjoining land was being used for the training and trial of race-horses.<sup>76</sup> The defendant was a "racing tout" and had for a considerable period of time walked up and down on a fifteen yard stretch of the highway in order to make notes on the trials.<sup>77</sup> It was held that "the defendant had exceeded the ordinary and reasonable user of a highway as such to which the public was entitled, and he therefore was guilty of a trespass on the plaintiff's land."<sup>78</sup> It has been said that:<sup>79</sup>

On a highway I may stand still for a reasonably short time, but I may not put my bed upon the highway and permanently occupy a portion of it. I may stoop to tie up my shoelace, but I may not occupy a pitch and invite people to come upon it and have their hair cut. I may let my van stand still long enough to deliver and load goods, but I must not turn my van into a permanent stall.

In an American case where the plaintiff had possession of the soil of a road outside his house it was held that a

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<sup>76</sup> *Hickman v. Maisey*, [1900] 1 Q.B. 752, C.A.

<sup>77</sup> *Hickman v. Maisey* is especially interesting because here we have a case of visual intrusion which effectively constituted, albeit *indirectly*, a trespass.

<sup>78</sup> *Ibid.*, p. 752.

<sup>79</sup> *Joseph (Earl) v. Martin*, [1961] 1 Q.B. 232, per Paull J. at p. 273.

person who slandered him from there was guilty of trespass.<sup>80</sup>

An analogous group of cases have to do with the use of the foreshore. The only right of the public on the foreshore is to pass over it in boats when it is covered by water in order to fish or for purposes of navigation, and it has been held that there is no right to use the foreshore for bathing or for holding religious services.<sup>81</sup> Nor is there a public right to collect sea-coal,<sup>82</sup> or to put down permanent moorings in tidal waters where the sea bed is privately owned, although there is a right to navigate and anchor temporarily.<sup>83</sup>

Closely related to those cases where improprieties, in terms of the norms of the territorial proprietor, constitute trespass are the cases that deal with the

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<sup>80</sup> *Adams v. Rivers*, 11 Barb. N.Y. Rep 390 (1851).

<sup>81</sup> *Blundell v. Catterall* (1821) 5 B. & Ald. 268; *Brinckman v. Matley* [1904] 2 Ch. 313, 323 (Vaughan Williams L.J. observed here that the judgement of Holroyd J. in *Blundell v. Catterall* "has come to be regarded as one of the finest examples we have of the way in which the judgement of an English judge ought to be expressed, and the reason for it given.").

<sup>82</sup> *Sackett Ltd. v. Lyons* [1967] Ch. 449.

<sup>83</sup> *Fowley Marine (Fmsworth) Ltd. v. Gafford* [1967] 2 Q.B. 618.



revocation of a licence to be on land. Normally such a licence is justification for being there, but a licensee who exceeds his license is a trespasser. As early as the seventeenth century it was said that:<sup>84</sup>

A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful. As a licence ... to hunt in a man's park, to come into his house, are only actions which without licence had been unlawful.

Nevertheless a number of problems arose in cases where a plaintiff had entered premises by virtue of a licence, whether contractual or otherwise. In the view of the Common Law a licence could be revoked at any time, even if it was a contractual one as when someone had paid for admission to a theatre or race-course.<sup>85</sup> On the other hand Equity took the view that a licence that was contractual could not be revoked, as long as the contract had not been broken by the actions of the plaintiff, so that if he was ejected he could sue for assault.<sup>86</sup> This latter view seemed to confuse rights over land with contracts. The

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<sup>84</sup>*Thomas v. Sorrell* (1674) Vaughan 330.

<sup>85</sup>*Wood v. Leadbitter* (1845) 13 M. & W., 838.

<sup>86</sup>*Hurst v. Picture Theatres* [1915] 1 K.B. 1.

matter, however, was settled by the House of Lords in *Winter Garden Theatre v. Millenium Productions Ltd.*, [1948] A.C. 173, where it was held that a contractual licence cannot create a right over land itself (or a right *in rem* which runs with the land and may therefore affect third parties), but at the same time it cannot be unreasonably revoked during the time that the parties intended it to continue. In this way the principle of territorial control was maintained, but a society through its highest institution of cultural interpretation, saw to it that such control should stay within the bounds of reason.

Thus it is also that a society, through its jurisdictional control, ensures that some access to 'territories' should be permitted, for trespass to land consists only of unjustifiable intrusions by one person upon land in the possession of another. Modern statutes have greatly increased the number of people who are authorised to enter premises for some official purpose, such as health and factory inspections. Officers of the law too, are authorised to enter land to arrest a person or to make enquiries, or to take goods that they believe are stolen, and, as we will see in Chapter Six, these powers are considerable and growing. Even a private citizen may arrest a criminal in appropriate circumstances and it would not be a trespass to break into a house to prevent someone murdering his

wife.<sup>87</sup> In such cases the law in effect gives a licence to enter against the consent of the possessor. An entry may therefore be justified to prevent the spread of a fire or other nuisance.<sup>88</sup> There is no justification, however, for entering the land of someone else in order to hunt foxes,<sup>89</sup> or to chase after game that crosses over onto adjoining land<sup>90</sup> or to reclaim a swarm of bees.<sup>91</sup>

Other justifications for entry include the recapture of goods wrongfully taken, and by right of various easements under which a person may have the right to a certain use of land which is short of giving him exclusive possession. There is also justification under some customary rights. It is essential, however, that such customs apply to all the inhabitants of a delimited area, such as a town, manor, or parish, and that they be immemorial and reasonable. A custom for the inhabitants of a locality

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<sup>87</sup> *Handcock v. Baker* (1800) 2 Bos & P. 260.

<sup>88</sup> *Cope v. Sharpe No. 2* [1912] 1 K.B. 496.

<sup>89</sup> *Faul v. Summerhayes* (1878) 4 Q.B.D. 9.

<sup>90</sup> *Deane v. Clayton* (1817) 7 Raunt. 489.

<sup>91</sup> *Heary v. Pattinson* [1939] 1. K.B. 471.

to exercise rights outside of their own locality is not acceptable.<sup>92</sup> Such customs seem therefore to amount to the 'territorial' right of a community over its own locality, an idea which has a suggestive correspondence to the notion that communities and neighbourhoods are territorial. Thus it was that a custom for the general public to go upon a common such as Newmarket Heath in England in order to watch horse races without payment was considered bad.<sup>93</sup> But a custom for all the men of Kent to dry their fishing nets upon a particular piece of land by the seashore has been held to be good.<sup>94</sup>

We see, in this chapter, therefore, how human territoriality, which is an identifiable form of behaviour in a social context, is reinforced and clarified by the law of trespass to land.<sup>95</sup> Interesting as this may be, however,

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<sup>92</sup> *Edwards v. Jenkins* [1896] L.R. 2 Ex. 96.

<sup>93</sup> *Earl of Coventry v. Willes* (1863) 9 L.T.(N.S.) 384.

<sup>94</sup> See the judgement of Holroyd J. in *Blundell v. Catterall*, p. 296.

<sup>95</sup> This chapter gives a fair and reasonably comprehensive outline of common law trespass to land. Its primary purpose has not been to discuss the existing law as such, but rather to provide background material so that the parallels with the discussion of territoriality in Chapter Two are readily apparent. I cannot refrain from pointing out in this regard, that the case law is so

it is not enough. For the question of how this is to be fitted into some more general and overarching 'theory' presents itself forcefully. The following chapter attempts to find a guiding set of statements in the general notion of evolution, and especially of cultural evolution.

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extraordinarily detailed and rich in examples of territorial intrusions, that the problem has been to decide what material to keep *out* of the chapter.

## CHAPTER IV

AN EVOLUTIONARY APPROACH TO UNDERSTANDING  
HUMAN TERRITORIALITY AS EXPRESSED  
IN TRESPASS LAW

Trespass law, as a body of rules, represents a cultural interpretation of territoriality. In specific circumstances these rules are applied by formally constituted cultural interpreters, the judges. In this way a set of events is given an authoritative meaning. At such a level the justification for this meaning lies within the system of rules itself, just as it does in a game of chess or squash.<sup>1</sup> Similarly, the justification for the cultural geographer's interpretation of landscapes and human behaviour is found in ~~the~~ cultural rules or norms that constitute the relevant way of life. In a sense then, we can say that the interpretation or inference that is made in a particular case depends upon the principles of the given system, that is to say its logic. And, of course, it is readily apparent that different logics will lead to different interpretations. All that can be said about a

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<sup>1</sup> I wish to do homage to Ludwig Wittgenstein whose work, particularly his *Philosophical Investigations*, has had a considerable impact on my overall thinking. Wittgenstein's notion of rules and meaning was taken up by Peter Winch in *The Idea of a Social Science*.

cultural system in this regard is that it is the normal one. •

The more general question that this chapter will attempt to resolve is, what is it that this logic in its turn depends on? How, in other words, are we to interpret the interpretation? For to understand human territoriality at a deeper level it is necessary to find a basis for the rules themselves and for their development. In this way it will be possible to go some way towards answering such questions as, why these rules; what is their justification; how and why do they change; and in what way should they be changed? The objective will be to try to understand the *function* of these rules in a wider context than that of the particular culture itself.<sup>2</sup> How, in other words, do cultures themselves function? Obviously such a

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<sup>2</sup>The term 'function' has been used in a variety of ways by scholars. As a particular perspective or group of theories it has come to be known as 'functionalism'. It has been said of this, that for sociological theory (and this is also true of anthropological thought) "its most general characteristic is an assumption that society can be analysed as a systemic whole with constituent parts in search of a mutually adjusted equilibrium." N.J. Demerath III and Richard A. Peterson, eds., *System, Change and Conflict: A Reader on Contemporary Sociological Theory and the Debate over Functionalism*, (New York: Free Press, 1967), p. 2. Although many social scientists would still describe themselves as functionalists in some such sense, it is very doubtful that any of these would accept the widespread criticism that this precludes an interest in studying systems over time, and the change

question, in all its aspects, is too large to be properly covered in one chapter. The aim, therefore, will be the very limited one of sketching in a theoretical perspective or framework, into which the law of trespass to land can be fitted.

The perspective adopted is an evolutionary one. The normal progression for an argument maintaining such a perspective would be to begin with the biological foundations of evolution as developed by Darwin and modified and extended by contemporary sociobiologists, and to follow this with an examination of the idea of cultural evolution and related notions concerning the methods of selection and survival of rules, ideas, and meanings. Such a progression, however, invites the interpretation that there is a logical development and even causal connection

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and conflict that accompanies this. This study adopts a functionalist perspective which incorporates ideas of *fitment* and *use*, and of integration and relative harmony within a system. But alongside this is a very strong emphasis on conflict with other systems. The retention of system identity, that is to say its survival, depends on, by definition, its separation from the envioning conditions and yet its viability also depends on the support of those conditions. These co-existing requirements of separation and support are 'conflictual', in the sense that the stability brought by the former is inevitably incompatible with the changing nature of the other.



between biological and cultural evolution.<sup>3</sup> In fact each of the separately identified areas of discussion that follow in this chapter can stand alone, although it is my personal predilection to see them as resting on a coherent and consistent logic. A refusal, therefore, to accept the supportive arguments of sociobiologists does not necessarily invalidate the framework that is erected to help understand the law of trespass to land as a part of culture; although a failure to show a logical consistency at the different levels of biology, culture, and interpretation, would weaken the overall argument to some extent. In order, therefore, to assert, without equivocation, the independent validity of the different levels, the discussion begins with the question of interpretation itself. The specific aim is to show that interpretations (or meanings) are dependent on the *support* of the circumstances of life<sup>4</sup> for their very existence, and furthermore that there is in this dependency an inherent and pervasive conflict (the fundamentals of which are found in all

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<sup>3</sup>This is a problem encountered by regional textbooks that begin with the physical characteristics of an area and then move on to human activities.

<sup>4</sup>I would prefer to use the word 'environment' here, but unfortunately it is too often thought of as referring to only the natural environment.

aspects of a culture) between the social requirements of stability and certainty in the use of meanings and interpretive logics, and the practical need to use these flexibly and, if necessary, to alter them to better fit changing circumstances. This dilemma is reflected in the subsequent discussions on the 'biological foundations' and on 'cultural evolution'. In addition, all three topics show up a second inherent conflict in cultural systems, which is similarly pervasive, between the different interests of individuals and the society of which they are a part.<sup>5</sup> Indeed it is appropriate to begin with such a conflict, namely a fundamental disagreement over the appropriate interpretive framework in geography.

#### The Interpretive Dilemma

Contemporary geographic thought is marked by a serious challenge to the interpretive logic of positivism which is currently relied on in most geographic research work.<sup>6</sup> It is partly in the structure of, and the reasons

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<sup>5</sup> 'Society' is to be understood as a comprehensive term which refers to both the individuals and groups that constitute it.

<sup>6</sup> The discipline is replete with examples of this challenge. The following are no more than representative: Sister Annette Buttimer, 'Values in Geography', *Association of American Geographers*, Resource Paper No. 24, (Washington,

for, such a conflict that one of the bases for an analysis of trespass law can be found.

Strictly speaking, positivism is a broad school of philosophy which encompasses a number of different positions, but it can be characterised as adhering to: (i) empirical truth and (ii) logical consistency.<sup>7</sup> In this respect it is almost synonymous with what we understand by the scientific method, and indeed its acceptance in human geography is associated with the belief that the only valid form of knowledge is that of science and the only possible objects of such knowledge are facts.<sup>8</sup> The rules of the

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D.C.: Commission on College Geography, 1974), with commentaries by James Blaut, Torsten Hägerstrand, Edward Gibson, and Yi-Fu Tuan; Marwyn Samuels, *Science and Geography: An Existential Appraisal*; Yi-Fu Tuan, "Geography, Phenomenology, and the Study of Human Nature," *Canadian Geographer*, 15, 3, 1971, pp. 181-192.

<sup>7</sup> D.J. Walmsley, "Positivism and Phenomenology in Human Geography," *Canadian Geographer*, 18, 2, 1974, p. 97. I refer to Walmsley not because he is an authority, but because reference to the geographic literature best illustrates the problem at hand.

<sup>8</sup> *Ibid.*, p. 98. See for examples of this acceptance, Bunge, *Theoretical Geography*, 2nd edn.; Harvey, *Explanation in Geography*; Abler, Adams and Gould, *Spatial Organisation: The Geographer's View of the World*. There is, of course, an enormous literature about the proper role and status of science. The problem is referred to here only as part of a more general argument regarding an appropriate theoretical perspective for geography.

game, in other words, are those of empirical science.

The challenge to positivism in geography has manifested itself through the rise of perception studies, the adoption of existential and phenomenological approaches, and an interest in the critical social science of the Frankfurt school.<sup>9</sup> All of these approaches express a dissatisfaction with the dominant positivistic interpretation of data in geography. As Robson puts it, "the argument now in social geography is no longer about the empirical facts of society, but about the interpretations put upon those data."<sup>10</sup> Thus 'perception' studies emphasise meaning-variance, and the Frankfurt school advocates a hermeneutic and dialectical approach, and refers to the need for de-reification. Similarly it is said, that for human geographers, "the chief lesson in phenomenology is certainly that 'the world' can only be understood in terms

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<sup>9</sup>The recourse to the critical science of the Frankfurt school is referred to by B.T. Robson in a progress report on "Social Geography," *Progress in Human Geography*, 1, 3, 1977, p. 481, and also by Derek Gregory, *Ideology, Science and Human Geography*, (London: Hutchinson, 1978).

<sup>10</sup>Ibid., p. 482; and see G. Olsson, "Explanation, Prediction and Meaning Variance: An Assessment of Distance Interaction Models," *Economic Geographer*, 46 (Supp.), 1970, pp. 223-33.

of man's intentions and attitudes towards it."<sup>11</sup> As  
 Entrikin describes the situation:<sup>12</sup>

Humanist geographers hold that the study of human behavior cannot be modeled after the physical sciences. They reject the positivist claim of the isomorphism of social and physical science, because they are dissatisfied with, among other things, two related dichotomies: the subject-object distinction and the fact-value distinction. These distinctions are related in that by viewing the world as separable into the objective world of things and the subjective world of the mind, one can then separate the knowledge of that objective world as factual knowledge, and the subjective elements as emotion, value and meaning. By viewing the world as a reciprocal relationship of subject and object in which neither can be effectively separated, the fact-value distinction becomes blurred."

Entrikin correctly comes to the conclusion that this 'humanistic' geography is a form of criticism which reaffirms the importance of the study of meaning and

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<sup>11</sup> D.C. Mercer and J.M. Powell, *Phenomenology and Related Non-positivistic Viewpoints in the Social Sciences*, (Melbourne: Monash Publications in Geography No. 1, 1972), p. 48.

<sup>12</sup> J. Nicholas Entrikin, "Contemporary Humanism in Geography," *Annals, Association of American Geographers*, 66, 4 1976, p. 625. Entrikin is not saying anything that hasn't been said many times before outside of geography. The quote is merely used as a touchstone in geographic thought, and as such part of the framework of the overall argument.

value in geography.<sup>13</sup> This critical approach, with its inherent relativity, can therefore be understood as in opposition to an approach that is more absolute and which emphasises consistency, stability, and predictability. In effect it can be thought of as a battle of languages (or logics) in which, on the one side, are ranged those who support given and relatively fixed meanings (whom we might label 'positivists' or 'monists') and, on the other side, those who emphasise the variability of meanings, and indeed often seek to change them, ('humanists' or 'pluralists'). The ultimate test in such a conflict is the functional one of the survival of particular meanings or ideas.<sup>14</sup> It should not, however, be thought of as a conflict between the world viewed as 'fact' and as 'value', which is to be resolved in the social sciences by blurring the distinction, but instead as a conflict between a prevalent logic (or in Kuhn's terms, a prevalent paradigm)<sup>15</sup> and alternative logics, or at least the

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<sup>13</sup> It is interesting to see how 'perception' studies in geography have now been incorporated into the positivistic approach.

<sup>14</sup> This idea is developed further on pages 165-168.

<sup>15</sup> See T.S. Kuhn, *The Structure of Scientific Revolutions*, (Chicago: University of Chicago, 1962).

alteration of the existing one. The function of such alternative and additional rules is to cover the anomalies that are thrown up by new circumstances, that is to say their purpose is an adaptive one, and it is one that proceeds on a dialectical basis. The problem of certainty (that is to say of the normal or accepted logic) in other words, is that it constantly comes up against the changing circumstances of life.<sup>16</sup>

The fundamentals of this conflict are further exposed by the pre-eminent work on 'meaning' by Ludwig Wittgenstein.<sup>17</sup> Wittgenstein's philosophy is divided into two major parts which have been described as "two entirely distinct and original philosophical works of genius."<sup>18</sup>

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<sup>16</sup> Karl Popper, in such political writings as *The Open Society* (1945) and the *Poverty of Historicism* (1957) argues against the notion of certainty as a blueprint for change.

<sup>17</sup> K.T. Fann wrote, "Ludwig Wittgenstein is without doubt one of the greatest philosophers of our time and numerous philosophers in English-speaking countries would be quite prepared to describe him as *the* greatest. His place in the history of philosophy is comparable to that of Darwin in biology and Einstein in physics." *Ludwig Wittgenstein: The Man and His Philosophy*, K.T. Fann, ed., (New York: Delta, 1967) p. 11. Wittgenstein's work is such that contemporary discussions in the social sciences on problems of 'meaning' and the interpretation of data invariably give one the feeling of *déjà vu*.

<sup>18</sup> Justus Hartnack, *Wittgenstein and Modern Philosophy*, translated by Maurice Cranston, (New York: Anchor, 1965), p. 8.

The first is represented by *Tractatus Logico-Philosophicus*, published in 1922, and the second, by *Philosophical Investigations*, published in 1953.<sup>19</sup> The view put forward in the *Tractatus* is that language is to be regarded as a picture or mirror of reality. There are various views as to how this occurred to Wittgenstein, but one account is illustrative of the thinking involved.<sup>20</sup>

It was in the autumn of 1914, on the East front. Wittgenstein was reading in a magazine about a law suit in Paris concerning an automobile accident. At the trial a miniature model of the accident was presented before the court. The model here served as a proposition; that is, a description of a possible state of affairs. It had this function owing to a correspondence between the parts of the model (the miniature houses, cars, people) and things (houses, cars, people) in reality. It now occurred to Wittgenstein that one might

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<sup>19</sup> *Tractatus Logico-Philosophicus* (finished in 1918) with an introduction by Bertrand Russell. The first English translation by C.K. Ogden, (London: Routledge and Kegan Paul, 1922). A new English translation by D.F. Pears and B.C. McGuinness, (London: Routledge and Kegan Paul, 1961). *Philosophical Investigations* (Part I finished in 1945; Part II written between 1947 and 1949). Edited by G. Anscombe and R. Rhees with an English translation by G. Anscombe, (Oxford: Blackwell, 1953).

<sup>20</sup> Fann, *Ludwig Wittgenstein: Man and His Philosophy*, p. 18. The model referred to here seems to have been a schematic drawing in the magazine itself. See Norman Malcolm *Ludwig Wittgenstein, A Memoir* (London: Oxford University, 1962), p. 8. How reminiscent this is of the idea of a model-based paradigm as expounded in Chorley and Haggett, eds., *Models in Geography*.



reverse the analogy and say that a *proposition* serves as a model or *picture*, by virtue of a similar correspondence between *its* parts and the world. The way in which the parts of the proposition are combined - the *structure* of the proposition - depicts a possible combination of elements in reality, a possible state of affairs.

Many years later Wittgenstein came to realise that a fact could not have a logical form and that the picture theory was untenable. According to his own recollection this realisation was brought home to him by a colleague at Cambridge, the economist Piero Sraffa, who one day made a contemptuous Neapolitan gesture and asked Wittgenstein what logical form it had.<sup>21</sup>

The *Philosophical Investigations* presents a view that is generally held to be in complete opposition to the earlier view in the *Tractatus*.<sup>22</sup> The picture theory is replaced by what has been described as the "toolbox theory of language",<sup>23</sup> in which as Wittgenstein puts it "Language is an instrument. Its concepts are

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<sup>21</sup>See, Malcolm, *Ludwig Wittgenstein: A Memoir*, p. 69.

<sup>22</sup>Wittgenstein himself, however, did not think that this was so.

<sup>23</sup>Leonard Linsky, "Wittgenstein on Language and Some Problems of Philosophy", in Fann, *Ludwig Wittgenstein: The Man and His Philosophy*, p. 175.

instruments",<sup>24</sup> so that "the meaning of a word is its use in the language".<sup>25</sup> He writes: "think of the tools in a toolbox: there is a hammer, pliers, a saw, a screwdriver, a rule, a glue-pot, glue, nails and screws. - The functions of words are as diverse as the functions of these objects. (And in both cases there are similarities)."<sup>26</sup>

This position clearly implies a criticism of the more positivist and essentialist<sup>27</sup> position of the *Tractatus*.

It is reminiscent of Malinowski's views in which he noted that cultural objects, such as fish hooks, function differently in different situations. In one context it may be used for fishing and in another for ritual purposes. At all times we must remember, as Wittgenstein constantly reminds us, the normal setting which gives statements their meaning. Thus he writes of a philosophical problem, "a wheel that can be turned though nothing else moves with

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<sup>24</sup> Wittgenstein, *Philosophical Investigations*, paragraph 569.

<sup>25</sup> *Ibid.*, paragraph 43.

<sup>26</sup> *Ibid.*, paragraph 11.

<sup>27</sup> David Pears, *Wittgenstein*, (London: Fontana, 1971), p. 105.

it, is not part of the mechanism."<sup>28</sup> In other words the idling of language creates the problem, for "philosophy begins when language goes on holiday."<sup>29</sup>

Although this later philosophy clearly marks a shift towards anthropocentricity it is not solipsistic. It is firmly grounded in shared language-games (which serve many different purposes) for which the criteria are rules that are necessarily public and thus independent. The correct and incorrect use of words is justified by the background of custom, in the same way that trespass law is the customary way of deciding on the propriety of territorial behaviour. Interpretation, however, is always related to the particular circumstances and in this way becomes humanistic, as opposed to the more naturalistic and generalised approach of the positivists. The essence of this humanistic interpretation is that it is functional and purposive. The craving for generality and certainty that Wittgenstein speaks of, and which shows up so well in the *Tractatus*, gives way in the *Philosophical Investigations* to the requirement of particularity, to the concrete

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<sup>28</sup>Wittgenstein, *Philosophical Investigations*, paragraph 271.

<sup>29</sup>*Ibid.*, paragraph 38.

cases that Wittgenstein saw as unshackling philosophical investigations.

Although this pilgrimage into the intellectual territory of Wittgenstein can in no way represent or reflect the genius of his work, it is possible to draw from it the conclusion that the failure (as well as success) of the *Tractatus*, as with positivist thought generally, lies in its search for generality and certainty, and the success (as well as failure) of the *Philosophical Investigations* lies in its rejection of these and its recognition of the variability and relativity occasioned by changing relationships. This position parallels the attempts in geography to resolve the weaknesses of a positivistic spatialist theory by various critical reformulations of the geographic approach. It also parallels the dilemma in the Common Law between the need for generality and certainty in the rules themselves and the conflicting need to change them to fit changed circumstances. This dilemma has already been specifically referred to in the narrow context of the development of trespass law. The structure of Wittgenstein's overall work therefore can be seen as representing a conflict between the functional requirements of predictability or certainty, on the one hand, and the functional requirement of adaptability on the other. Given moment, such a structure becomes an evolu-

tionary process or dialectic. Thus it was, as Wittgenstein emphasised, that philosophy must be an *activity*.

Although this structure, involving a conflict between the need for predictability and the exigencies of real life, is no more than a personal derivation from Wittgenstein's work, there is some support for it in his own concerns in the last year and a half of his life, which were published as *On Certainty* in 1974.<sup>30</sup> This first-draft material reflects a tortuous examination of the problem of 'knowing', in response to Moore's saying that he knows that "here is one hand."<sup>31</sup> The following selected quotes speak for themselves, and it is clear that they are not inconsistent with the interpretation that is offered here.

We say we know that water boils and does not freeze under such-and-such circumstances. Is it conceivable that we are wrong? Wouldn't a mistake topple all judgment with it? More: what could stand if that were to fall? Might someone discover something that made us say "It was a mistake"?

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<sup>30</sup> Ludwig Wittgenstein, *On Certainty*, G.E.M. Anscombe and G.H. von Wright, eds., (Oxford: Blackwell, 1974).

<sup>31</sup> See G.E. Moore, "Proof of an External World," *Proceedings of the British Academy*, 25, 1939. Wittgenstein wrote of Moore's assertion, "If you do know that here is one hand, we'll grant you all the rest." Wittgenstein, *On Certainty*, paragraph 1.

Whatever may happen in the future, however water may behave in the future, - we know that up to now it has behaved *thus* in innumerable instances.

This fact is fused into the foundations of our language-game.

(Para. No. 558)

You must bear in mind that the language-game is so to say something unpredictable. I mean: it is not based on grounds. It is not reasonable (or unreasonable).

It is there - like our life.

(Para. No. 559)

But now it is also correct to use "I know" in the contexts which Moore mentioned, at least *in particular circumstances*. (Indeed, I do not know what "I know that I am a human being" means. But even that) might be given a sense.)

For each one of these sentences I can imagine circumstances that turn it into a move in one of our language-games, and by that it loses everything that is philosophically astonishing.

(Para. No. 622)

What is odd is that in such a case I always feel like saying (although it is wrong): "I know that - so far as one can know such a thing." This is incorrect, but something right is hidden behind it.

(Para. No. 623)

In terms of trespass law, as indeed of all law, the interpretive dilemma is expressed in the competition between the goal of certainty of the rules and categories *per se*, including of course the policy goals that are somehow contained in them, and the challenge of alternative

goals.<sup>32</sup> This is not at all unlike Wittgenstein's dilemma of 'knowing'. There is thus the desire on the one hand to *know the world*, to have it regular and predictable; and on the other the nagging recognition that knowing is itself dependent on the *support* of that world, and that this requires that knowledge and regularity be dissolved and reassembled to fit different circumstances. This challenge is one that trespass law has to meet in the concreteness of its cases as will be seen in the next chapter. In the meantime, however, there is a need to clarify what is contained in this notion of 'knowing' the world and also what is meant here by saying that 'knowing' requires the support of that world. This is where an evolutionary approach to understanding culture helps. Thus Wittgenstein's dilemma could be interpreted as having to do with the problem of the *survival* of unvarying meanings (that is to say of 'knowing'), and thus their replication

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<sup>32</sup> The goals of rules and policy, respectively, have been characterised as follows:

- (a) "Decisiveness, clarity, publicity, predictability, consistency, authoritativeness and impartiality.
- (b) Peace, order, dignity, physical and economic well-being, knowledge, respect, love, security, privacy, freedom of action, and certain other agreed interests."

Coval and Smith, "Supreme Court and a New Jurisprudence for Canada."

in the context of a changing reality.<sup>33</sup>

The full scope and importance of ~~this argument~~ will be made clearer and strengthened by the following discussion of biological and cultural evolution.

### Biological Foundations

The objective of this section is to establish a perspective on both the individual and his relationship to the environment that is not inconsistent with evolutionary theory and that offers a plausible position from which to begin the interpretation of the cultural expression of territoriality in the law of trespass to land. The fascinating, but extremely complex, evolutionary approach to understanding human behaviour calls for a much more detailed treatment than the scope of this study will allow. Nevertheless, it is hoped that a reasonably tenable position can be outlined.

The potential of the evolutionary approach is such that it may well be of the greatest significance to the future development of all the social sciences. Since it is not unlikely that such a claim will be misunderstood as advancing a biological explanation of human behaviour I

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<sup>33</sup>This link between Wittgenstein's ideas and evolutionary theory may be a significant one.



want immediately to say that although the foundations of human behaviour appear to be biological,<sup>34</sup> including, perhaps, even the origin of human values,<sup>35</sup> I do not think that the evolutionary explanation should be restricted to the biological mechanism of human behaviour. Indeed, it seems most likely that it will have a leading role in the explanation of cultural development. Of course, such an approach is fraught with the dangers of oversimplification, and false analogy, as well as the additional burden from having to carry the unwanted baggage of the past.<sup>36</sup> Nevertheless, the potential gains from crossing the minefield of cultural evolution are such as to warrant the attempts to do so. Yet, any such attempt must be based on

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<sup>34</sup> Some of the behaviours that may be genetically coded include aggression, allegiance, altruism, conformity, ethics, genocide, indoctrinability, love, male dominance, parent-child conflict, and the sexual division of labour, spite, territoriality, and xenophobia. It is not, however, so important here to say what they are as that the evidence for a genetic influence on behaviour is increasing. See, Wilson, *Sociobiology: New Synthesis*.

<sup>35</sup> See George Edgin Pugh, *The Biological Origin of Human Values*, (New York: Basic Books, 1977).

<sup>36</sup> The classical form of Social Darwinism is no longer taken seriously in the social sciences. Nevertheless, to avoid any possible misunderstanding it must be emphasised that, as will become clear, evolution is not used in this study to support an unilineal view of human development, the *status quo*, *laissez-faire* individualism, or nationalism.

at least a rudimentary understanding of the biological foundations of human behaviour.<sup>37</sup>

One modern view of the import of such a biological foundation is that which is characteristic of the sociobiologists. Thus according to Edward Wilson, who has synthesised this view, "socialisation ... is not the cause of social behaviour in the ultimate genetic sense. Rather, it is a set of devices by which social life can be personalised and genetic individual fitness enhanced in a social context."<sup>38</sup> Whether this explicit linkage between culture and biological fitness is accepted or not, it seems certain that culture and its development cannot be properly understood without some conception of what the human organism is trying to do. And, put at its simplest, what the organism (or, more exactly, its genes) is 'trying' to do is to survive.<sup>39</sup> So that it can be usefully thought

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<sup>37</sup> Some of the objections to an evolutionary approach, such as accusations of deterministic and political bias, and the dangers of the 'naturalistic fallacy' are dealt with in the next section.

<sup>38</sup> Wilson, *Sociobiology: New Synthesis*, p. 382. There is no universally agreed definition of a gene. It can be thought of as a portion of chromosomal material which survives as a unit for a number of generations.

<sup>39</sup> The word 'trying' is inappropriate when used to talk about genes and is therefore used here figuratively rather than literally. Indeed, this is an opportune

of as a "survival machine",<sup>40</sup> and culture, therefore, as the social mechanism by which man adapts to his environment.<sup>41</sup> Cultural ecology thus relates directly to man's survival on earth.<sup>42</sup>

This, of course, is essentially part of the evolutionary theory of Charles Darwin expressed in terms of modern sociobiology.<sup>43</sup> The central struggle of life is seen as the drive to survive. In such a struggle two very

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time to request some reasonable latitude in the use of words such as 'conflict', 'competition' and so on. They must be understood in the context of the overall argument.

<sup>40</sup> See Dawkins, *Selfish Gene*.

<sup>41</sup> 'Adapts' should be understood as including all the various *adjustments* man makes to his total environment.

<sup>42</sup> See William Bunge, "Geography of Human Survival."

<sup>43</sup> Considering the fertility of Darwin's thought, and the geographical nature of the variations that inspired him, it is surprising that geographers have not been able to develop a creditable Darwinian perspective on their work. In part this is due to the reaction against the excesses of early environmental determinism which was built on Spencer's notion of the survival of the fittest and a simplistic Darwinism. See, Ellsworth Huntington, "Geography and Natural Selection," *Annals, Association of American Geographers*, 14, 1924, pp. 1-16. For an informative assessment of Darwin's impact on geography, see D.R. Stoddart, "Darwin's Impact on Geography" in *The Conceptual Revolution in Geography*, Wayne K.D. Davies, ed., (London: University of London Press, 1972), pp. 52-76.

generalised and pervasive tensions in culture can be identified, and these will be helpful in understanding the law of trespass to land. The first, identified in the previous section, is the tension that arises between the contrary requirements of stability and change. The second, newly emphasised here, is the tension that exists as a result of the self-serving<sup>44</sup> objectives of the different survival machines.

Of the first of these tensions, that between stability and change, it has been said that "Darwin's 'survival of the fittest' is really a special case of a more general law of *survival of the stable*."<sup>45</sup> The universe is populated by stable things and it appears that "the earliest form of natural selection was simply a selection of stable forms and a rejection of unstable ones."<sup>46</sup> However, this does not explain the existence of complex entities such as man. Darwin's theory of evolution by

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<sup>44</sup> The word 'selfish' rather than 'self-serving' is unfortunately invariably used in the literature. Yet it is clear that *selfishness*, in a social context, will seldom benefit the individual.

<sup>45</sup> Dawkins, *Selfish Gene*, p. 13.

<sup>46</sup> *Ibid.*, p. 14. The following account owes much to the clear and lively discussion in this book of the biological foundations of human behaviour.

natural selection comes to the rescue here because it shows how the original simple selections could be made more complex. Richard Dawkins, in a very readable account of the whole process, explains it in the following way.<sup>47</sup> To begin with, a molecule which has the property of being able to create copies of itself is formed by accident. Dawkins calls this a *replicator* and invites us to think of it as a kind of mould or template. The presence of this replicator provides a new kind of 'stability' whereby its copies are spread rapidly. But inevitably copies are not perfect, and as Dawkins points out "erratic copying in biological replicators can in a real sense give rise to improvement, and it was essential for the progressive evolution of life that some errors were made."<sup>48</sup> These mis-copyings would produce varieties of replicators with differential abilities to survive.<sup>49</sup> Paradoxically then, copying errors are an essential prerequisite for evolution, although at the same time natural selection favours high copying-fidelity. The answer to this paradox, as Dawkins

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<sup>47</sup> Ibid.

<sup>48</sup> Ibid., p. 18.

<sup>49</sup> The actual differential survival is the result of 'natural selection'.

explains it, is "that although evolution may seem, in some vague sense, a 'good thing' especially since we are the product of it, *nothing actually 'wants' to evolve.*"<sup>50</sup> In other words evolution happens despite the efforts of the replicators to replicate.<sup>51</sup>

This process of evolution through natural selection "favours replicators which are good at building survival machines."<sup>52</sup> Ultimately, the best survival machines are likely to be those with both the capability of adapting to a wide range of environments and also of consciously changing such environments in order to obtain better support for themselves. As Dawkins puts it, "the genes can only do their best *in advance* by building a fast

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<sup>50</sup>Dawkins, *Selfish Gene*, p. 19, (italics added).

<sup>51</sup>Notice the creative ambiguity that results from the imperfect transmission of meanings!

<sup>52</sup>Dawkins, *Selfish Gene*, p. 25. Is culture also a construction of the replicators?

Dawkins refers to the survival machines as "a confederation of long-lived genes." (p. 46). He writes: "Now they [the genes] swarm in huge colonies, safe inside gigantic lumbering robots, sealed off from the outside world, communicating with it by tortuous indirect routes, manipulating it by remote control. They are in you and in me; they created us, body and mind; and their preservation is the ultimate rationale for our existence." (p. 21).

executive computer for themselves, and programming it in advance with rules and 'advice' to cope with as many eventualities as they can 'anticipate'.<sup>53</sup> Of course, such prediction in unpredictable environments is a chancy business and one way to solve the problem is "to build in a capacity for learning"<sup>54</sup> and also for simulation through imagination.<sup>55</sup> In programming for their lives,

Genes are the primary policy-makers; brains are the executives. But as brains became more highly developed, they took over more and more of the actual policy decisions, using tricks like learning and simulation in doing so. The logical conclusion to this trend, not yet reached in any species, would be for the genes to give the survival machine a single overall policy instruction;<sup>56</sup> do whatever you think best to keep us alive.

In short, the 'objective' of the gene is to predict the world, that is to say, in a sense, to 'know' it, and thus to survive.

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<sup>53</sup>Ibid., p. 58.

<sup>54</sup>Ibid., p. 60.

<sup>55</sup>Ibid., p. 62. Dawkins writes: "the evolution of the capacity to *simulate* seems to have culminated in subjective consciousness." (p. 63).

<sup>56</sup>Ibid., p. 64. For some powerful support for the existence of such a trend, see the seminal book by Carl Sagan, *The Dragons of Eden: Speculations on the Evolution of Human Intelligence*, (New York: Ballantine, 1977).

Given that this is the objective and the general nature of those survival-machines which we call men, what can be said about their ideal environment or the environment that would support them? What might the genes, seeking immortality and speaking through us, ask for in the world around them? We can speculate that, amongst other things, they would require environmental support in the form of sustenance and plenty, timelessness, security, and the absence of catastrophe, hazards, and conflict; and surroundings that are 'known'. Such indeed are the usual literary characteristics of utopia, the good place,<sup>57</sup> a place which achieves a steady state and where history ceases to exist, a place which "requires conditions of stability, not an environment of change, in order to flourish."<sup>58</sup> As such, of course, utopia is a functioning system thriving on isolation;<sup>59</sup> a set of principles which support human biological life in a certain and

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<sup>57</sup> According to Porter and Lukermann the question of what is a good place is perhaps the central question in utopian literature. See Philip Porter and Fred Lukermann, "The Geography of Utopia", in *Geographies of the Mind*, David Lowenthal and Martyn Bowden, eds., (New York: Oxford University Press, 1976), p. 189.

<sup>58</sup> Ibid., p. 201.

<sup>59</sup> Ibid., p. 207. "Utopia cannot survive in proximity to an alternative way of life."



predictable world.<sup>60</sup> In the utopian world:<sup>61</sup>

time is recursive and ahistorical, borders are strictly maintained to ensure isolation from exogenous sources of contamination, the utopia is located in a remote, inaccessible place. All of these features are requisite to the central concerns of utopia - stability and equilibrium.

But the paradox is that utopia is not only a good place, it is also no place. It is an idealised model of the world, perhaps even, as has been suggested, the biological ideal of the human replicators - the genes - but it is not life itself. It is a way of life that follows a deductive code, when real life is lived inductively. Real life, of course, involves change and consequences that cannot be foreseen, and utopias are unable to cope with this. The desire to 'know' meets once again the exigencies of a changing world.

There is also another tension, which Darwin himself emphasises, that results from the 'competition' for scarce resources between the replicators, represented by their survival machines. In the struggle for existence, the

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<sup>60</sup> Ibid., p. 206. "In utopia nothing is left to chance."

<sup>61</sup> Ibid., p. 208. Notice how similar the requirements of 'territory' are to those of utopia. The essence of territory is isolation and the regulation of access, and, through spatial control, the exclusion of 'bads', thus providing both stability and predictability.

selective pressures of the environment operate to promote a "differential survival of genes in the gene pool."<sup>62</sup> Fitness in Darwinian terms is the individual's success in passing on its genes to the next generation. Thus the self-serving objectives of individuals appear to be in conflict with the cooperative objectives of culture, and Wilson views this difficulty as the central theoretical problem in sociobiology. As he puts it, "how can altruism, which by its nature reduces individual fitness, possibly evolve by natural selection?"<sup>63</sup> The answer, at least in part, is that close relatives (kin) have a very much greater than average chance of sharing their genes. In Wilson's words:<sup>64</sup>

If the group members are related genetically it follows that an act of altruism by an individual will help to favor the transmission of its (shared) genes to subsequent generations. Natural selection will therefore select favourably for such altruistic acts, and thus for the genes that determine them.

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<sup>62</sup>Dawkins, *Selfish Gene*, p. 64.

<sup>63</sup>Edward Wilson, "Sociobiology: New Approach to Understanding the Basis of Human Nature", p. 342.

<sup>64</sup>Ibid. The use of 'altruism' in the literature is confusing. Wilson is here using it to cover 'inclusive fitness', that is to say in a situation where the individual is in a real sense acting in a self-serving way by favouring the welfare of his own genes. Such altruism is probably better called 'nepotism'.

Such behavioural traits are genetically favoured because they contribute to the survival of descendants. It is not unreasonable to think that such an 'altruistic' trait might also be triggered by individuals who are not closely related, providing that they are familiar or geographically close, in other words part of the community.<sup>65</sup>

Something of this sort probably happens when a cuckoo leaves its eggs in the nests of other birds. Perhaps even the treatment of pets is a by-product of such a genetically based altruism. At this stage in sociobiological knowledge we just do not know how extensive such altruism is. We can, however, readily anticipate the social tensions that will result from self-serving behaviour interwoven with a limited proclivity towards altruism.

The all too brief outline in this section of the chapter, of what the organism is trying to do, clearly cannot begin to do justice to the very complex issues raised in sociobiology. It is, therefore, essential that the references cited should be referred to for clarification where necessary, and, of course, for elaboration of

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<sup>65</sup> Apart from physical similarity, which is likely to be a poor indicator, this would be the only way of predicting a relationship. One could, therefore, hypothesise that 'altruistic' behaviour would generally decrease outside of the relatively small groups (perhaps a 100 or so) that characterised the early hominid hunting bands.

the points raised. What I have tried to do is to identify two ongoing tensions in human life which have a biological foundation, and which over the short term may give rise to conflicts, and over the long term constitute evolution itself. The first of these is analogous to the problem of 'knowing' in a world where the support for this knowing comes from the circumstances of life. This tension between the requirement of stability and the concurrent need for adaptive change is well exemplified by the unreality and exclusiveness of the literary utopia.<sup>66</sup> The second tension is that between the self-serving 'goals' of individual genes located in different survival machines. Both these tensions will re-emerge in the following comments on cultural evolution and they will then be used in subsequent chapters as a ~~basic~~ structure for analysing trespass law.

### Cultural Evolution

The cultural geographer knows full well that 'things' (whether plants, animals, norms, objects, or people) have to *survive* in a cultural as well as a physical environment. Yet the striking similarity between cultural

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<sup>66</sup>For reference to this literature see Porter and Lukermann, "Geography of Utopia."

and biological evolution<sup>67</sup> has been neglected in geographic thought,<sup>68</sup> and too often dismissed in the social sciences generally as a superficial analogy.<sup>69</sup> Certainly the exaggerated and mistaken claims of the past should make us wary of facile extensions of Darwinian thought to social theory and the prestige and authority of Darwin's scientific doctrines should not be borrowed lightly, nor too readily translated into social terms.<sup>70</sup> Yet although 'evolution' is used as something of a magic word, the fertility of Darwin's thought and the resurgence of inter-

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<sup>67</sup> Cultural evolution usually refers to a continuous adaptation over time. This is similar to the definition of biologists such as Lewontin and Dobzhansky. The latter means by evolution the "creative response of living matter to its environment." See R. Lewontin, "The Concept of Evolution," *International Encyclopedia of Social Sciences*, 5, p. 102, and T. Dobzhansky, "Ethics and Values in Biology and Cultural Evolution," *Zygon*, 8, 1973, pp. 261-281.

<sup>68</sup> See for instance, Stoddart, "Darwin's Impact on Geography."

<sup>69</sup> See Wispé and Thompson, "War between the Words," p. 342. Anatol Rapoport expresses this position forcefully when he writes: "The similarity between cultural and biological evolution is too striking to be dismissed as a superficial analogy." See his *Conflict in Man-Made Environment*, (Baltimore: Penguin, 1974), p. 69.

<sup>70</sup> Alland in *Human Imperative*, observes that "the premature publication of rather rigid social evolutionary theories in the late 19th century turned many anthropologists away from the idea that human behavior could be effectively placed in the Darwinian mold."

est in the evolutionary idea make this an opportune time for a re-examination of its geographic significance, and hopefully for the continued re-definition of its meaning.<sup>71</sup>

Cultural evolution is made possible by biological evolution, and might well be greatly influenced by it as the sociobiologists proclaim,<sup>72</sup> although the evidence for this is by no means complete (see Table 3 for an illuminating perspective). Certainly it would be difficult to think of culture as having originated ~~and~~ developed as an autonomous system, as a veritable clean slate for the inscriptions of experience, as Skinner comes close to

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<sup>71</sup> Donald Campbell documents the fact that evolutionary theories are coming back strongly in anthropology and also, to a lesser extent, in sociology and political science. He advocates a similar psychological perspective. See, "On the Conflicts Between Biological and Social Evolution and Between Psychology and Moral Tradition," *American Psychologist*, 30, 1974, p. 1103.

<sup>72</sup> The likelihood of this is made plain by the history of human evolution. Thus, it is believed that the primate order is about 75 million years old, and it is estimated that the evolutionary branch that led to man separated from other primates some 5 to 10 million years ago. Modern man (*Homo sapiens sapiens* or Cro-Magnon Man) is perhaps 40,000 to 60,000 years old. Agriculture began about 10,000 years ago, and thus 99.8% of the history of man preceded the introduction of agriculture. See Pugh, *Biological Origin of Human Values*, p. 174.

Table 3

The Cosmic Calendar

The fifteen-billion-year lifetime of the universe has been compressed into one year, so that one second is equivalent to 475 years. All of recorded history occupies the last ten seconds of December 31.

Origin of <i>Proconsul</i> and <i>Ramapithecus</i> , probable ancestors of apes and men	Approx. 1:30 P.M.
First humans	Approx. 10:30 P.M.
Widespread use of stone tools	11:00 P.M.
Domestication of fire by Peking man	11:46 P.M.
Beginning of most recent glacial period	11:56 P.M.
Seafarers settle Australia	11:58 P.M.
Extensive Cave Painting in Europe	11:59 P.M.
Invention of Agriculture	11:59:20 P.M.
Neolithic civilization; first cities	11:59:35 P.M.
First dynasties in Sumer, Ebla and Egypt; development of astronomy	11:59:50 P.M.
Invention of the alphabet; Akkadian Empire	11:59:51 P.M.
Hammurabic legal codes in Babylon; Middle Kingdom in Egypt	11:59:52 P.M.
Bronze metallurgy; Mycenaean culture; Trojan war; Olmec culture; invention of the compass	11:59:53 P.M.
Iron metallurgy; First Assyrian Empire; Kingdom of Israel; founding of Carthage by Phoenicia	11:59:54 P.M.
Asokan India; Ch'in Dynasty China; Periclean Athens; birth of Buddha	11:59:55 P.M.
Euclidean geometry; Archimedean physics; Ptolemaic astronomy; Roman Empire; birth of Christ	11:59:56 P.M.
Zero and decimals invented in Indian arithmetic; Rome falls; Moslem conquests	11:59:57 P.M.
Mayan civilization; Sung Dynasty China; Byzantine empire; Mongol invasion; Crusades	11:59:58 P.M.
Renaissance in Europe; voyages of discovery from Europe and from Ming Dynasty China; emergence of the experimental method in science	11:59:59 P.M.
Widespread development of science and technology; emergence of a global culture; acquisition of the means for self-destruction of the human species; first steps in spacecraft planetary exploration and the search for extraterrestrial intelligence	Now: The first second of New Year's Day

Source: Sagan, *Dragons of Eden*.

suggesting.<sup>73</sup> A great deal of culture is clearly concerned directly with human survival. Thus the world's leading industrial nations spend the largest proportion of their budgets on such things as health, education, and defence. It would not seem at all remarkable, therefore, to conclude that social objectives must correspond in large part, if not in their entirety, to the survival objective of the individual biological organism.

Nevertheless, it is often very difficult to connect 'survival' with cultural activity. The development of art is an obvious case in point. It is true that even this might be forced into a Procrustean bed whereby as 'aesthetics' it might be seen as an evolutionary preference for harmonious and stable forms. The connection, however, is at best tenuous and the preferable strategy is to view culture as separate from biology, yet subject to the same overall constraints of human survival. The model of cultural evolution, therefore, is not so much the biological model as a more general model of adaptive fit, which nevertheless operates under the same sort of evolutionary

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<sup>73</sup> See for example, B.F. Skinner, *Contingencies of Reinforcement: A Theoretical Analysis*, (New York: Appleton-Century-Crofts, 1969).



principles.<sup>74</sup>

Thus, for example, we can view cultural artifacts as having evolved in response to selective environmental pressures.<sup>75</sup> The 'survival' of the various 'ideas' (each of which can be thought of as a 'message' and roughly equivalent therefore to a gene) that go into the construction of a camera or aeroplane<sup>76</sup> is dependent on their reproduction, and this in turn is related to their function in comparison with the function of alternative 'ideas'. In other words, the ideas are effectively competing for survival.<sup>77</sup> An analogous situation is found in the business

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<sup>74</sup> It has been said that the problem in using the term 'evolve' about culture seems to be the uncertainty about the lineal descent of ideas. The upcoming discussion of the concept of memes (pp.167-68) may be helpful in this regard.

<sup>75</sup> As Rapoport puts it: "The man-made environment, including the symbolic, will then appear, like man himself, as a product of evolution of systems." *Conflict in Man-Made Environment*, p. 7.

<sup>76</sup> This idea links with an idea put forward by Philip Wagner, *Environments and Peoples*, (Englewood Cliffs, N.J.: Prentice-Hall, 1972), p. XI, and expressed by Campbell, "Conflicts between Biological and Social Evolution and between Psychology and Moral Tradition"; p. 1108, as "... cumulated technological wisdom is now embodied in industrial machines, rather than in individual memories."

<sup>77</sup> Rapoport in *Conflict in Man-Made Environment* makes the important comment on the notion of 'competing' in nature that, "whether one sees 'cooperation' or 'competition' depends

world. The restaurants and factories that survive are those that can reproduce viable 'ideas' whether in the form of meals or automobiles. In a changing and competitive world, however, these reproduced 'ideas' must also evolve. Like animal species, restaurants and factories must find and adapt to environmental niches. In the discussion of Wittgenstein's work earlier in this chapter a similar notion was put forward regarding meanings. This general position is given some additional credibility by a parallel idea suggested by Dawkins.<sup>78</sup> He accepts that cultural transmission is analogous to genetic transmission in that it is both conservative and evolving.<sup>79</sup> At the same time he expresses dissatisfaction with the mere

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on what one has singled out as a 'system' and what as 'environment'." p. 28. Thus, as he says, "the system 'insect' seems to be in cooperation with the system 'plant'. But taken as a whole, the system 'insect-plant' may have out-competed other such systems less well integrated, that is, not so efficiently adapted to each other." Rapoport's argument is that the 'contradiction' is nothing more than a projection of our concepts onto nature. The deer and the lion are in 'conflict' in a sense, but they are also part of a 'cooperative' ecosystem. I find these observations useful in providing a context for Kropotkin's arguments regarding "mutual aid" in nature. See B. Galois, "Ideology and the Idea of Nature: The Case of Peter Kropotkin", *Antipode*, 8, 3, 1976, pp. 1-16.

<sup>78</sup> Dawkins, *Selfish Gene*, Chapter 11.

<sup>79</sup> *Ibid.*, p. 203.

search for biological advantages. The challenge posited by cultural variations requires, according to Dawkins, that we "begin by throwing out the gene as the sole basis of our ideas of evolution."<sup>80</sup> In his opinion, "Darwinism is too big a theory to be confined to the narrow context of the gene." The fundamental principle of all life is that it "evolves by the differential survival of replicating entities", and this raises the question of whether there are replicating entities other than the gene itself. Dawkins posits the idea of a *meme*, which is a unit of cultural transmission, or a unit of *imitation*. "Just as genes propagate themselves in the gene pool by leaping from body to body via sperms or eggs, so memes propagate themselves in the meme pool by leaping from brain to brain via a process which ... can be called imitation."<sup>81</sup> Dawkins insists that this is not just a metaphor, a way of talking, for as he stresses, the "meme for, say, 'belief in life after death' is actually realised physically, millions of times over, as a structure in the nervous systems of individual men the world over."<sup>82</sup> As with genes the

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<sup>80</sup> Ibid., p. 205.

<sup>81</sup> Ibid., p. 206.

<sup>82</sup> Ibid., p. 207.

qualities needed for survival are longevity, fecundity, and copying-fidelity.

These ideas, are not only illuminating, they also invite further exploration. More than this, they have an important link with specifically geographic concerns. That is so because the competition between the memes can be thought of as being for limited storage space, such as the attention of a human brain, or "radio and television time, billboard space, newspaper column-inches, and library shelf-space."<sup>83</sup> This dovetails well with, for instance, Hägerstrand's interest in spatial *packing* problems. As he rightly suggests, we may, as geographers, have overlooked "the space-consuming properties of phenomena and the consequences for their ordering which these properties imply." He urges, therefore a greater concern for "spatial competition, for the 'pecking-order' between structures seeking spatial accommodation."<sup>84</sup> Of course, to some extent this is what locational theory is all about, but the arguments here amount to a clarion call for a much wider and more sophisticated theoretical perspective in order to advance our understanding of landscape expression and evolution.

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<sup>83</sup> Ibid., p. 212.

<sup>84</sup> See Hägerstrand, "Domain of Human Geography," p. 70.

There is no reason to think that the evolution of cultural rules, and thus the rules of law, do not work on the same sort of principles. There are, however a number of objections to the analogy between biological and cultural evolution which require comment. Thus, for example, it is said that:<sup>85</sup>

(a) biological evolution is Darwinian, while social evolution is Lamarckian - in the sense that elements acquired through learning and socialization are, in fact, inherited;

(b) social evolution is potentially more rapid than biological evolution, perhaps because language is so effective as an information transmission system;

(c) the elements of biological selection are individuals, but for social evolution the elements are social groups or communities - this is particularly important when dealing with the moral order, which can exist only through consensus; and

(d) the possibility that although neither biological nor social evolution is teleological, maybe social evolution is a little more so.

None of these differences appear to be substantial objections to the analogy. In the light of the preceding discussion it is clear that with regard to (a) the inheritance and variation of ideas (memes) can be thought of as paralleling the inheritance and variation of genes. This will be made clearer in the upcoming comments on the mechanism of

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<sup>85</sup>Wispé and Thompson, "War Between the Words," p. 342.

cultural evolution. The difference in the speed of evolution, as outlined in (b), is certainly striking but it does not really attack the validity of the analogy as such. The objection in (c) seems misconceived. The *elements* of biological selection are the genes, although it is true that the selection goes on at the level of the individual. Similarly, the *elements* of cultural selection are Dawkins' memes or something similar, and the level of selection is again the individual (think of diffusion studies as an example) although the selective pressures themselves come largely from the cultural environment. Finally, the last difference, referred to in (d), although of great significance, represents no more than a development of the evolutionary process itself, and leaves the substance of the analogy intact.

A broader attack on the evolutionary approach is the accusation of political bias. I would be reluctant to address myself to this problem were it not for the fact that this is a recurring criticism.<sup>86</sup> Certainly, where

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<sup>86</sup> See, for example, Richard Symanski and Nancy Burley, "Geography and Natural Selection -- Revisited," *Discussion Paper Series*, No. 25, Department of Geography, Syracuse University, N.Y., December, 1976 and "Comments on 'Geography and Natural Selection -- Revisited' by Symanski and Burley", David Robinson, ed., No. 26 of the same series - especially the comments of John Agnew. There have been extensive 'political' criticisms of Wilson's

evolutionary doctrines are used to substantiate a clearly defined and articulated political position such criticism is legitimate, but mere emotional reactions to the idea of evolution should not be allowed to preclude the examination of its usefulness.<sup>87</sup> Evolutionary doctrines are most frequently associated with a conservative position, but this does not square well with the 'evolutionary' thinking that is incorporated into the ideas of Marx and Mao.<sup>87</sup>

Nor does the conservative emphasis in western society on the freedom of the individual fit well with the idea of

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*Sociobiology* such as that by the 'Science for the People' organization in the *New York Review of Books*, November, 1975, and by the 'Science as Ideology Group of the British Society for Social Responsibility in Science' in *New Scientist*, 1000,70, May 1976. Wilson has just published (October) a reply to his critics, *On Human Nature* (Cambridge, Mass: Harvard University, 1978). See also Campbell, "Conflicts between Biological and Social Evolution and between Psychology and Moral Tradition," and Wispé and Thompson, "War between the Words."

<sup>87</sup> See Paul Heyer, "Marx and Darwin: A Related Legacy on Man, Nature and Society" (Ph.D. dissertation, Rutgers University, 1975). Plekhanov, according to Wetter, saw Marxism as "the application to social development of the Darwinian theory of the adaptation of biological species to the conditions of the environment." See G.A. Wetter *Dialectical Materialism*, (London: Routledge and Kegan Paul, 1958), p. 107. See also, Ian M. Matley, "The Marxist Approach to the Geographical Environment," in Wayne K.D. Davies, ed., *The Conceptual Revolution in Geography*, (London: University of London, 1972). For further reference to Marx's position on evolution and an illustration of Mao Tse-tung's evolutionary thinking see the comments of Anne Freedman in Wispé and Thompson, "War between the Words," p. 375.

cultural evolution, with its inevitable hint that culture is 'superorganic' and autonomous. The emphasis on culture as distilled wisdom, as a system of curbs and constraints on the self-serving goals of the individual, seems likewise at odds with a conservative position in which the individual seeks freedom from the 'system'.<sup>88</sup> It is enough to say, in concluding on this point, that an evolutionary approach to explaining and understanding human behaviour does not necessarily involve any particular political stance.

A related, but more serious, objection is that evolutionary doctrines frequently fall into the naturalistic fallacy that what 'is' is also what 'ought' to be.<sup>89</sup> That

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<sup>88</sup>We associate, simplistically, the political right with the freedom of the individual and the political left with a paramount concern for society as a whole. This is, of course, one of the fundamental tensions that this chapter emphasises. Yet, paradoxical as it may seem, which of these systems is properly labelled conservative and which reformist (or revolutionary) depends on which is established and in control. The two viewpoints, therefore, also represent the other fundamental tension emphasised in this chapter, that between stability and conservation on the one hand, and change on the other.

<sup>89</sup>This would lend itself to the support of a position which justifies the exploitation of the masses by an elite, and this is clearly unacceptable. It should be noted in regard to the naturalistic fallacy that the idea of evolution appeared at the same time as the idea of relativity and these two latter concepts are the antithesis of absolutist ideas. As for the problem of elites generally it



the 'is' is of necessity virtuous is clearly not so. For one thing, evolutionary processes favour variations that fit past worlds. Furthermore, optimisation is dependent on the quality of variations that occur. Then again, in the absence of much selective pressure, sub-optimal products and obnoxious behaviours may exist for a long time. This may be the result of isolation, or a lack of competition, or of a deliberately designed set of circumstances that will protect and support a particular product or given state of affairs. Over the short term, then, 'is' is not necessarily also what 'ought to be'. Over the longer term, however, selective pressures preserve 'goods' and extinguish 'bads' - not in some absolute moralistic sense, but in the relative sense of their fitment to a set of circumstances, including the values of a society. The *ultimate* test, therefore, of ideas or cultural artifacts (including 'meanings') is their survival.<sup>90</sup> There is no other.

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is a fact that no complex societies (and perhaps no social groups at all) are without a privileged hierarchy. Unfortunately, the self-serving objectives of the human 'survival machines' can, at times, become so dominant that the social process is grossly abused. This remains an unsolved problem.

<sup>90</sup>This raises the interesting paradox that the only way to 'falsify' this proposition is to see that it does not survive!

None of these objections to the idea of cultural evolution is fatal. On the contrary, the case that can be made out for it is a strong one.<sup>91</sup> The evolutionary process of variation and systematic selective retention seems in large part to be parallel in both biological and cultural evolution. Perhaps the most obvious difference, is that whereas the process is 'blind' in biological evolution, this is not an appropriate description of the activity in cultural evolution that stems from the use of foresight.<sup>92</sup> Unfortunately, few of the 19th century or modern treatments of sociocultural evolution pay sufficient attention to the actual processes involved.<sup>93</sup> Yet it is

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<sup>91</sup> See Campbell, "Conflicts between Biological and Social Evolution and between Psychological and Moral Traditions," and Wispe and Thompson, "War between the Words."

<sup>92</sup> Although in so far as such conscious direction has no ultimate destination it might conceivably be described as 'blind'. On the other hand, even biological evolution is not necessarily blind, in the sense that it cannot be directed on a rational basis. Plant and animal breeding, and sexual selection, involve at least a limited teleology. Nevertheless, as Rapoport emphasised, "the only sure thing that can be said about the 'direction' of evolution is that at any given time it is toward a better adaptation to the environment in which a class of life is immersed at that time, the adaptation being insured by natural selection." Rapoport, *Conflict in Man-Made Environment*, p. 65.

<sup>93</sup> Campbell, "Conflicts between Biological and Social Evolution and between Psychology and Moral Tradition," p. 1105. He points out that such studies were commonly descriptive of human social 'progress'.

here that the viability of the approach will be decided, and therefore some comment on variation, selection, and retention, which together constitute the 'mechanism' of social evolution, is called for.

The nature of the cultural *retention* system, that is the storage of 'messages' or 'instructions' in a way that is analogous to their storage in DNA, seems to fit well with some of the contemporary developments in our understanding of 'culture'. Thus, for example, the concept of culture espoused by Clifford Geertz is essentially a semiotic one, as is that used by Edmund Leach in *Culture and Communication*.<sup>94</sup> And in geography Philip Wagner expresses a similar view when he interprets the advantage of mankind as "resting in environments suffused with manmade symbolism, peerless and imperishable repertoires of the past experience of all the species. Transformed environments are good alternatives to bigger brains."<sup>95</sup> Thus it

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<sup>94</sup> Clifford Geertz, *Interpretation of Cultures*, p. 5; Edmund Leach, *Culture and Communication: The Logic by which Symbols are Connected*, (Cambridge: University Press, 1976). See also James Spradley, "Foundations of Cultural Knowledge."

<sup>95</sup> Philip L. Wagner, *Environments and Peoples*, p. XI. He refers to "engraving memory upon habitats" and "the earthly storehouse of experience materialised." See also his "Cultural Landscapes and Regions: Aspects of Communication" in *Man, Space, and Environment: Concepts in Contemporary Human Geography*, Paul Ward English and Robert

is not only cultural tradition that acts as a storage house, but increasingly the physical-cultural environment as well.<sup>96</sup> Much of what is stored may be stored blindly, but the guardians of tradition also consciously retain and reject. This is made quite plain by a study of how the Common Law operates.

What is retained, therefore, is not necessarily blindly selected. The choice of an automobile or camera is based on judgement, as are innovative rules in the law. Similarly, the appropriate selection from the existing stock of tradition (or law) in dealing with a particular set of circumstances is often consciously decided, and thus creative. In short, human beings construct a cultural environment so that it behaves towards them in a predictable way, but they, in turn, must fit into the circumstances they create. To this extent cultural evolution is qualitatively different to biological evolution - it is teleological over the short term. Purposive intelligence, however, does not enter into all selection and retention.

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Mayfield, eds., (New York: Oxford University, 1972).

<sup>96</sup>This idea is similar to that of Dawkins, *Selfish Gene*, Chapter 12, and Campbell "Conflicts between Biological and Social Evolution and between Psychology and Moral Tradition," p. 1108. Campbell ingeniously suggests that this lessens the need for the individual to conserve traditions and thus the pressures to conform can be reduced.

Perhaps the best demonstration of this is in the work of B.F. Skinner.<sup>97</sup> I interpret Skinner's work as a powerful exposition of blind cultural evolution, in which behaviour is selected for or shaped by environmental pressures or, in Skinner's terms, by the *consequences* of an act. Thus rewards positively reinforce certain behaviours and punishments negatively reinforce others. The economic system relies largely on incentives to shape behaviour and the traditions of the cultural system rely largely on sanctions to curb behaviour, although incentives and sanctions frequently overlap.

*Variation*, too, is often blind or 'accidental' in cultural evolution, as it is in the mutation of genes. But it need not be so. Trial and error learning is closely analogous to the process of natural selection. Planning, design, the operation of government and the law, all lend witness to this process of conscious experimentation - to deliberate, common-sense, variation.

It can be seen, therefore, that this evolutionary process of variation, selection, and retention produces a

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<sup>97</sup> Skinner, *Contingencies of Reinforcement; Beyond Freedom and Dignity*, (New York: Knopf, 1972), and especially the suggestive (although inadequate) chapter on "The Evolution of a Culture"; *About Behaviorism*, (New York: Knopf, 1974).

kind of 'knowing' of the world, a functional wisdom, which is dependent for its validity on the 'support' of that world. This functional wisdom (or culture) is described by Campbell as "recipes for living that have been evolved, tested, and winnowed through hundreds of generations of human social history."<sup>98</sup> In advocating the case for social evolution he writes:<sup>99</sup>

In considering human behavioral dispositions, we should attend not only to the biological sources of behavioral tendencies, and not only to the person's own past history of reinforcement, but also to the culturally inherited baggage of dispositions, transmitted by example, indoctrination and culturally provided limitation on perspectives and opportunities. This cultural inheritance can, on evolutionary grounds, be regarded as adaptive, and treated with respect. Note that when an evolutionary biologist encounters some ludicrous and puzzling form of animal life he approaches it with a kind of awe, certain that behind the bizarre form lies a functional wisdom that he has yet to understand.

In concluding this section I would like very briefly to draw attention to the very difficult question of the function and autonomy of culture itself. Are we to interpret culture in terms of the self-serving biological

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<sup>98</sup> Campbell, "Conflicts between Biological and Social Evolution and between Psychology and Moral Tradition", p. 1103.

<sup>99</sup> Ibid., p. 1105. But as Campbell himself suggests a "skeptical respect" is perhaps more appropriate than "a gullible awe."

organism, viewing that as primary and the characteristics of culture as secondary,<sup>100</sup> or are we to view culture as in opposition to the self-serving goals of the individual survival machines?<sup>101</sup> The position adopted in this study is that the rigid separation of nurture and nature is untenable, and that therefore the primary and secondary behavioural characteristics must be considered intertwined. Such a position, however, does not preclude the very plausible strategy of seeing the individual as having some different interests from those of his society, as expressed in its culture, and therefore as coming into conflict with that society. Indeed much of the momentum for the

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<sup>100</sup> Symanski and Burley, "Geography and Natural Selection - Revisited", adopt the same view as Dawkins that human behaviour should be interpreted in terms of the self-serving biological organism. For a view of nature as essentially cooperative see P'etr Kropotkin, *Mutual Aid: A Factor of Evolution* (Boston: Extending Horizons, 1955, first published in 1902).

<sup>101</sup> This is the major thrust of Campbell's argument, "Conflicts between Biological and Social Evolution and between Psychology and Moral Tradition." A primary thesis is that "present-day psychology and psychiatry in all their major forms are more hostile to the inhibitory messages of traditional religious moralising than is scientifically justified." (p. 1103). He concludes that:

1. Human urban social complexity has been made possible by social evolution rather than biological evolution.
2. This social evolution has had to counter individual selfish tendencies which biological evolution has continued to select as a result of the genetic competition among the cooperators." (p. 1115).

evolutionary development of cultures comes from just such a tension, caused by shifting patterns of individual interest.<sup>102</sup>

The arguments to this point constitute a complex position, which will require much more clarification and refinement if it is to be more widely adopted in geography. Yet although the discussion has covered a great deal of ground, it is founded on a substantial, authoritative, and growing literature. That does not mean, obviously, that many of the assertions and conclusions are not controversial and not open to further debate. Nevertheless, the presentation is sufficiently well-developed to provide a useful framework for looking at territoriality, as this is expressed in trespass law.

#### Guiding Statements for Analysis of Human Territoriality

The word 'evolution' in the social sciences often refers to mere historical development. This is not its use in this study. A descriptive and interpretive account of the history of trespass law, useful as this might well be,

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<sup>102</sup>In arguing that a better balance should be struck between moral codes and individual selfishness, Campbell ignores the possible "functional wisdom" in the shift that he perceives.



is not the objective here. ~~Instead~~ the aim is to analyse trespass law from the theoretical perspective of a Darwinian-like evolution that emphasises process rather than history. Such an evolutionary framework is suggested by territoriality itself, which is one of the more likely candidates for a biological explanation of human behaviour. But, of course, as the previous discussion has indicated, the Darwinian model can be extended into a more general model of adaptive fit.

The most general assumption is that the human organism is trying to survive, although the connection with survival is not always clear and the links may be tenuous at best. This assumption is implicit in the next chapter, "Towards Stability and Predictability in Territorial Situations", and in Chapter Six, "Tensions Leading to Adaptive Change." The first part of Chapter Five focuses on some problems of cognition in trespass law, of 'knowing' the world, and in this sense having it certain and predictable. The second part focuses on the same sort of problem but from a somewhat different viewpoint, where the reliability or predictability of the environment itself is seen as the main concern of the law. Chapter Six looks at some of the tensions that lead to adaptive change. Firstly, conflicts between the individual and 'society' are examined, and, subsequently, the tensions between man and his

environment, brought about by the changing circumstances of life. Both these conflicts are fundamental in all cultures.

## CHAPTER V

TOWARDS STABILITY AND PREDICTABILITY  
IN TERRITORIAL SITUATIONS

Culture is a way of maintaining life. As Leslie White says, "the purpose and function of culture are to make life secure and enduring for the human species ... Specifically, the functions of culture are to relate man to his environment ... and to relate man to man."<sup>1</sup> As such it can be thought of as a code-book for the members of a society, whereby their prospects for survival and well-being are enhanced.<sup>2</sup> Bunge is one geographer who has explicitly recognised the significance of this issue of survival. Writing of geography's role in human survival he states that "geography is a very clear survival subject" and that "everything, directly or indirectly, consciously or subconsciously, exists for the sake of

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<sup>1</sup> Leslie White, *Evolution of Culture*, (New York: McGraw Hill, 1959), p. 8.

<sup>2</sup> Just as genes can be thought of as instructions for behaviour so can the 'elements' of culture, although the latter are far more flexible, whereby their meaning relates to, and is dependent on, a wide range of contexts.

collective existence, for survival."<sup>3</sup>

In so far as culture promotes the survival of man it will have at least three fundamental objectives.<sup>4</sup> Firstly, it implies the inculcation of a high degree of knowledge and understanding of a wide variety of environmental situations, so that events in those situations can be predicted and interpreted as reliably as possible. Secondly, it includes the propensity to make the environmenting conditions as safe and supportive as practicable. This objective differs from the first in its emphasis on external arrangement rather than internal cognition, although both objectives are closely related. And thirdly, it has to enable the individual to adapt to changing conditions, and to anticipate these where possible. The first two objectives will be considered separately in this

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<sup>3</sup>W. Bunge, "Ethics and Logic in Geography", in *Directions in Geography*, Richard J. Chorley, ed., (London: Methuen, 1974), p. 317-318. Bunge's article is polemical. I refer to it because I think that he is touching on something important, although I am not necessarily in agreement with his detailed observations. In particular I think that his idea that things exist for the sake of the *collective* existence is not borne out by current sociobiological theory.

<sup>4</sup>The sentence clearly suggests a superorganic view of culture. This problem has been discussed in Chapter One. I will only say here that it seems entirely legitimate to think of culture as something that embodies human values.

chapter, and the third one will be examined in the following chapter.

The aim of this chapter will be to show that a cultural interpretation of human territoriality, as expressed in the Common Law tort of trespass to land, takes into account the problems of both internal cognition and the provision of a safe and predictable environment. Both these concerns have to do with 'knowing' the world, that is to say with its stability and predictability. The significance of this overall aspect of a culture could, of course, be demonstrated in any number of areas. Here it is shown to be a significant cultural consideration in deciding cases on the relatively narrow ground of trespass law. Both parts of this overall concern for 'knowing' the environment which are dealt with in this chapter, namely 'cognition' and 'hazards', have the additional merit of being major areas of current geographic interest and research.<sup>5</sup>

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<sup>5</sup> See for example, *Environmental Knowing*, Eds. Gary T. Moore and Reginald G. Golledge, (Stroudsburg, Penn.: Dowden, Hutchinson and Ross, 1976). Thomas F. Saarinen's "Environmental Perception" in *Perspectives on Environment*, Eds. Ian R. Manners and Marvin W. Mikesell, (Washington, D.C.: Association of American Geographers, Publication No. 13, 1974) pp. 252-289, gives a useful and broad introduction to this area of interest. Saarinen refers specifically to the extensive geographic work on perception of natural hazards. A comprehensive review of the

The analysis is confined to a limited number of representative cases, rather than being comprehensive.<sup>6</sup>

Yet it touches on points of major concern as the articles on trespass in the law journals indicate.<sup>7</sup> It thereby not

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geographic literature on hazards is given by James K. Mitchell in the same volume under the title, "Natural Hazards Research". See also, *Natural Hazards: Local, National, Global*, Ed. Gilbert F. White, (New York: Oxford University, 1974) and the *Environment as Hazard*, by Ian Burton, Robert W. Kates, and Gilbert F. White, (New York: Oxford University, 1978).

<sup>6</sup> There are, of course, many other ways that trespass law could be analysed, including the use of a more comprehensive statistical analysis, although this is not the way chosen here. The approach that was adopted fits well with both the evolutionary perspective developed in the previous chapter and geographic concerns. It should be re-emphasised that it is not intended to be an analysis of the law as such.

<sup>7</sup> See the *Index to Legal Periodicals*, under 'Trespass'. I listed 76 articles that related to hazards (occupier's liability) in the eleven years 1965-75. The following is a list of ten references that have to do with trespassing children: "Trespassing Child Diving from Pier Denied Recovery as a Matter of Law under Restatement Section 339," *Utah L. Rev.* 1967: 150 Mr' 67; "Trespassing Children: A Study in Expanding Liability," *Vand. L. Rev.* 20:139 D'66; "Trespassing Children in South Carolina," *SC. L. Rev.* 17:375 '65; "Infant Trespasser on Railway Lines," *A.L. Goodhart L.Q. Rev.* 79:576 O'63; "Theories of Recovery of the Child Trespasser in Missouri," *Wash. U.L.Q.* 1964:214 Ap' 64; "Landowners Liability to Infant Trespassers: Status of the Law in New York," *Fordham L. Rev.* 25:290 Summ'56; "Child Trespassers and Licensees," *Ir. Jur.* 19-20:31 '53-54; "Children as Trespassers," *Sol. J.* 97:690-2 O 10'53; "Trespassing Children in Kentucky - Limitations on the Attractive Nuisance Doctrine," *Ky. L.J.* 40:204-10 JA'52; "Summation in an Infant Trespasser Case," *N. Weitz. Tr. Law* 9:15-22 Summ'73.

only throws some light on the working of a culture, but perhaps also, in a somewhat unusual way, on trespass law itself.

### Cognitive Structuring of Territorial Situations

Although life is not a game, it is not unlike one. It is played within the constraints of a set of rules. This framework of convention provides guidelines for action, and thus for predicting and interpreting the actions of others. Despite the seemingly infinite ways of successful living, cultural groups operate within narrow bands of convention, and different sets of conventions give rise to visible cultural variations.

A stranger placed in an alien society and lacking the appropriate guidelines for action and the cognitive code is unable to operate effectively without help.<sup>8</sup> A new social milieu requires a new orientation and the stranger must learn the rules before he can "play the game". For the essence of culture, as used in this study, is a set of rules or norms for proper behaviour, together with a variety of inducements to behave in such a way. Proper behaviour, in this sense, means behaviour in conformity with the cultural code, and inaccurate 'imitation'

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<sup>8</sup> For example, a child in a new school.

or 'copying' of the proper cultural behaviour will normally be selected against. Trespass law is one of many sub-sets of such cultural rules.

These rules are not arbitrarily arrived at, for culture itself as a great model or system for the adaptive fit of human beings to their total environment, is constantly being worked on and directed towards a 'better' adaptation to the prevailing conditions of life. Although, of course, such adaptation may not always be judged successful from a wider temporal and spatial perspective.

The first requirement for cultural behaviour, its *sine qua non*, is a shared understanding of a situation, a more-or-less common reading of its principal constituents. Family life and education help to provide a vocabulary for comprehending a situation, and to make an individual more aware of, and sensitive to, its nuances, so that alien worlds become familiar worlds.<sup>9</sup> This adaptive need to 'know' the world is one of the most essential aspects of a

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<sup>9</sup> Note the reverse case that occurs when there is a radical change in the control of a territory and the set of norms change. Environments are then newly constituted to reflect the new norms. Thus the adoption or imposition of a radically different ideology (as recently happened in Cambodia) may result in the destruction of books and non-verbal symbols that no longer 'fit'. One environmental 'language' (or logic) is effectively rejected for another.



culture. As the geographers Abler, Adams, and Gould, put it, "being able to understand the experience continuum to the point that future experience can be predicted has always had survival value."<sup>10</sup> They draw attention to the stress that people suffer in situations where experience is unpredictable and argue that "we have a deeply rooted desire to pass our existence in controlled situations." This argument dovetails well with the discussion of utopia in the previous chapter of this dissertation. As supportive evidence for their argument, Abler, Adams, and Gould, draw upon experiments in sensory deprivation. They persuasively argue that:<sup>11</sup>

Because the ability to order events has conferred great survival value in the past, we have developed an ordering organ which emits distress signals if it cannot perform its accustomed functions. What we recognise as a primarily psychological need for ordered experience has deep physiological-biological bases.

In recent years geographers have become acutely aware of the significance of the cognitively structured

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<sup>10</sup> Ronald Abler, John Adams, and Peter Gould, *Spatial Organisation: The Geographer's View of the World*, (Englewood Cliffs, N.J.: Prentice-Hall, 1971) p.7.

<sup>11</sup> Ibid., p. 8.

environment for understanding human behaviour.<sup>12</sup> So far, however, there has been no attempt to ground this new awareness in any fundamental theory. The general model of adaptive fit that was discussed in the previous chapter holds out some promise of being useful in this regard. Knowledge of, and preference for, a type of environment can be expected to be a surrogate measure of adaptation.<sup>13</sup> For culture, as an adaptive way of 'perceiving' environments, comes to bear on places to make the events in them predictable, and to reduce ambiguities and the danger from hazards. In short it enables us to live together in a society and in a particular physical world through a system of related designs for living. Of course conditions are so diverse and changeable that this predictability is imperfect and necessarily measured in terms of probability.

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<sup>12</sup> Geographic interest in 'perception' studies developed in the early 1960's, and was stimulated by David Lowenthal's "Geography, Experience, and Imagination: Towards a Geographical Epistemology," *Annals, Association of American Geographers*, 1961, 51, 3 pp. 241-260. The word 'perception' is now conventionally, and somewhat inappropriately, used to cover a wide range of studies of the cognitive structuring of environments. For a good introductory discussion, see Saarinen, "Environmental Perception" in *Perspectives on Environment*.

<sup>13</sup> See Joseph Sonnenfeld, "Environmental Perception and Adaptation Level in the Arctic," in *Environmental Perception and Behaviour*, Ed. David Lowenthal (Chicago: University of Chicago, Research Paper No. 109, 1967), pp. 42-59. Note the similar preference for people one knows, rather than strangers (xenophobia).

Because of the complexity of human life and the subtle variety of conditions, flexibility of response is vital. Instead, therefore, of an invariant relationship between particular events and the responses to them, there is a variable one which is dependent on the broader context. Thus it is that trespass law, in giving meaning to events (cognitively structuring the environment), must be matched to the various circumstances of life. Rule and factual setting must *fit* together.<sup>14</sup> This is the real difficulty that lawyers have to face. The stock of cultural rules on territorial behaviour provides the basis for deciding on appropriate behaviour, but the actual selection from that stock, and its variation where necessary, must take into account the detailed and complex facts of the situation. In reducing the world to order, this more complex aspect of the task of 'knowing' should not be overlooked.<sup>15</sup>

In the process of cultural education, children are naturally less adept than adults at reading the world around them and they require special consideration and

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<sup>14</sup> Aristotle pointed out that "the general nature of rules means that not every individual situation can be foreseen or provided for adequately". See the discussion of this and Equity in Dennis Lloyd, *The Idea of Law*, (Harmondsworth, Middlesex: Penguin, 1976), p. 124.

<sup>15</sup> This, of course, is one of the lessons of Ludwig Wittgenstein's later work.

protection.<sup>16</sup>

Children: Other things being equal, the individual in a population who acquires most sensory information from an environmental situation and who interprets this correctly has an advantage over an individual who is less proficient. The less an individual knows about, or is aware of, his environment the more vulnerable he is likely to be. Thus, in general, the danger from environmental hazards will vary inversely with knowledge of the conditions. The very young and the very old, and the blind and deaf, are likely, therefore, to be particularly vulnerable. Young children represent a specific cultural problem, for their limited enculturation restricts their ability to interpret the sensory information that they receive; to put it simply they cannot easily read or diagnose situational events. It is because of this that parents take such care as they do of young children.<sup>17</sup>

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<sup>16</sup> Are nursery rhymes, such as 'Red Riding Hood' and modern day stories about 'Bigfoot', and so on, a means of preparing children for a dangerous world, where caution and staying close to home are essential for survival?

<sup>17</sup> Children are usually supervised and controlled in 'private' territories and conform quite readily to its mores. In 'public' territories this is less likely to be so. Vandalism in such places should relate inversely to the degree of 'presence'.

Parents and guardians act, in effect, as interpreters of environmental information, and where that alone is insufficient they will restrain young children in order to protect them. These interests are also those of society and the law contains many rules that are designed to protect children. They may not drive before a certain age, or drink alcohol. They may not use a firearm and so on. The objective is to keep the hazard at a distance. For this reason children are encouraged to stay close to home or to their parents and admonished when they do not do so, in order to avoid the ever present dangers in the environment.

It is not always possible, however, especially in a complex and busy world, for parents to keep a permanent eye on their children, who hence are likely to wander off and find themselves in dangerous situations. It is often necessary, therefore, to set up physical barriers to dangerous objects or conditions. Thus in the Vancouver area there are by-laws requiring that swimming pools be adequately fenced to deter children from entry. More generally, electrical sub-stations and transformers are usually barricaded.<sup>18</sup> School zones that require

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<sup>18</sup> See *McGlone v. British Railways Board* (1966) SC(HL) 1, where a 12 year old boy got through some barbed wire, climbed up a transformer structure, and suffered severe

motorists to take special care are set up with the similar objective of protecting children. The overall purpose is the very geographical one of trying to reduce the *accessibility* of children to dangerous things and, where that cannot be done by erecting the necessary barriers, to require that children receive proper care when there are dangerous things in their vicinity.<sup>19</sup> Cultures thus, through enculturation, prepare children for environments and at the same time through conscious design they also prepare environments for children.<sup>20</sup> The law

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burns by coming into contact with a live wire. The case was not one where the child was too young to understand the meaning of the barbed wire fence. Lord Pearce maintained that, "even where the danger was both lethal and artificial, it was enough if the occupier made it *clear*, beyond the possibility of mistake, that all persons were forbidden to enter and, in addition, backed up that *manifestation* by some serious obstruction (such as barbed wire) which could be overcome by a deliberate act intended to defeat its *obvious function*" (italics added).

<sup>19</sup> Thus in *Railways Commissioner v. Quinlan* [1964] 1 All ER at 912, [1964] A.C. at 1084, Lord Radcliffe said: "in the case of children, ... full weight [will be] given to any reckless lack of care involved in allowing things naturally dangerous to them to be accessible in their vicinity."

<sup>20</sup> There is a similar problem with animals for, as with very young children, they cannot know the environmental code. They too, must be fenced in or fenced out. Under the old *scienter* action, owners who knowingly kept a vicious animal (*scienter retinuit*) that is to say one that had a propensity to attack persons or property, were considered negligent. This action was abolished

of trespass to land reflects both these cultural considerations, but first we will look at the problem of cognition.

One of the more dangerous additions to the landscape since the industrial revolution is that of railways. Stretching as they do for thousands of miles through cities and countryside alike, with ineffective barriers to access and the minimum of supervision, they present a significant danger to both adults and young children. That this is so, is shown by the relatively large number of railway cases. A paradigm railway trespass case having to do with a young child is that of *British Railways Board v. Herrington*.<sup>21</sup> This case was decided in the House of

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by statute in England in 1971 (Animals Act, 1971) and replaced by a simple form of strict liability. Incidentally, in sheep-rearing districts an owner is still expected, as a matter of social obligation, to kill a dog given to worrying sheep. See Glanville Williams and B.A. Hepple, *Foundations of the Law of Tort*, (London: Butterworths, 1976) p. 110.

<sup>21</sup> *Herrington v. British Railways Board* [1971] 1 All E.R. CA., *British Railways Board v. Herrington* [1972] 1 All E.R. HL. The reported Court of Appeal case has 26 pages and refers to 24 cases. The reported case in the House of Lords is 49 pages long and refers to 57 cases. For the standard of care in relation to trespassing children, see 28 Halsburys Laws (3rd Edn.) 17, 18, para 15, and for cases on the subject, see 36 Digest (Repl.) 120, 121, pp. 600-611. This 'paradigm case' is what a lawyer would call a 'leading case'. It is worth re-emphasising here that cases in the law do not stand apart from the history of law. On the contrary they are based on precedent. Judges draw together various strands of thought

Lords by way of an appeal by the British Railways Board against the order of the Court of Appeal, which had affirmed the earlier judgement of Cairns J. awarding damages to the infant Peter Herrington, for personal injuries.

The facts of the case are as follows:<sup>22</sup>

The plaintiff, a boy aged six, went with his two older brothers to play in a field which was National Trust property freely open to the public and frequented by children. Through the field ran a path which led to an electrified railway track owned by the British Railways Board ('the board'). Shortly before reaching the line of a four foot high chain-link fence, which had been erected to border the railway track, the path turned to the right and led to a footbridge over the track. Where the path turned to the right, however, there was a further short stretch of trodden path which continued straight up to the fence. At the point where the trodden path reached it, the fence had become detached from one of the supporting posts and pressed down to within ten inches of the ground. The evidence showed that the fence had been in that condition for sometime and that people had been using the gap to take a short cut across the railway line. There was also evidence that

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that reach back into the past and from it weave a model that both reflects that past and also makes a statement for the future. Although *Herrington's* case is an important one it has been strongly criticised for still leaving the law in a state of uncertainty.

<sup>22</sup> *Ibid.*, pp. 749-750. This extensive extract from a complex case is essential in order that the situation can be clearly understood. In addition it is a useful example for geographers, who are, perhaps, unfamiliar with the law, of the core of a legal judgement.



employees of the board had reported some seven weeks before the accident that children had been seen on the stretch of railway line but no action had been taken by the board in consequence of the report. After playing in the field for some time with his brothers the plaintiff wandered off, crossed the gap in the fence and walked onto the railway line where he was severely injured by the electrified rail. In an action by the plaintiff, the board claimed that they were not liable to him for being a trespasser on the railway track, they owed him no duty of care, nor had they shown any reckless disregard for his presence on the track.

It was held that:<sup>23</sup>

(i) Although as a general rule a person who trespassed on the land of another did so at his own risk, and the occupier of the land did not owe him the common duty of care owed to persons lawfully on the land, it did not follow that an occupier was never, in any circumstances, under a duty to take steps to protect a trespasser from potential danger; nor was the occupier's duty limited to refraining from acting with the deliberate intention of doing harm to a trespasser actually on the land or with reckless disregard of his presence there. Where an occupier knew that there were trespassers on his land, or knew of circumstances that made it likely that trespassers would come on to his land, and also knew of physical facts in relation to the state of his land or some activity carried out on the land which would constitute a serious danger to persons on the land who were unaware of those facts, the occupier was under a duty to take reasonable steps to enable the trespasser to avoid the danger. That duty would only arise in circumstances where the likelihood of the trespasser being exposed to the danger was such that, by the standards of

<sup>23</sup> Ibid., p. 750.

common sense and common humanity, the occupier could be said to be culpable in failing to take reasonable steps to avoid danger.

(ii) Accordingly the board were in breach of their duty to the plaintiff for they had brought on to their land in the electrified rail a lethal and, to a small child, a concealed danger; it would have been easy for them to have maintained and enforced a reasonable system of inspection and repair of the boundary fence; it was known to them that children were entitled and accustomed to play on the other side of the fence and they must have known that a young child might easily cross a defective fence and run into grave danger. Although in failing to take any steps to maintain the fence in good repair the board could not be said to have acted with reckless disregard of the plaintiff's presence on the track, they had failed to act with due regard to humane considerations and were, in the circumstances, culpable.

The case raises many issues, some of which are more relevant to the discussion in the latter part of this chapter, such as the hazardous nature of the railway line itself and the question of fencing. The focus here is on the narrower issue raised by a child's inadequate perception of his environment. By drawing from the opinions of all five judges, the point will be made that the cultural interpreters are acutely conscious of the problem of environmental predictability.

Lord Reid puts the matter clearly:<sup>24</sup>

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<sup>24</sup> Ibid., p. 756.

Child trespassers have for a very long time presented to the courts an almost insoluble problem. They could only be completely safeguarded in one or other of two ways. Either parents must be required always to control and supervise the movements of their young children, or occupiers of premises where they are likely to trespass must be required to take effective steps to keep them out or else to make their premises safe for them if they come. Neither of these is practicable. The former course was practicable at one time for a limited number of well-to-do parents but that number is now small. The latter, if practicable at all, would in most cases impose on occupiers an impossible financial burden.

Lord Reid goes on to suggest that legal principles cannot solve the problem and that it can only be decided by public policy. Thus in an earlier case<sup>25</sup> that was decided some fifty years ago the House of Lords had taken the view that as a matter of public policy "occupiers should have no duty at all to keep out such children or to make their premises safe for them. Their only duty was a humanitarian duty not to act recklessly with regard to children whom they knew to be there."<sup>26</sup> The facts of this case were described by Salmond, L.J. in *Herrington v. B.R. Board* [1971] p. 900 as follows:

The plaintiff's son, a boy of four years of age, was in a field forming part of a colliery and commonly used as a playground by children.

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<sup>25</sup> *R. Addie and Sons (Collieries) Ltd. v. Dumbreck*, [1929] A.C. 358, [1929] All E.R. Rep. 1.

<sup>26</sup> *Ibid.*, p. 757.

The field was close to the main road and bounded by a hedge in which there was a number of large gaps. In the field there was a large iron wheel, completely unprotected in front, round which there passed a wire cable. Children frequently played around the wheel, which was highly dangerous but attractive to them. At times children were ineffectually warned off this field but they continued to frequent it. Knowing all the facts I have stated, but without taking steps to find out whether children were playing around the wheel and having every reason to believe that they might well be, the colliery servants started up the machinery which set the wheel in motion. As a result the plaintiff's infant son, who at the time was playing on or near the wheel was killed.

In Lord Reid's opinion, the public policy that had informed the judges in this older case was no longer applicable, and the passage of time urgently required that the law now be developed in the *Herrington* case to reflect current realities. As far as possible, Lord Reid preferred that this would be done without actually overruling any part of the precedent-setting decision of the earlier case.

In the same reforming vein, Lord Morris of Borth-Y-Gest pointed out that for weeks or months "the fencing was so broken down at a point ahead of a public path that a person could easily get across to the line; an adult would doubtless appreciate the risks or perils in so proceeding; a boy aged six would not."<sup>27</sup> As he says, common sense would suggest that having regard to "the dangerous nature of the

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<sup>27</sup> *B.R. Board v. Herrington*, p. 760.

live rail and its perils for a small child, the appellants were grievously at fault in allowing a fence at the particular place in question to remain for a long time in a broken down condition." He adds that "it must at any time be a matter of regret and of concern if the answer of the law does not accord with the answer that common sense would suggest." Emphasising that it is a matter of ordinary common knowledge that children will roam and will explore, Lord Morris goes on to say that:<sup>28</sup>

A small boy who finds a part of a fence so dilapidated that there is no real obstacle to his progress will not or may not know that he is at once a 'trespasser' if he goes on. So the problem raised in this case is whether, if an occupier has for legitimate reasons (and with no object of hurting anyone) placed something highly dangerous on his land, he owes any and what duty to take some steps to lessen the risk that a wandering child may run into the danger.

He draws attention to the case of *Glasgow Corporation v. Taylor*<sup>29</sup> in which the corporation ought to have realised that "the poisonous berries deceptively presented a tempting and harmless appearance to a young boy who was entitled to be where he was." He concludes his opinion by observing that although the general law remains that one who

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<sup>28</sup> Ibid., p. 762.

<sup>29</sup> *Glasgow Corporation v. Taylor* [1922] 1 AC 44, [1921] All ER Rep. 1.

trespasses does so at his peril, in the present case there were special circumstances.<sup>30</sup>

(a) the place where the fence was faulty was near to a public path and public ground; (b) a child might easily pass through the fence; (c) if a child did pass through and go on to the track he would be in grave danger of death or serious bodily harm; (d) a child might not realise the risk involved in touching the live rail or being in a place where a train might pass at speed.

Lord Wilberforce raises directly the question of the duty of care to infant trespassers. While not suggesting that special rules ought to be devised for child trespassers<sup>31</sup> he urges that "we can at least accept that fresh and more lethal dangers to their safety have appeared, and come nearer to them, and that somewhere more care has to be used to prevent them being hurt" (italics added). However, he recognises that:<sup>32</sup>

the fact that Parliament has not imposed a duty securely to fence children or others out is a recognition that a compromise must be struck between the desire to save everyone from every danger and the cost to the community of doing so. It means that there are situations where even children will not recover.

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<sup>30</sup> *British Railways Board v. Herrington*, p. 767.

<sup>31</sup> As was done in the *Restatement of the Law, Second, Torts*, 2d. [Rev. & Enl.] (St. Paul: American Law Institute, 1965), 2 v.

<sup>32</sup> *British Railways Board v. Herrington*, p. 771.

In his judgement, Lord Pearson **emphasises** changing physical and social conditions which require the proper development of the law. As he reminds us:<sup>33</sup>

With the increase of the population and the larger proportion living in cities and towns and the extensive substitution of blocks of flats for rows of houses with gardens or back yards and quiet streets, there is less playing space for children and so a greater temptation to trespass. There is less supervision of children, so that they are more likely to trespass. Also with the progress of technology there are more and greater dangers for them to encounter by reason of the increased use of, for instance, electricity, gas, fast-moving vehicles, heavy machinery and poisonous chemicals. There is considerably more need than there used to be for occupiers to take reasonable steps with a view to deterring persons especially children, from trespassing in places that are dangerous for them.

Finally, Lord Diplock concludes that where an occupier knows of:<sup>34</sup>

physical facts which a reasonable man would appreciate involved danger of serious injury to the trespasser his duty is to take reasonable steps to enable the trespasser to avoid the danger. ... If the duty is owed to small children too young to understand a warning notice the duty may require the provision of an obstacle to their approach to the danger sufficiently difficult to surmount as to make it clear to the youngest unaccompanied child likely to approach the danger, that beyond the obstacle is *forbidden territory* (italics added).

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<sup>33</sup> Ibid., p. 785.

<sup>34</sup> Ibid., p. 794.

The humanitarian view adopted in this case contrasts with the 'hard' view that children trespass at their own risk and it is currently the preferred view in the Common Law. In *Sioux City and Pacific Railroad Company v. Stout* the Supreme Court of the United States adopted the humanitarian view.<sup>35</sup> It held that a landowner owes a duty to guard a young child that goes onto premises where there is an attraction or allurement such as, in this case, a railway turntable. It was said in the English case of *Latham v. Johnson* that, "in the case of an infant, there are moral as well as physical traps. There may accordingly be a duty towards infants not merely not to dig pitfalls for them, but not to lead them into temptation."<sup>36</sup> In one of the leading English textbooks on the law of torts it was pointed out that although an occupier is not bound to make his premises "as safe as a nursery, most of the articles on which children come to grief are not such as are commonly found in nurseries, and this is to be borne in mind in considering whether they amount to a trap."<sup>37</sup>

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<sup>35</sup> *Sioux City and Pacific Railroad Company v. Stout*, (1873) 17 Wall. 657.

<sup>36</sup> *Latham v. Johnson* [1913] 1 K.B. 398, 415.

<sup>37</sup> Heuston, *Salmond on the Law of Torts*, 16th. ed., p. 291.



The specific recognition of this problem of cognition, of matching the rules of territoriality to the facts of a situation, in the special case of children, is clearly shown in *Herrington's case*, which is representative of legal thinking.<sup>38</sup> But adults, too, face problems of cognition, although these often have to do with the categorisation of geographic space into 'public' and 'private', rather than with the 'reading' of the individual constituents of a situation, which is the difficulty often faced by the child. Most of these individual constituents of an adult's surroundings will, unless he is in a foreign land, make some sense, but there are combinations that may give rise to ambiguities because of a conflicting or unclear message.

Public and Private Spaces: In a private space the possessor may consider himself 'sovereign' and, indeed, where legal and private spaces coincide they may effectively be so, subject of course to a variety of jurisdictions which impinge on the possessed area. These can range from strict legal prohibitions on certain behaviour to

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<sup>38</sup> There are many other cases concerning children that could have been cited and discussed. See *Salmond on Torts*, "Duty to Children", p. 228, and Charles Seepersad, "Duty of Care", *The New Law Journal*, Nov. 16, 1972 p. 1005, (Children as Trespassers). See also *Purtill v. Athlone U.D.C.*, [1968] IR, 205; *Southern Portland Cement Ltd. v. Cooper*, [1974] 1 All E.R. P.C. (An Australian case).

relatively weak cultural norms. The individual who enters private space must tailor his behaviour to the various rules or norms that flow from such 'sovereignty'. In unfamiliar situations these are seldom readily apparent and initially the tendency will be to proceed cautiously, for the individual is very much aware that his freedom of action is subject to the expressed and implied directives of the occupier.

The existing norms in public spaces, on the other hand, are likely to be more standard and well-established, and the canons of behaviour will therefore be potentially less arbitrary.<sup>39</sup> Nevertheless, it should be noted that public and private spaces are not always easy to define and distinguish, for rights of access to both may vary

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<sup>39</sup> Erving Goffman defines 'public places' as "any regions in a community freely accessible to members of that community." See his *Behavior in Public Places*, (New York: Free Press, 1966), p. 9. The norms in public places may be relatively rigid and constraining as on public highways, or relatively unconstraining as in a public park (which as Goffman points out (p. 215) may therefore be the place that maximises the acceptability of various "nefarious" acts and "hence minimizes the price of being caught performing them.") Classes of public places are somewhat analogous to typewriters in the limited sense that their norms and physical setting follow standard patterns. Such situational predictability is both efficient and comforting (hence the spread of standardisation, which is also, of course, lamented for its obliteration of the particular). Private places on the other hand are more like typewriters that have variable and non-standard key patterns, they are discomfitting until their 'pattern' is learned.

considerably. Some publicly owned spaces may be 'private' in the sense that the public is excluded, such as a nuclear-power station. Similarly, some private properties such as a shopping-centre, are 'public' in the sense that the public has wide-ranging rights of access. Nevertheless, apart from such cases, the implications of the qualitative difference are such as to make ready categorisation of considerable importance to the individual. Public spaces are by definition accessible and continued access is dependent on the individual's behaviour falling within prescribed limits. Unauthorised entry to a private space may on the other hand lead to conflict, as will behaviour within such a space that is unacceptable to the possessor.

Usually of course the differentiation is relatively apparent, for we learn to categorise places which 'belong' to others and places which we share as members of a community. Ambiguities are rare, because cultures operate to remove them. Nevertheless, trespass law contains examples of territorial ambiguity which illustrates what is happening. Such ambiguities often arise as a result of new developments on the landscape, such as the construction of condominiums or comprehensive shopping-centre developments, both of which are examples of an increasingly important cultural expression.

These ambiguities show up well in the various shopping-centre cases. In the Canadian case of *Harrison v. Carswell* the dilemma is readily apparent.<sup>40</sup> Mrs. Carswell, who was picketing in a shopping-centre in pursuance of a lawful strike, was convicted under the Petty Trespasses Act of Manitoba when she refused to leave the centre as requested. Chief Justice Laskin, in dissenting from the majority, was of the opinion that:<sup>41</sup>

the principles of the law of trespass based upon the unjustified invasion of another's possession must be adjusted as the need arises to reflect changing situations; the introduction into our lives of shopping-centres requires a review of those legal principles and the creation of new principles.

In his judgement Chief Justice Laskin refers explicitly to the factual setting.<sup>42</sup>

The shopping-centre has the usual public amenities such as access roads, parking lots and sidewalks which are open for use by members of the public who may or may not be buyers at the time they come to the shopping-centre. There can be no doubt that at least where a shopping-centre is

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<sup>40</sup> *Harrison v. Carswell*. See the comment on this case by S.C. Coval and J.C. Smith, "The Supreme Court and a New Jurisprudence for Canada, *Canadian Bar Review*, 1975, 53, p. 819.

<sup>41</sup> *Ibid.*, p. 673.

<sup>42</sup> *Ibid.*, p. 680.

freely accessible to the public, as is the one involved in the present case, the private owner has invested members of the public with a right of entry during the business hours of his tenants and with a right to remain there subject to lawful behaviour (*italics added*).

He goes on to urge that:<sup>43</sup>

The considerations which underlie the protection of private residences cannot apply to the same degree to a shopping centre in respect of its parking areas, roads and sidewalks. Those amenities are closer in character to public roads and sidewalks than to a private dwelling.

According to the Chief Justice, "This is a use of *theory* which does not square with economic or social *fact* under the circumstances of the present case"<sup>44</sup> (*italics added*).

He argues for a greater recognition of the need to balance the interests of the shopping-centre owner with the competing interests of members of the shopping public, and in this regard he draws attention to the comparison between the public markets of long ago and the shopping-centre as a modern market place.<sup>45</sup>

Although this case, like other important cases, raises many difficult issues, it is the significance of the

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<sup>43</sup> Ibid., p. 684.

<sup>44</sup> Ibid., p. 685.

<sup>45</sup> Ibid., p. 687.

nature and appearance of the setting itself that is our prime concern here, and this is an issue that the Chief Justice explicitly drew attention to. In a 1968 journal note on a similar case in the United States, attention is drawn to the fact that "of the few courts who have ruled on the precise issue, most have based their decisions upon the physical characteristics and the use made of the property by its owners, instead of attempting to balance the competing interests involved."<sup>46</sup> Thus the various cases in the United States dealing with peaceful picketing on private property, like those in Canada, take into account its quasi-public nature. In *People v. Mazo*, where the defendant was convicted for handing out leaflets in a parking lot, the appeal court reversed the conviction arguing that the employer had virtually dedicated the parking area to public use, and holding that where rights of property and free speech conflict in such circumstances, the former must give way.<sup>47</sup> Similarly in *Marshall Field*

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<sup>46</sup> L. Frederick Neft, note on "Amalgamated Food Employees Local 590 v. Logan Valley Plaza Inc.,: The Right to Picket on a Privately Owned Shopping Center", *Dickinson Law Review*, Vol. 73, 1968, pp. 519-532 at p. 525. The writer describes the emphasis on the physical characteristics of a property and the owner's use of it, as opposed to an emphasis on a balance of interests, as unfortunate! But, on the contrary, the cognition of a setting is of great significance and should properly be taken into account.

<sup>47</sup> *People v. Mazo*, 38 CCH Lab. Cas. 65,835 (IU. Ct. Cl. 1959).

and *Co. v. NLRB* the court found that a company-owned court-way which divided a department store at street level had assumed the character of a public street and therefore the company could not prohibit constitutionally protected activities.<sup>48</sup> *Moreland Corporation v. Retail Store Employees Local 444*, which involved peaceful picketing on privately owned sidewalks, was also a case in which the court relied on the physical characteristics and actual use of the property. In applying the concept of quasi-public property, the court stated:<sup>49</sup>

If the record before us clearly established that the property involved is a multi-store shopping center, with sidewalks simulated so as to appear public in nature, we would have no difficulty in reaching a conclusion that the property rights of the shopping center owner must yield to the rights of freedom of speech and communications which attend peaceful picketing.

Again in *Freeman v. Retail Clerks Local 1207*, one of the factors that were listed as being significant if present was:<sup>50</sup>

When the private property owner designs his property for use by the general public in

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<sup>48</sup> *Marshall Field and Co. v. NLRB*, 200 F.2d 875 (7th Cir. 1953).

<sup>49</sup> *Moreland Corporation v. Retail Store Employees Local 444*, 16 Wis. 2d 499, 144 N.W. 2d 876 (1962).

<sup>50</sup> *Freeman v. Retail Clerks Local 1207*, 58 Wash. 2d 426, 363 P.2d 803 (1961).

such a manner as to make it difficult or impossible to distinguish its physical characteristics from publicly-owned property similarly so devoted.

All these cases clearly show the two cultural tensions that have been emphasised in this study. Firstly, the problem in each case, of accommodating conflicting interests, and secondly the problem, in a developing and increasingly complex world, of accommodating the need to reduce ambiguities with the need to adapt to new circumstances. Thus, for example, in the *Carswell* case the majority of judges were anxious to maintain the law of trespass in its "pristine" condition (as Laskin referred to the situation), that is to say in keeping with its long tradition and the theoretical (but not experiential) certainty that accompanies this.<sup>51</sup> The minority, on the other hand, urged adaptation of the rules to the changed conditions of life. So we have a paradoxical situation in which the majority in their quest for certainty, in their desire to remove ambiguities by maintaining the existing rules, were unable to resolve the dilemma that the ambiguity of the setting itself created. The rules, in a sense, were divorced from the situation. The minority, in seeking to change the rules, were, paradoxically,

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<sup>51</sup>*Harrison v. Carswell.*



supporting the utility and predictability of having rules match, or fit, a factual setting where *res ipsa loquitur*, rather than having an unbending tradition with its on-going theoretical simplicity and certainty.<sup>52</sup> There is, of course, something to be said for both positions.

Although the shopping-centre cases show up the difficulties well, there are many other cases that involve similar problems in categorising public and private space. These include such situations as demonstrations in universities, and questions regarding the access of outsiders to school premises and embassies, and the access of visitors to Indian Reservations, and also to labour camps on privately owned property.<sup>53</sup>

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<sup>52</sup> *Res ipsa loquitur*. The thing speaks for itself. Lawyers normally use this expression in a more specialised way than is done here.

<sup>53</sup> See for example, the following: *Regina v. Gingrich* (1958) 29 WWR (trespassing on Indian Reserve in Alberta) and a related article "The Concept of Native Title" by J.C. Smith; *Kamara and others v. Director of Public Prosecutions* [1973] 2 All E.R. HL (agreement to enter and occupy building of High Commission of Sierra Leone); Robert R. Rosenthal, "Injunctive Relief against Campus Disorders", *University of Pennsylvania Law Review* (1970) 118 p. 746; H. Edward Smith, a comment on "Constitutional Law - Freedom of Assembly - Conviction of Civil Rights Demonstrators for Trespass Upheld", *South Carolina Law Review*, (1967) 19, p. 415; Kent Spriggs, "Access of Visitors to Labour Camps on Privately Owned Property", *University of Florida Law Review*, (1969), 21, p. 295.

Many labour camps, for example, function as towns and are comparable, in varying degrees, to municipal corporations. In *Marsh v. Alabama* the court came to the conclusion that the use of the company's property was that of a town, despite its private ownership.<sup>54</sup> Indeed courts in the United States have repeatedly found that owners of property who have allowed substantial public access may be said to have dedicated that property for at least some public uses, especially where that access is for commercial gain.<sup>55</sup>

A significant group of cases in English trespass law has to do with the public or private nature of beach areas. *Blundell v. Catterall* (1964) is the leading case on this subject.<sup>56</sup> The case was one of trespass, "for breaking and entering the plaintiff's close ... and with feet in walking, and with the feet of horses, and with the wheels of bathing machines, carts and other carriages,

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<sup>54</sup> *Marsh v. Alabama*, 326 U.S. 501 (1946).

<sup>55</sup> Kent Spriggs, "Access of Visitors to Labour Camps on Privately Owned Property", p. 304.

<sup>56</sup> *Blundell v. Catterall*. *Brickman v. Matley*, [1904] 2 Ch., was another case of this type in which a headmaster and two hundred boys crossed a foreshore to bathe in the sea.

passing over, tearing up, damaging the sand, gravel and, soil of the said close."<sup>57</sup> The arguments hinged around the question of whether the public had a Common-Law right to bathe in the sea, and to cross the sea-shore for that purpose. The judgements are learned and detailed, and, like so many Common Law cases, make fascinating reading for the cultural geographer. The courts, in coming to the conclusion that there is no Common-Law right of bathing in the sea, wrestled with the problem that the sea-shore is often thought of, and indeed appears to be, a public highway (although they do not put it quite like this, referring instead to a general public right), and that this is "inconsistent with the nature of permanent private property, or with the sea-shore becoming such permanent private property."<sup>58</sup>

It is tempting to delve further into the rich material that is available and which deals with this important problem of the appropriate categorisation of geographic space, but enough has already been said to demonstrate the very real ambiguities that can arise and

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<sup>57</sup> Ibid., p. 299. There are a number of older cases that deal with the similar question of whether, and to what extent, particular roadways are private or public.

<sup>58</sup> Ibid.

the attempts of a society, through its appointed arbiters, to resolve these. An even more ubiquitous potential problem, is the very basic one of the recognition of territorial boundaries *per se*.

Boundaries: Limitations on the use of geographic space and the resources it contains are a fact of life. Much of our surroundings is reserved for the virtually exclusive use of others. Even in those public areas to which we have access, behaviour is highly circumscribed by society. We may use the highways, the public area of a store, or a park, but only as long as our behaviour there is appropriate. Cultures regulate and sanction, through law and custom, this use of space.

Survival in this cultural world requires that we recognise a complex of territorial markings in order to predict the behaviour of others and anticipate danger, and furthermore, to provide a model for our own proper behaviour. Categorisation of geographic space into public and private is an important part of this, but meaningful behaviour in a society is predicated on more subtle cognition, the ability to 'know', or define, a situation.

Naïvely, we would expect the recognition of territorial boundaries to be one of the more significant prerequisites of such subtle cognition. For these boundaries

serve to set off one group of norms from another. They are the mechanism of both inclusion and exclusion, producing, in effect, a landscape dialectic of human integration and differentiation. Yet despite their significance as spatial expressions of social order, obvious linear markers are not always present, nor is there any apparent consistency in their type. Nor, on the whole, does the law seem to be unduly concerned with the provision of such markers as an aid to boundary cognition.<sup>59</sup> Indeed the strict liability of trespass law and the rule that a mistake of fact or law is no defence, makes it generally unnecessary to clearly mark boundaries, although it will often be a wise precaution to minimise the ambiguity of a territorial boundary in order to reduce conflict.<sup>60</sup> Thus,

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<sup>59</sup> "The common law imposes no obligation upon a landowner to erect and maintain fences around his land; he need not delineate the boundaries of his property in any way." Vincent Powell-Smith, *The Law of Boundaries and Fences*, 2nd Ed. (London: Butterworths, 1975), p. 3. "Fences, although they may have been occasionally used as boundaries for the division of property are, nevertheless, treated by our law for the most part as guards against intrusion." H.W. Woolrych, *Party Walls and Fences*, p. 281, quoted in Powell-Smith, *Law of Boundaries and Fences*, p. 3.

<sup>60</sup> As Peter Haggett observes, "each boundary creates around it a zone of relieved stress..." *Geography: A Modern Synthesis*, 2nd Ed. (New York: Harper & Row, 1975) p. 436. Similarly, Edward Soja writes, "Boundary creation and maintenance stabilise social relationships by reducing intra-group conflict and reinforcing established behavioral norms." "Political Organization of Space", p. 29.

"the law bounds every man's property and is his fence."<sup>61</sup>

The justification for not requiring visible boundary delineation is undoubtedly its sheer impracticality.<sup>62</sup> The environment is also a more congenial place when boundary markers are softened and subtle, rather than relatively aggressive features of the landscape. The best strategy to adopt, therefore, in moving about space, is to think that everything, other than one's own territory, belongs to someone else, and that therefore one should go nowhere without either a licence (express or implied) or an invitation to do so.<sup>63</sup> Indeed, the Common Law for many years explicitly recognised this distinction between trespassers, licensees, and invitees, and still does so in some jurisdictions.

It is not so much, then, the actual boundary line that one must be aware of, as it is the type of places

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<sup>61</sup> Sir H.S. Theobald, *Law of Land*, 2nd edn., (1928), p. 345, quoted in Powell-Smith, *Law of Boundary and Fences*, p. 3. Theobald cites: *Star v. Rookesby* (1710), 1 Salk, 335; *Boyle v. Tamlyn* (1827), 6 B. & C. 329; *Cornwell v. Metropolitan Sewers Commissioners* (1855), 10 Exch. 771; *Erskine v. Adeane* (1873), 8 Ch. 756; *Jones v. Lee* (1912), 106 L.T. 123.

<sup>62</sup> What, for example, would and would not constitute a boundary marker?

<sup>63</sup> Hence the significance of being able to readily categorise public and private spaces.

where one should not be.<sup>64</sup> The recent British Columbia case of *Regina v. Bushman* makes this point very well.<sup>65</sup>

The facts are as follows:<sup>66</sup>

Two police constables investigating a complaint of a "hit and run" automobile accident called at respondent's private house at 11:00 p.m., drove their car into respondent's yard and there examined his automobile, removing from it some paint scrapings. They then approached the house, entered a small porch, the door of which stood open, and knocked on an inner door which led to the kitchen. Respondent's wife came to the door where she was shortly joined by respondent who, following some questioning by the constables, suddenly ordered them to leave and immediately thereafter struck one of them.

It was held by two of the justices of appeal that:<sup>67</sup>

the appeal must be allowed and a verdict of guilty entered; the police had implied leave and licence to enter respondent's yard and to approach his house in order to communicate with him on their lawful business; they did not become trespassers when they entered the porch which, with its open door, constituted an invitation to them to proceed

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<sup>64</sup> I do not want to make too much of this rather subtle point, for obviously boundaries play a significant part in determining where one should or should not be. Nevertheless, if one trespasses on cropped farmland it makes no difference (other things being equal) where the territory of one farmer ends and another begins.

<sup>65</sup> *Regina v. Bushman* (1968) 63 WWR.

<sup>66</sup> *Ibid.*, p. 346.

<sup>67</sup> *Ibid.*, p. 346.

past it to the outer door of the house proper. Whilst the respondent was fully entitled to revoke the implied leave and licence he was required to give the licensee a reasonable opportunity to act on the revocation.

The third judge, however, dissented and argued that:

When the constables approached respondent's car, which was standing on his private property, and without any authority from him, removed paint scrapings from it, they were trespassers and it may be questioned whether, following this, on their approach to the house, they took on the character of licensees; in any case, when they entered the porch they became trespassers since, when they crossed its threshold, they had passed the point where respondent intended his privacy to begin; the fact that the porch door stood open did not change matters. At the time when respondent struck the constable the latter being a trespasser, was not engaged in the lawful execution of his duty.

In this dissenting judgement the judge quoted part of the cross-examination of one of the constables as follows:<sup>68</sup>

Q. So you entered onto the private property of the accused, did you? A. Yes, I did.

Q. When you got to the porch was this a closed-in porch? A. It was all boarded in except for the door was open.

Q. It was boarded in? A. It had four walls on it and a doorway.

Q. Were there any lights on in the house? A. No, I don't believe there was.

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<sup>68</sup> Ibid., p. 354.



Q. So you - did you knock on the outside wall of this porch? A. I knocked on the door of the house.

Q. So you entered into the porch to do that. A. Inside the porch.

Q. How great a space is there between the porch outside the door and the inside door. A. Maybe three or four feet, five feet at the most.

Q. Was there anything to prevent you from knocking on the outside porch door? A. No, there wasn't.

The judge then argued that:<sup>69</sup>

The porch was an integral part of the dwelling house; it was completely boarded in and had an outer door as well as an inner door. With deference to those who may hold a contrary view, I do not think that it is open to us to find that a man's dwelling-house does not begin where he has put a wall with a door in it through which one must pass to get into the house. That is the point where he intends his privacy to begin and his, and his alone, must be the decision on that. The fact that the outer door happened to be standing open did not change matters.

In this particular case the significance of a subtle cognition of the character of a place, rather than a particular boundary line, is readily apparent.

The right to cross the legal boundary of private property also depends on the character of a place.

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<sup>69</sup> Ibid., p. 357.

When a householder lives in a dwelling house to which there is a garden in front and does not lock the gate of the garden, it gives an implied licence to any member of the public who has lawful reason for doing so to proceed from the gate to the front door or back door, and to inquire whether he may be admitted and to conduct his lawful business.<sup>70</sup>

Nevertheless, even this implied licence may be a prescribed one. Thus the dissenting judge in *Regina v. Bushman* suggested that "the law would indeed be an ass if it implied leave and licence on the part of every householder to every member of the public to bring the householder to the door whatever the hour."<sup>71</sup>

Obviously the manifestation of boundaries is an important part of the cultural ordering system on the landscape. But boundaries also have functions other than in the cognitive structuring of the environment. In diffusion terminology they may act as absolute, reflecting, or permeable barriers.<sup>72</sup> As such they are designed to keep out what is harmful, or what may be harmed, as well as to

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<sup>70</sup> *Robson v. Hallett* [1967] 2 Q.B. 939 at pp. 954-4, per Diplock, L.J.; [1967] 2 All E.R. 407.

<sup>71</sup> *Regina v. Bushman*, p. 358.

<sup>72</sup> Note that barriers do not have to be continuous lines that enclose geographic space in the way that boundaries do.

contain.<sup>73</sup> Indeed any boundary, no matter in what form it exists, is there to separate or isolate to some degree. In the most general sense then, the basic function of a boundary is to keep things (including such things as ideas) apart. Since geography has much to do with the factor of distance and spatial interaction, this is a very geographic concern.<sup>74</sup>

Although the Common Law does not usually require that property be fenced, there is an obligation on a landowner to contain dangerous objects and animals that might cause harm. With regard to animals it was said that, "Generally speaking the owner of an animal is responsible if it trespasses; but the Common Law in its common sense

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<sup>73</sup> Robert Frost's poem, "Mending Wall", is apropos. While he recognises the maxim that "Good fences make good neighbours", he is also adamant that they should have a proper function:

"Before I built a wall I'd ask to know  
What I was walling in or walling out,  
And to whom I was like to give offense."

Boundaries, of course, have numerous functions, among the more important of which are to protect, maintain, contain, defend, exclude, regulate, and identify.

<sup>74</sup> Soja indicates the more general significance of boundaries when he writes: "The surface of the earth is enmeshed in a labyrinth of boundaries created and maintained by man. Embedded within the pastel colors of a satellite photograph of the earth are layers of intricate and overlapping mosaics of spatial organisation unseen by the distant eye but nevertheless profoundly influencing human activity and behaviour." Soja "Political Organisation of Space", p. 1.

admits of exception to this general rule, and among the exceptions is the dog ... and there is no distinction between a dog and a cat."<sup>75</sup> The Common Law, however, imposes no duty to restrain domestic animals from straying upon a public highway.<sup>76</sup> With modern traffic conditions on the roads this no longer seems sensible and indeed the general rule was abolished in Britain by Section 8 of the Animals Act in 1971.<sup>77</sup> In earlier times, however, it was neither practical nor necessary to prevent animals straying upon a public highway. Thus it was pointed out by one English authority that:<sup>78</sup>

.. The former courts leet frequently made it an offence to allow certain animals to wander in the streets of a town. These animals commonly included swine, which were noisome, and unmuzzled mastiff dogs, which were regarded as general mischief-makers. In some towns ducks were brought within the same prohibition, and it was forbidden to

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<sup>75</sup> *Buckle v. Holmes*, [1926] 2 KB 125 (Per Bankes, L.J.).

<sup>76</sup> *Searle v. Wallbank* [1947] A.C. 341; [1947] 1 All E.R. 12. See also the comment on "Fencing Laws in Missouri - Restraining Animals" in *Missouri Law Review*, 1967, 32 p. 522.

<sup>77</sup> For a discussion of this Act and other related matters see Powell-Smith, *Law of Boundaries and Fences*, Chapter 7.

<sup>78</sup> Glanville Williams, *Liability for Animals*, (Cambridge: University Press, 1939), pp. 378-379.

milk cows in the streets. But there was no universal principle that animals were not to be allowed to stray in this way; for example, the right to pasture sheep in the streets is expressly recognized in the Beverley customal, and fowls seem to have been accorded complete freedom. As for country districts, no restriction whatever is recorded; traffic moved so slowly that there was comparatively little, and travellers on foot or on horseback do not receive serious inconvenience from straying animals.

In *Searle v. Wallbank* (a particularly interesting case for the cultural geographer because of its historical perspective) Lord Maugham was at pains to point out that there was "no record before recent times of any accident between a vehicle of any kind and an animal straying from an adjoining enclosed field on to a road" and that "it is only since cycles and motor-cars began to move along our roads at speeds generally unthought of a hundred years ago that there has been any chance of such collisions."<sup>79</sup> He referred to the fact that before the enclosure movement, which altered the face of England, roads or tracks between market towns were almost completely unenclosed by hedges or fences. In the Statute of Wynton 1285 it was written

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<sup>79</sup>In a detailed historical review of "the growth of our highways to see whether there was at any time such a state of things that a legal obligation ... to repair and maintain the adjacent hedge may reasonably have been inferred," the judge refers to "the *Historical Geography of England before 1800*, edited by H.C. Darby, Cambridge."

that:<sup>80</sup>

Highways leading from one Market Town to another shall be enlarged so that there be neither Dyke, Tree, nor Bush Whereby a Man may lurk to do Hurt, within 200 feet of the one side and 200 feet of the other side of the Way.

Although the Act became obsolescent it remained on the Statute Book for over five centuries which seems to show, as Viscount Maugham pointed out, that there was no real demand for hedges along the roads. Nor did subsequent Inclosure Acts require the repair and maintenance of hedges and fences.

The responsibility for containing dangerous things is similar to that for animals. Thus in the leading case of *Rylands v. Fletcher*, Justice Blackburn stated that:

... the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and that, if he does not do so, he is *prima facie* answering for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of *vis major*, or the act of God ...

This responsibility for the proper containment

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<sup>80</sup>Quoted in *Searle v. Wallbank*, p. 14.

within a 'territory' of animals and dangerous things, is somewhat analogous to the general requirement of parents to guard their children, in the sense that none of them can find their way around the environment in accordance with cultural norms. In other words their behaviour is not predictable. An alternative and better (although closely related) way of looking at it, is to say that societies are concerned to protect their members from environmental hazards.

#### Control of Environmental Hazards

Evolution is the constant process of adaptation to an ever-changing environment, with the overall objective of survival. Indeed, if our culture has any ideal at all it is surely that of the sacredness of human life. In keeping with this ideal, cultural directives represent a stock of wisdom designed to help individuals to avoid accidental injuries and unnecessary conflicts (in fact the purpose of tort law is the prevention of, and compensation for, damage). Conformity to such cultural directives makes sense because it benefits the individual and it will therefore be selected for by environmental pressures - including social sanctions themselves.

One cultural strategy for survival, as we have seen, is to ensure, through education, the capacity to 'read' environments correctly in order to prepare people

for the hazards "which life throws at their survival machines." There are, however, numerous hazards in the environment which are not easily foreseen and which exact a social toll. It is clearly desirable to eliminate these where practicable or to reduce their danger. Thus a second, although closely related, strategy favours the construction of a safe environment. This ensures that the individual's security is enhanced by the arrangement of things outside of himself, as well as inside. Indeed, this conscious and purposive arrangement of things for the overall benefit of a society is essentially what culture is all about.

A great deal of modern legislation is expressly concerned with providing a safe environment and security for the individual. Recently in this province, for example, it has become mandatory to wear seat-belts. Similarly, modern legislation that deals with the environmental hazard of 'pollution' reflects a growing concern about such life-sustaining 'goods' as the air we breathe, the water we drink, and the food we eat. Rules varying from the prohibition of cigarette smoking in public places to laws that forbid flying a plane without a licence, are part of a rapidly growing host of regulations designed to protect people from danger (the field of negligence law is just one extension of such growth). Increasing



environmental complexity seems to require increasing protective regulation. This is reinforced by population growth and greater mobility which lead away from localised social control towards a more ubiquitous one, from a concern for kin and tribe towards that of a common humanity. In constructing a safe environment through such cultural regulation, the general aim must be to eliminate either the hazard itself or, if it has some useful function, to isolate it in some way, for it is only through some restriction on access that the public can be protected.<sup>81</sup>

Some of the hazards that a society has to deal with are natural, such as floods, droughts, hurricanes and earthquakes, and it is such natural hazards which have most interested geographers up to this time.<sup>82</sup> Studies of natural environmental hazards form a noteworthy research tradition in geography. In general, however, these focus more on the 'perception' (cognition) of a specific hazard by individuals closely associated with it than on the preventative actions of the society at large. Furthermore, they

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<sup>81</sup>Note that the geographic focus has traditionally been on 'nearness' rather than 'distance apart' or 'separateness'.

<sup>82</sup>This interest is, perhaps, a relic of the somewhat obsolescent idea that the 'environment' is natural.

seem somewhat remiss in their relative neglect of man-made hazards, for these seem increasingly to be, on the whole, more consequential. Nevertheless, some geographers have drawn attention to such hazards - to the conflict between the inorganic machines and the organic survival-machines.<sup>83</sup>

For its part, trespass law has increasingly sought to protect from injury those who cross a boundary line. Thus the territorial occupier, the individual who controls a given space, has been made responsible to some degree, for its safety. His 'altruistic' obligation, however, varies according to his 'closeness' to the entrant, which parallels, to this extent at least, what we know about genetically based altruism. Thus, a category of invitees was historically accorded the greatest consideration, followed by licensees, while trespassers were considered aliens and entered at their peril.<sup>84</sup> Recent

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<sup>83</sup> For example, Bunge, "Geography of Human Survival", and Ronald J. Horvath, "Machine Space", *The Geographical Review*, 64, 2, 1974 pp. 167-188.

<sup>84</sup> The distinction between invitees and licensees is a difficult one to make and it varies with the jurisdiction. This is not surprising, for it is obviously difficult to categorise, rigidly and fairly, the whole range of potential entrants. The status of an invitee seems to be accorded to anyone who is expressly or impliedly invited or induced, by the occupier, to enter. If the occupier derives any economic benefit from the visit, the entrant

trends have been towards an extension of such 'altruistic' behaviour and increasingly there is a recognition of a 'common humanity'.

At a very early stage hidden dangers were outlawed unless proper notice was given. Thus, if landowners placed spring guns on their land, as they did in the early part of the 19th century in Britain, it was the practice to give public notice of this in market towns.<sup>85</sup> Those who brought claims where no notice had been given were able to recover damages. In *Jay v. Whitfield* (1817) a boy who entered some premises in order to cut a stick was shot by

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is likely to be classified as an invitee. A licensee has no such invitation but instead an express or implied permission.

<sup>85</sup> *British Railways Board v. Herrington*, p. 763. Surprisingly, perhaps, spring guns and other such devices are still used. In the Vancouver Sun of May 15, 1978, there was a report from Paris under the heading "Home-made booby trap splits France after killing." Apparently "a mounting tide of violent crime in France" fueled the arguments over how far the citizen can go to protect his property. In this case the device was a bomb that killed one burglar and injured an accomplice, despite warning notices outside and inside the house. Another recent case (1971) was *Katko v. Briney* in the United States [183 N.W. 2d. 657 (Iowa 1971)]. This case received national attention in newspapers (see, e.g., Chicago Tribune, Feb. 10, 1971, at 1A-7, col. 5-7; New York Times, Feb. 10, 1971, at 32, col. 1) and on national news programmes. The injured prowler was fined \$50 for larceny and paroled. He sued the farm couple, who were attempting to protect (without notice) household items in their abandoned farm house, and collected \$30,000.

a spring gun. He recovered £120 damages for his injuries.<sup>86</sup> The reasons were firstly, because "an occupier could not do indirectly what he could not do directly" which was to fire a gun at a trespasser.<sup>87</sup> And secondly, because it was "contrary to principles of humanity to place a spring gun of which a trespasser was unaware... It was the 'common understanding of mankind' that such notice ought to be given"<sup>88</sup> (*italics added*). Where notice was given, however, trespassers could not collect damages on the principle *volenti non fit injuria*.<sup>89</sup> This was the situation in *Ilott v. Wilkes* (1820) where the trespasser knew that there were spring guns in a wood, although he did not know exactly where they were.<sup>90</sup> But

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<sup>86</sup> *Jay v. Whitfield* (1817) 3B. and Ald. 308.

<sup>87</sup> *British Railways Board v. Herrington*, p. 763.

<sup>88</sup> *Ibid.* This is obviously very similar to the discussion of the importance of cognition earlier in this chapter, nevertheless despite the overlap the emphasis here remains on the distinguishable question of the safety of the environment itself, rather than on its cognition.

<sup>89</sup> *Volenti Non Fit Injuria*. No injury is done to one who consents.

<sup>90</sup> *Ilott v. Wilkes* (1820) 3B. & Ald. 304; All E.R. Rep. 277.

the duty to warn was emphasised:<sup>91</sup>

... although it may be lawful to put these instruments on a man's own ground, yet as they are calculated to produce great bodily injury to innocent persons (for many trespassers are comparatively innocent) it is necessary to give as much notice to the public as you can, so as to put people on their guard against the danger.

and re-emphasised:<sup>92</sup>

Humanity requires that the fullest notice possible should be given, and the law of England will not sanction what is inconsistent with humanity.

In the case of *Bird v. Holbrook* (1828), where a young man went over a wall into a garden in order to catch a stray fowl and tripped a wire which fired a gun, it was said that:<sup>93</sup>

But we want no authority in a case like the present; we put it on the principle that it is inhuman to catch a man by means which may maim him or endanger his life, and, as far as human means can go, it is the object of English law to uphold humanity, and the sanctions of religion.

In general, the rule is that only a reasonable amount of force can be used to defend property.<sup>94</sup> The use

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<sup>91</sup> *Ibid.*, at 312 and 279-290, respectively (per Bayley, J.)

<sup>92</sup> *Ibid.*, at 319 and 282, respectively.

<sup>93</sup> *Bird v. Holbrook* (1828) 4 Bing. at 643.

<sup>94</sup> See *Hemmings v. Stoke Poges Golf Club*. In general, it

of spring guns is usually an excessive amount of force. But in circumstances where walls and fences by themselves are insufficient to deter intruders, additional protection in the form of such things as barbed wire, spikes, broken glass cemented on the top of walls, and watchdogs, is usually tolerated. Unlike spring guns which are considered retributive, these 'barriers' act as deterrents. It is said of such mechanical devices that they:<sup>95</sup>

carry their own warning that prevent them from operating as dangerous traps in the day time, while at night, such devices are justified by rationalising that where their use is common, the trespasser is said to know or should know of their existence.

The rules regarding vicious dogs kept in order to defend property are analogous to those governing other defences of property, whereby the safety of human life cannot be unnecessarily endangered, although the exact form of the rules varies from one jurisdiction to another. The English case of *Cummings v. Granger* [1976]<sup>96</sup> is interesting because it illustrates a widespread attitude. The facts

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seems that more force can be legitimately used to defend a person in his dwelling house than the property itself.

<sup>95</sup> M. Jerry Garfinkle, "Tort Law - Use of Mechanical Devices in the Defense of Property," *South Carolina Law Review*, 1972, 24, p. 135. This is a useful review of the current law.

<sup>96</sup> *Cummings v. Granger* [1976] 3 W.L.R. 842.

as found by Justice O'Connor were as follows: Granger ran a scrap-yard in the East End of London, which he protected at nights by allowing his Alsatian dog to roam there loose. This dog was a big, untrained, undisciplined animal, which added racism to its other canine sins by being especially fond of biting black people. Granger erected a big notice, "beware of the dog", prominently warning intruders of the dangers of entry. The plaintiff, Miss Cummings, was the barmaid at a nearby pub, and her boyfriend, X, was allowed by Granger to use the scrap-yard to store tools. Late one night X lawfully entered the yard with the absent owner's consent, and Miss Cummings, who did not have the owner's consent, unlawfully came in with him, knowing the dog was fierce and knowing that it was running loose. It attacked her and she was badly mauled.

Since *Herrington's* case abolished the trespasser's disability to sue an occupier in negligence, the plaintiff could proceed on this basis, or alternatively (as in this case), proceed under section 2 of the Animals Act 1971. With regard to a possible claim of negligence Lord Denning M.R. said that *Herrington* was a case of

children trespassing and their presence was to be expected. But this was a case of a grown-up person. The owner had no reason to expect that anyone would enter unlawfully, especially as he had a large

warning notice and a guard dog. It seems to me that he was not under any duty of care towards her.<sup>97</sup>

The plaintiff, however, relied on Section 2 (2) of the Animals Act which is as follows:

Where the damage is caused by an animal which does not belong to a dangerous species, a keeper of the animal is liable for the damage except as otherwise provided by this Act, if -

- (a) the damage is of a kind which the animal, unless restrained, was likely to cause or which, if caused by the animal, was likely to be severe: and
- (b) the likelihood of the damage or of its being severe was due to characteristics of the animal which are normally found in animals of the same species or are not normally so found except at particular times or in particular circumstances: and
- (c) those characteristics were known to that keeper or were at any time known to a person who at that time had charge of the animal as that keeper's servant or, where that keeper is the head of a household, were known to another keeper of the animal who is a member of that household and under the age of sixteen.

The Court of Appeal agreed that all the requirements were fulfilled. The case was brought under the requirement (b) by the fact that the dog was guarding its own territory and this was held to be a "particular circumstance".

The question then was whether Granger could rely

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<sup>97</sup> Ibid.



on the defences in section 5 of the Act:

- (1) A person is not liable ... for any damage which is due wholly to the fault of the person suffering it.
- (2) A person is not liable ... for any damage suffered by a person who has voluntarily accepted the risk thereof.
- (3) A person is not liable ... for any damage caused by an animal kept on any premises or structure to a person trespassing there, if it is proved either -
  - (a) that the animal was not kept there for the protection of persons or property: or
  - (b) (if the animal was kept there for the protection of persons or property) that keeping it there for that purpose was not unreasonable.

The court was of the opinion that all defences would succeed. With regard to 5(3) the plaintiff was taken to be a trespasser and the court found that keeping the dog there to protect the yard was entirely reasonable, especially in view of the contents of the yard, the rough neighbourhood, and the prominent notice saying "beware of the dog."

The Court of Appeal thus recognised the long traditions of the Common Law which allow a reasonable amount of self-help in protecting property, including the use of deterrent hazards, as long as fair warning is given. However, in 1975 the Guard Dogs Act came into being which makes it a crime to use a dog to guard property unless it is chained up or unless there is a dog-handler to watch and restrain it. This restriction led one writer to make the

caustic comment that:<sup>98</sup>

The common law has always had more sense than to require the citizen to sit back and meekly wait for thieves to come and steal his property, just because the state in one of its manifestations may be able to get it back for him. Parliament, however, does not seem to approve of this individualistic philosophy. Evidently believing, if not that "property is theft," then at any rate that it is better that ten innocent men should be burgled than a single trespasser go frayed ...

Such limitations on the defense of property are, however, only a small (but illustrative) part of the very much wider problem of occupiers' liability. Indeed, no part of trespass law has received more attention than this in the last decade or so.<sup>99</sup> It epitomises very well the two fundamental tensions within a culture that were

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<sup>98</sup> J.R. Spencer, "Protection of Property and Protection of Trespassers - which Principle Prevails?", *The Cambridge Law Journal*, 1977, p. 42.

<sup>99</sup> There would be no difficulty in finding a hundred articles on this subject. For an overall review see Heuston, *Salmond on the Law of Torts*. Some useful additional articles and case comments, not footnoted elsewhere in this study, are: Max Weaver, "Forgiving our Trespassers", *New Law Journal*, Jan. 1974; J.F. Keeler, "Recent Developments in the Law of Occupiers and Trespassers," *The Australian Law Journal*, Sept. 1972, 46; Gary R. Thune, comment on recent cases, "Torts-Landowner's Liability - Common Law Distinctions between Trespasser, Licensee, and Invitee Prevail over Modern Trend," *North Dakota Law Review*, 1973, 49, 3; Theodore Boyd, "Parking Lots and Personal Injuries," *Cleveland State Law Review* (2), May 1970; C.J. Miller, notes of cases, "Acting with Common Humanity." *The Modern Law Review*, 1972, 35.

previously identified in this study; firstly, that between competing individual interests; and, secondly, that between existing, tried and tested, cultural directives (which are, perhaps, too often naïvely conceived of as immutable), and the pressures of a modern society which clamour for recognition. Thus, on the one hand, there is a conflict between the interests of the land occupier to use and control his property without hindrance, and the interests of others to move about the environment with a reasonable assurance of physical safety and to be compensated if injured. And, on the other hand, there is a tension that arises from the lack of fit of rules that were formulated for social, economic, and industrial conditions of the past, to modern circumstances.

In the latter part of the 19th century when the prevalent economic theory was that of *laissez-faire* the law favoured the interest of the land occupier rather than the entrant. People, at this time, were encouraged to take care of themselves and not to hinder the development of economic resources. Towards the end of the 19th century, industrialisation and its effects (including the number of industrial accidents) led to the emergence of a renewed sense of social responsibility and the interest of

the injured plaintiff became more prominent.<sup>100</sup> However, the category system (invitees, licensees and trespassers) hindered this developing judicial tendency. Thus in a Canadian case of 1942, it was said:<sup>101</sup>

It may be a common tendency to attempt classification of the various human relationships which may give rise to a breach of duty. But the modern decisions ... indicate that such classifications cannot be final. They cannot be set up as inflexible yardsticks, but must be regarded rather as convenient sensitive instruments fashioned and refashioned from time to time in the judicial workshops, to record and harmonise the relationship between the law and altering social and business conditions and outlooks. The standard of duty must be deduced from the facts in the particular case at the particular time.

The essence of this traditional formulation of liability is as follows:<sup>102</sup>

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<sup>100</sup> See Bryan M.E. McMahon, "Conclusions on Judicial Behaviour from a Comparative Study of Occupiers' Liability," *The Modern Law Review*, 1975, 38, p. 40.

<sup>101</sup> *Ibid.*, p. 41. McMahon points out the various reports on law reform that are evidence of widespread dissatisfaction. "Besides the English and Scottish reports which led to statutory reforms in 1957 and 1960, reports have now been issued in Canada (1969) and (1972), New Zealand (1970), Australia (1968-69) and Ireland (1972)." As he says, in Civil Law jurisdictions, such as France, South Africa and Scotland, where the concept of *culpa* prevails, the situation is better.

<sup>102</sup> *Ibid.*, p. 42. Note that the presence of an allurement on the premises may be interpreted as constituting an invitation to children.

- (1) To his invitee, the occupier owes a duty to prevent damage from *unusual* dangers of which he knows or *ought to know*.
- (2) To his licensee, the occupier owes a duty to warn of *concealed* dangers of which he *actually knows*.
- (3) To the trespasser, the occupier owes a duty not to be *reckless* and not to injure him intentionally.

In England the distinctions between licensees and invitees were eventually abolished by the Occupiers' Liability Act, 1957. Section 2(1) of the Act provides that an occupier owes the "common duty of care" to all his lawful visitors, except where he extends, restricts, modifies or excludes his duty by agreement or otherwise. Not all jurisdictions, however, have followed this example. In the United States, courts have found it necessary to formulate "increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each".<sup>103</sup> The result of these various refinements in different jurisdictions has been a far from uniform approach to such problems as the treatment of

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<sup>103</sup> Richard Lasko, case comment on "Duty of Reasonable Care to Third Persons on the Premises," *Washington and Lee Law Review*, 1969, XXVI, p. 131. Note, however, the very important decision of the California Supreme Court in *Rowland v. Christian* [70 Cal. Rptr. 97. 443 P. 2d 561 (1968)], in which the court abandoned the Common Law classifications of trespasser, invitee, and licensee. The broad test of reasonable care was preferred to one based on status.

members of the public who are injured in such public places as parks and swimming pools.<sup>104</sup>

In general it is said of the category system, that "all the dictates of this modern society - man versus machine and the establishment - cry for an immediate change."<sup>105</sup> This is especially so in areas of high density of population and in close proximity to industry, where one cannot help come in daily contact with the property of others. Such proximity requires added assurance that people's lives and limbs will be adequately protected. Thus it was written:<sup>106</sup>

The United States is no longer the agrarian society that accepted the scheme of entrant classes from England as adopted common law. The national character is now dominated by a rapid-paced urban and suburban culture. The exigencies of this urban civilization have produced a more "gregarious society" and have increased the probability that people will enter the property of others. Considerations of human safety within an urban

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<sup>104</sup>McMahon, "Conclusions on Judicial Behaviour from a Comparative Study of Occupiers' Liability."

<sup>105</sup>N.J. Greisler, "The Hidden Distinction: An Analysis of the Duty Owed Adult Trespassers and Licensees in New York," *Albany Law Review*, 34, 1970, p. 621.

<sup>106</sup>Anonymous, "Torts - Abrogation of the Common-Law Entrant Classes of Trespasser, Licensee, and Invitee," *Vanderbilt Law Review*, 1972, 25, p. 640.

community dictate that the landowner's relative immunity, which is primarily supported by the values of the agrarian past be modified in favour of negligence principles of landowner liability.

In conclusion, it can be seen that judicial emphasis on predictability, if over-emphasised, inhibits the development of the law. "Predictability in the sense of who wins the law suit becomes separate from predictability in the sense of a fair result, and the former becomes master and the latter servant."<sup>107</sup> The essential genius of the Common Law is its case by case approach, in which the rules of the system are expected to match the facts of the situation. The cultural drive towards predictability and stability cannot, sensibly, be merely a theoretical one; it must also be a practical one. In the following chapter, some of the pressures for change in the law of trespass to land will be looked at.

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<sup>107</sup> John Bernard, "Loss of the Land Occupier's Preferred Position - Abrogation of the Common Law Classifications of Trespasser, Invitee, Licensee," *Saint Louis University Law Journal*, 1969, 13, 3, p. 456.

## CHAPTER VI

## TENSIONS LEADING TO ADAPTIVE CHANGE

It has been rightly said that social life is an adaptation for the efficient use of time and space upon the earth.<sup>1</sup> Such social life necessarily entails integration and this in turn implies a tendency towards maintaining and increasing the predictability and stability of the circumstances of life.<sup>2</sup> But this stability is a dynamic one, shifting in response to inevitable changes in the environment (both cultural and non-cultural), changes which result

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<sup>1</sup> Angus M. Woodbury, *Principles of General Ecology*, (New York: Plakiston, 1954) p. 412. It seems axiomatic that human social practices are generally adaptive. Marvin Harris has even argued that cultural practices which appear bizarre are adaptive. See his *Cows, Pigs, Wars, and Witches* (New York: Random House, 1974). This certainly does not mean that everything that is done is adaptive. On the contrary, in a changing world there is inevitably an element of uncertainty, for on the one hand adaptations are keyed to past environments, and on the other new behaviours (whether planned or arising by chance) are subject to future environmental support. Culture is not an omniscient human adaptation, although perhaps that is the longed-for objective. For a discussion of some limitations of the concept of adaptation, see Richard C. Lewontin, "Adaptation", *Scientific American*, 239, 3, September, 1978. This issue is devoted to 'Evolution' and is therefore particularly pertinent to this dissertation.

<sup>2</sup> An interesting commentary on cultural integration is that by P.A. Sorokin, *Social and Cultural Dynamics*, Vol. 1 (New York: American Book Co., 1937), Chapter 1.



in a variety of tensions which social forces, usually institutionalised, operate to resolve.<sup>3</sup> Beyond that, societies anticipate future stresses and strains by formulating rules of behaviour or altering environmental conditions. In this way custom and law function to minimise conflict and, where it persists, to channel it within tolerable bounds so that ultimately it may be resolved through some institutional arrangement.<sup>4</sup> Each law may therefore be viewed as a "generalised integrative instrument." Thus, through elaborate rules of the game (culture), a society seeks the achievement of common purposes and the reduction of disharmony.<sup>5</sup>

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<sup>3</sup> Failure to resolve these tensions may well give rise to so much pressure that a revolution results. This is analogous to what happens when an earthquake occurs. Institutional change, like earth movements, reestablishes an equilibrium.

<sup>4</sup> Conflict is to be thought of here as a multidimensional social process which covers not only individual relationships but also the relationships of people to their non-human environment. It does not encompass the psychological conflict in which a person is torn between conflicting objectives.

<sup>5</sup> The achievement of common purposes or altruism, including even outright self-sacrifice, may have a genetic basis as was indicated in Chapter Four, but there is no definite evidence for this. Such behaviour may just as well be inculcated by learning, as coded for by genes. Indeed, it is likely that the specific genetic programming of behaviour would be inadapative in a complex society because of its inflexibility. A high degree of plasticity in human behaviour is more likely to be the major characteristic. Although the genetic benefits of kin selection may propel

At times the literature seems to emphasise this integrative element of social life, this tendency towards a moving equilibrium, and at other times the emphasis is on change and conflict. It is likely that this shifting emphasis is in response to the circumstances of history. Thus in the 19th century, perhaps as a result of the inequities of the industrial revolution, Marx and Engels focussed attention on class conflict.<sup>6</sup> And Social Darwinists such as Spencer, imbued with the individualistic and *laissez-faire* spirit of the times, proffered alternative interpretations of social conflict, often based on Spencer's notion of "survival of the fittest."<sup>7</sup> Later, during and after the

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the development of human society, it is not so much the biological determinism of a genetically controlled behaviour which is at work, as the biological potentiality of the brain and human consciousness.

<sup>6</sup> In the dialectical thought derived from Hegel, conflict and its inevitable resolution are of central concern.

<sup>7</sup> Anatol Rapoport points out that Hegel's dialectical formulation of conflict was anticipated two and a half millennia earlier by Heraclitus, and that the social Darwinists of the nineteenth century were anticipated in the seventeenth by Hobbes. He reminds us that the idea of conflict pervades practically all human thought, and suggests that more has been written on it than on any other subject, with the possible exceptions of God and love. *Conflict in Man-Made Environment*, pp. 7, 18. George Simmel was one of the first to focus attention on the idea of conflict itself, and his ideas were later restated by Lewis Coser.

Second World War, there was a marked interest in integration expressed as functionalism, structuralism, and, more recently, systems theory. The work of Talcott Parsons epitomises this stress on the harmony model of society whereby conflict is seen as a kind of sickness of society.<sup>8</sup> One can infer that this is partly in reaction to the upheavals of the time and partly a reflection of the functionalist, non-conflict, approach in the natural sciences which were emulated by the social sciences at this time and indeed still are. The prestige of the natural sciences seems to have been the reason for the similar situation that prevailed in geography after the Second World War. The functionalist models of the 'spatialists' still dominate the discipline, although there is an increasing interest in Marxian analysis.<sup>9</sup> This interest parallels a more general opposition in the social sciences to the functionalist model in recent years, largely under the influence of Marxian

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<sup>8</sup> See for example, Max Black, ed., *The Social Theories of Talcott Parsons*, (New York: Prentice-Hall, 1961), and for a more general view, Demerath and Peterson, *System, Change and Conflict*. The work of Talcott Parsons has been strongly attacked.

<sup>9</sup> The core of much geographic thought, especially in economic geography, still lies in such functionalist models as those of von Thünen, Christaller, and the Gravity Model. The work of David Harvey is representative of recent interest in Marxian analysis.

thought.<sup>10</sup> In general, however, it is fair to say that the whole question of social conflict has been neglected in geographic thought.<sup>11</sup> This is unfortunate if one views both the functionalist and conflict models of society as part of the same evolutionary process. As Lewis Coser puts it, "we deal here not with distinct realities but only with differing aspects of the same reality."<sup>12</sup> Conflict and order are part of the same cybernetic system whereby, "both the cementing and the breaking of the cake of custom constitute part of the dialectic of social life."<sup>13</sup>

The focus in this chapter is on conflict rather than integration. It seeks, through the examination of representative examples of tensions found in the law of trespass to land and related torts, firstly, the relatively circumscribed objective of furthering geographic understanding of territorial possession and its corollary the

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<sup>10</sup> See Demerath and Peterson, *System, Change and Conflict*.

<sup>11</sup> A noteworthy exception is Cox, Reynolds, and Rokkan, *Locational Approaches to Power and Conflict*, (New York: Wiley, 1974).

<sup>12</sup> *International Encyclopedia of the Social Sciences*, (Crowell Collier and MacMillan, 1968) 3, p. 235.

<sup>13</sup> *Ibid.*, p. 235.

invasion of territorial space. And, secondly, more broadly and tentatively, it attempts to focus some light on the role of conflict in the functioning of a culture. In this role, conflict is not viewed as something pathological (unless, as with genetic mutations, there is too much of it), but as something essentially creative, a part of the mechanism of evolution itself.<sup>14</sup> The discussion will not attempt to root out in detail the causes or function of spatial conflicts at all levels in our world - an enormous task - but it will attempt to incorporate the social processes at work in adaptive change within an evolutionary framework.<sup>15</sup>

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<sup>14</sup> As Lewis Coser puts it: "Conflict prevents the ossification of social systems by exerting pressures for innovation and creativity; it prevents habitual accommodations from freezing into rigid molds and hence progressively impoverishing the ability to react creatively to novel circumstances. The clash of values and interests, the tension between what is and ought to be produce social vitality." Coser also argues persuasively that conflict has a very significant integrative element. *Ibid.*, p. 235.

<sup>15</sup> The significance of the work of Marx on conflict has already been referred to. Freud is another eminent thinker whose ideas are relevant to this discussion. He saw civilisation as a product of the clash between the incompatible demands of biological instincts and the process of socialisation (the upbringing of children can be viewed as a repression of individual desires and a strengthening of social conformity, and reflects well Freud's position). Campbell, *Conflicts Between Biological and Social Evolution*, would appear to be restating this fundamental conflict referred to by Freud.

The various tensions will be looked at in terms of two general categories which are closely interwoven. The first of these is that tension that is inherent in all social relations whereby the interests of the individual (perhaps biologically motivated) must not be pushed so far that the fundamental well-being and integration of the society is threatened. As such, social life can be thought of as a tacit bargain between individuals for mutual aid and benefit.<sup>16</sup> Broadly speaking, the foregoing type of tension and the resulting conflict have been largely neglected in geographic thought. Far more attention has been paid to a second category of tension, that between man and his environment. The whole body of thought that we call environmentalism can be interpreted as an examination of environmental challenges and human adaptation to these. In particular the last hundred years or more has seen rapid environmental changes as a result of industrialisation and considerable technological advances, and this has wrought great changes in human behaviour which are reflected in the law.

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<sup>16</sup> The history of Common Law torts can be thought of as a continuing search for a satisfactory equilibrium position between the individual's interest in both security and freedom of action.

Conflict Between the Individual and Society  
Over Access to Geographic Space

A pervasive characteristic of human geography during the last two decades has been the assumption that a society's behaviour and expression on the landscape can be analysed as a systemic whole. The constituent parts of this spatial organisation are seen as seeking out a mutually adjusted equilibrium. The principal mechanism that geographers have relied on in explaining the systemic arrangement of things on the surface of the earth is 'distance', which was interpreted by Tobler to mean that "everything is related to everything else, but near things are more related."<sup>17</sup> Essentially what is meant by distance is 'accessibility' that is to say the more accessible one thing is to another the stronger is the potential interaction. Unfortunately accessibility is by no means a straightforward function of distance. The geographic world is organised into 'territories' rather than 'fields', and the territorial restrictions on access reflect competition within a population for the control and use of space.

Insufficient attention has been paid to the obvious fact that geographic space is limited and that any

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<sup>17</sup>W.R. Tobler, "A Computer Movie Simulating Urban Growth in the Detroit Region", *Economic Geography*, 46, 1970;234-240.

particular content inevitably excludes alternative contents. Furthermore a particular spatial order precludes other orders. Anyone who has packed a suitcase for a vacation knows the problem of deciding on both content and its arrangement. Hägerstrand makes a similar point when he says that, "as soon as one object has found a location, the space it occupies is not available for a host of other 'weaker' objects and the probability field of their location has changed."<sup>18</sup> The failure to adequately consider these aspects of the competitive process at work in the possession of scarce geographic space and its resources represents a significant *lacuna* in spatial analysis.<sup>19</sup> Hägerstrand rightly complained that the notion of space as made up of distances has overtaken the notion of space as a provider of room.<sup>20</sup> A more careful consideration of competition in societies such as ours will introduce into the

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<sup>18</sup> Torsten Hägerstrand, "Domain of Human Geography", p. 71.

<sup>19</sup> Anatol Rapoport, *Conflict in Man-Made Environment*, p. 187, observes that "Marxist theory puts allocation of resources at the basis of all major social conflicts, both endogenous and exogenous," and he suggests that "there is ample evidence that allocation of resources is, in fact, an underlying issue of many, perhaps most, social conflicts."

<sup>20</sup> Hägerstrand, "Domain of Human Geography", p. 70.



equation of spatial organisation an enormous variety of crisscrossing interests of individuals, groups and, of course, society itself represented by the state. The proper and improper location of things in geographic space is decided then, not solely by classical economic man (or even some close relation), but in large part by cultural man who operates from within a wide variety of cultural frameworks.<sup>21</sup>

Thus it is that the smooth, efficient, and functionalist, abstract landscapes of spatialist geography, supposedly guided by the rationale of some invisible hand largely through the mechanism of distance, are in fact pockmarked with conflict. Thousands of individual interests concerning the use of space fight for survival. Indeed, so complex and multitudinous are the interactions, that perhaps we have more cause to wonder at the relative paucity of conflict than at its prevalence. Yet despite this, the earth's surface has been and still is a battleground of sorts, ranging from the destructive world wars of this century, through conflicts that arise from the use of urban

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<sup>21</sup>Note that, in any case, there can be no single optimal spatial arrangement where present worlds are different from past worlds and where one place is different from another. The functionalist approach is divorced from reality in direct proportion to its neglect of this temporal and spatial differentiation.

space primarily for machines rather than people, and down to micro-geographic problems that are posed by considerations of privacy and personal space. This problem of proper spatial utilisation is nicely exemplified in a delightful children's book, *The Pushcart War*, which is about a conflict in the streets of New York between aggressive truckers and a band of pushcart peddlers who are determined to defend the 'freedom' of the streets.<sup>22</sup> The author makes the point (no doubt with tongue-in-cheek) that one would have to study geography for twenty years just to locate the battlefields of our large modern wars, let alone all the smaller ones. Today, on a smaller scale, we find, increasingly, interest groups lobbying for or against particular locational arrangements. Thus, on the one hand, a neighbourhood may resist a drug treatment centre, a prison, a shopping-centre, or low-cost housing, and on the other hand, try to attract facilities such as parks and hospitals.<sup>23</sup> The optimal packing of space is primarily

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<sup>22</sup>Jean Merrill, *The Pushcart War*, (New York: Grosset and Dunlap, 1964).

<sup>23</sup>David Harvey pointed out that much urban political activity is concerned with competition between neighbourhoods to attract land uses with beneficial externality effects on the one hand and to push those with negative externality effects elsewhere. See his "Social Processes, Spatial Form and the Redistribution of Real Income in an Urban System," *The Colston Papers* 22, 1970 (Quoted in Cox,

predicated on the exclusion of certain types of land use and, as a corollary, the inclusion of alternative uses and as such it has an obvious territorial dimension.<sup>24</sup> Trespass law, with its paramount concern with rights of access, illustrates these spatial aspects and some of the fundamental tensions involved.

Of course, each and every case in trespass law represents a conflict of some sort. As with tort law in general, most of these conflicts are between individuals. Here, however, we shall look more closely at the conflict between the individual and the state (including its institutions) with regard to territorial access. One of the most interesting and representative cases in this regard is that of *John Entick, Clerk, v. Nathan Carrington and three others, Messengers in Ordinary to the King*.<sup>25</sup> The plaintiff

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Reynolds, and Rokkan, *Locational Approaches to Power and Conflict*, p. 32.

<sup>24</sup> It is theoretically possible to interpret all social conflict as being essentially spatial (even models for psychological conflict, such as that of Neal E. Miller, are spatial), in the sense that it is ultimately concerned with the propriety of the location of some object or behaviour, or questions of access to a location. Of course, such an interpretation is too generalised to be of great use, but it is nevertheless something that the geographer might do well to keep in mind.

<sup>25</sup> *Entick v. Carrington*.

declared that the defendants had broke into his house at Westminster in Middlesex in 1762 and, amongst other things, "read over, pryed into, and examined all the private papers, books, &c. of the plaintiff there found, whereby the secret affairs, &c. of the plaintiff became wrongfully discovered and made public."<sup>26</sup> The defendants argued that they had special justification under a warrant from the Earl of Halifax who was a Secretary of State.

Entick, apparently, had been writing seditious weekly papers, entitled *The Monitor, or British Freeholder* and these were said to contain "gross and scandalous reflections and invectives upon His Majesty's Government, and upon both Houses of Parliament." The Lord Chief Justice, Lord Camden, stating that the case was "of the utmost consequence to the public," held that the Secretary of State had no jurisdiction to grant a warrant "to break open doors, locks, boxes, and to seize a man and all his books, &c. in the first instance upon an information of his being guilty of publishing a libel." In this case there had been no previous summons, examinations, hearing of the plaintiff, or proof that he was the author of the supposed libels. "If this is law," the Chief Justice commented, "it would be

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<sup>26</sup>Ibid. This and the following quotes are taken from the report in 2 Wils. K.B. 275.

found in our books, but no such law ever existed in this country." Indeed, if there was such a law, "it would destroy all the comforts of society; for papers are often the dearest property a man can have." As the Chief Justice said, "if a man is punishable for having a libel in his private custody ... half the kingdom would be guilty." The court concluded that the warrant was wholly illegal and void, stating that "our law is wise and merciful, and supposes every man accused to be innocent before he is tried by his peers." As for the trespass it was said that "our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law."

Few, today, would dispute the general proposition that nobody, including agents of the state, can invade private property without lawful justification. Yet emerging events in Canada in 1978 have shown that R.C.M.P. officers have indeed entered such property without the necessary warrants and have even removed papers for copying, and sought to justify this on the basis of expediency. This indicates the ongoing delicacy of the balance between both the security and freedom of the individual, and the

concomitant need to be constantly vigilant.<sup>27</sup>

Yet the present tendency, perhaps surprisingly, seems to be towards extending the powers of the police and other public officials to enter and search premises and seize chattels there. The Canadian Government, for example, has argued for the validity of the R.C.M.P.'s actions in general, though not necessarily in specific instances. It thus appears that this is public policy in Canada, and perhaps in Britain as well. Lord Denning, for instance, one of the most liberal of British judges, argued that "in these present time, with the ever-increasing wickedness there is about, honest citizens must help the police and not hinder them in their efforts to track down criminals."<sup>28</sup> In the same vein, Justice Ackner said, in the unreported British case of *Garfinkel v. Metropolitan Police Commissioner*, 1971, that:

... it is accepted that the law on this subject can be stated quite shortly. Where police officers enter a man's house by virtue of a warrant then, if in the course of their search they come upon any goods which show him to be implicated in some crime other than the crime for which the warrant was directed, they may take

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<sup>27</sup> See Peter Burns, "The Law: Calling Mounties to Account", *The Province* (Vancouver newspaper), May 10, 1978.

<sup>28</sup> *Chic Fashions (West Wales) Ltd. v. Jones*.

them provided they act reasonably and detain them no longer than is necessary.<sup>29</sup>

A recent British Columbian case *Eccles v. Bourque, Simmonds and Wise*<sup>30</sup> provides another example where the public interest was preferred to that of the rights of the individual. The case was decided by the Supreme Court of Canada on an appeal from the judgement of the British Columbia Court of Appeal which allowed an appeal against judgement awarding damages for trespass against three police officers. The officers, believing that one Edmund Cheese, also known as Billy Deans, for whom there were three outstanding Montreal warrants, was in the apartment of the appellant Eccles, knocked on the apartment door, identified themselves, and searched for Cheese without success. The Supreme Court held that the appeal should be dismissed since the officers had met the basic requirements which were to give: (1) notice of presence by knocking or ringing a doorbell; (2) notice of authority by identifying themselves as law enforcement officers; and, (3) notice of purpose by stating a lawful reason for entry.

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<sup>29</sup>See, *Ghani v. Jones*, [1970] 1 Q.B. 693 per Lord Denning, M.R. p. 706b.

<sup>30</sup>*Eccles v. Bourque, Simmonds and Wise* [1975] 1. W.W.R. 609.

Justice Dickson, in dismissing the appeal, went back to vintage common law and quoted *Semayne's Case* (1604) as follows:<sup>31</sup> "That the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose." He stressed that this was a principle firmly entrenched in our jurisprudence.

That, then, is the basic principle, as important today as in Biblical times (Deuteronomy 24:10) or in the 17th century. But there are occasions when the interest of a private individual in the security of his house must yield to the public interest, when the public at large has an interest in the process to be executed. The criminal is not immune from arrest in his own home nor in the home of one of his friends. So it is that in *Semayne's Case* a limitation was put on the "castle" concept and the Court resolved that (p. 195):

"In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors." <sup>32</sup>

It was the Court's view that no place can be allowed to give a criminal fugitive sanctuary. There must, however, be reasonable and probable grounds for believing that the

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<sup>31</sup> See *Semayne's Case* (1604).

<sup>32</sup> *Eccles v. Bourque et al.* p. 611. The traditional demand to open doors was, "Open in the name of the King."



person sought is within the premises.

An alternative viewpoint has been presented that suggests that *Eccles v. Bourque et al.* opens the door to abuse in police entry practices, and should be viewed with concern.<sup>33</sup> The argument was made that additional obligations "should be fixed upon a police officer who seeks to enter premises belonging to a stranger." It was suggested that forcible entry, without a warrant, to the premises of innocent third parties should only be permitted in special circumstances, thus ensuring "a healthy balance between the interests of the state and of the individual - a balance less likely to be achieved by a police officer whose aim is maximum crime control" and thus by implication not the other fundamental value of the maximum protection of individual rights.<sup>34</sup>

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<sup>33</sup> Marilyn MacCrimmon, note on "Trespass-Arrest without Warrant-Announcement-Circumstances Justifying Police Entry into Dwelling of Innocent Third Party - *Eccles v. Bourque et al.*", *U.B.C. Law Review*, vol. 9, 1, 1977.

<sup>34</sup> In *Harrison v. Carswell*, p. 686, Laskin, C.J.C. in arguing (in a somewhat different context) for a balancing of rights, stressed the need for a consideration of the relativity of rights involving advertence to *social purpose* as well as to *personal advantage*. The balancing of rights doctrine, however, is generally more prevalent in the U.S.A. than it is in Commonwealth countries, as befits the constitutional history of the United States.

In civil cases the rule is indeed much more stringent, for if a sheriff's officer enters a stranger's house he does so at his peril, and will be guilty of trespass if the person or goods he is looking for are not in fact there. Thus in *Cooke v. Birt* (1814) Justice Dallas said: "The sheriff may enter the house of a stranger, if the door be open, but it is at his peril whether the goods be found there or not; if they be not, he is a trespasser."<sup>35</sup> There is also the case of *Morrish v. Murrey* (1844) in which Baron Alderson said that:

... the plea amounts to no more than this, that the defendants had reasonable ground to suspect that the party sought to be arrested was in the plaintiff's house; but it turns out that she was not there. A party, however, who enters the house of a stranger to search for and arrest a defendant, can be justified only by the event.<sup>36</sup>

Once again we see how a general rule has to be matched to a particular situation.

This is nowhere clearer than in the questions raised in the interesting case of *Southam v. Smout*.<sup>37</sup> This was an appeal by the defendant, Smout, from a fine of £10 for

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<sup>35</sup> *Cooke v. Birt* (1814), 5 Taunt. 765.

<sup>36</sup> *Morrish v. Murrey* (1844), 13 M. & W. 52.

<sup>37</sup> *Southam v. Smout*, p. 104.

assaulting a bailiff in the execution of his duty. The appeal (which was dismissed) dealt with the question of whether the entry of the two bailiffs was lawful. The circumstances that were reported are as follows:

Two bailiffs went to execute a county court warrant for the arrest of a debtor. Not finding the debtor at her house, they went to the house of her daughter and son-in-law. Bailiff B went to the front door which was closed, but not locked nor bolted. After knocking two or three times, the door came open and he entered the house, where he found the debtor. Thinking that the arrest might be difficult, he opened the back door and let Bailiff S. in. The householder, resenting the bailiffs' entry without his permission, told the bailiffs to leave and, on their not leaving, he tried to push Bailiff S into the street, using no more force than was reasonable.<sup>38</sup>

The burden was on the prosecution to show that the complainant was not a trespasser, and this depended on the right of a sheriff's officer to enter a house to execute civil process. It was established in *Semayne's Case* that in civil process if the door is open the sheriff may enter, but he may not break in. The question in *Southam v. Smout* was what is to happen where the door is shut but not locked, bolted or barred? Lord Denning came to the conclusion that

where a man locks, bolts or bars his door, he makes it clear that no one is to come in; whereas, if he leaves it open, or if he just

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<sup>38</sup> *Ibid.*, p. 104. For the right of a sheriff to break open a door, see 34 *Halsbury's Laws* (3rd edn.) pp. 685-687.

shuts it and all that is needed is to turn the handle or lift the latch or give it a push, then he gives an implied invitation to all people who have lawful business to come in.<sup>39</sup>

Clearly *accessibility* is a much more subtle thing than a layman might suppose! It would not, however, be lawful to enter through an unfastened window. In *Nash v. Lucas*, Justice Lush said,<sup>40</sup>


The ground of holding entry through a closed but unfastened door to be lawful, is that access through the door is the usual mode of access, and that the licence from the occupier to any one to enter who has lawful business may therefore be implied from his leaving the door unfastened. Entry through a window is not the usual mode of entry, and therefore no such licence can be implied from the window being left unfastened.

With regard to the important question of a sheriff's officer going to a *stranger's* house to execute process, Lord Denning in *Southam v. Smout* reaffirmed the law that "if the goods are not there or if the person whom he seeks is not present, then he is guilty of a trespass." In Lord Denning's view, "it would be putting far too much power into the hands of sheriff's officers or bailiffs if it was open to them to excuse an entry by saying that they had reasonable grounds.

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<sup>39</sup> *Ibid.*, p. 109.

<sup>40</sup> *Nash v. Lucas* (1867), L.R. 2 Q.B. 593.



They might go and invade a person's house too easily without justification."

Another illustration of the jealous preservation of the individual's right to deny access in civil matters, as opposed to criminal ones, is *Watson v. Murray and Co.*<sup>41</sup>

The defendants, who were sheriffs' officers, seized goods in the plaintiff's shop (a ladies' and children's outfitters) under writs of *fieri facias*.<sup>42</sup> But in doing so they exceeded their jurisdiction, and it was held that each of the following acts of the officers constituted trespass: (1) locking the plaintiff's premises when they had lotted the goods for the purpose of a sale and thus excluding her; (2) opening her premises for a public viewing of the goods; (3) and putting up posters on the window of the plaintiffs shop advertising the sale.

These trespass cases (and there are many others of similar nature<sup>43</sup>) illustrate clearly the ongoing tensions between the individual and society over questions of access

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<sup>41</sup>*Watson v. Murray and Co.*, [1955] All E.R., 1 Q.B.D. 350.

<sup>42</sup>*Fieri facias*. A writ of execution in an action of debt or damages.

<sup>43</sup>For an interesting but brief note on "Search and Seizure and the Law Regarding Trespass" in the context of U.S.A. law, see *Baylor Law Review*, 1970, XXII, 561.

to geographic space. As such they are but a small, although not unrepresentative, part, of a complex and constantly evolving relationship between multitudinous interests that have to do with questions of territorial access, and ultimately the control and use of geographic space. They represent, at best, a precariously balanced and deep-seated structure of human behaviour, which, while easily taken for granted, has profound implications for spatial behaviour and organisation. It is through the resolution of the continuing conflicts that arise between individuals and their society as a result of shifting interests and circumstances, that a culture evolves, and although in particular cases the geographic impact may appear minimal, cumulatively it is of considerable significance.<sup>44</sup>

Adaptation of Trespass Law and Related Torts to  
Changing Environmental Conditions

The whole body of trespass law stands as a monument to cultural evolution and to the genius of the Common Law lawyers who have responded to the various and changing circumstances of life. The cases discussed in this study bear witness to its adaptability and to its having come to terms

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<sup>44</sup>The role of the law, of course, is to help identify, define, and formalise some of the more important conflicts, and ultimately to resolve them.

(or to its struggling to do so) with such modern developments as overflying aircraft, dangerous machines, and shopping-centres. It does not, of course, follow therefore that trespass law has kept pace in all respects with changes in the conditions of life. Not only is there some inevitable lag in the response of the law, there is also the fact that as a result of its historical definition it may not be able to cope with modern innovations, so that new vehicles of social purpose must be developed.

In this section we will look at some unauthorised territorial intrusions that have developed in modern society as a result of industrialisation, urbanisation, and the development of modern technology; intrusions that severely test the maxim that the law "bounds every man's property and is his fence."<sup>45</sup> Whereas, in the previous section, the discussion revolved around questions regarding *rights* of access, in this section the emphasis will be on accessibility itself.

Pollution - Few terms in the last decade can have had more significance than that of pollution in any discussion of the relationship between man and his environment. The most obvious attribute of pollution, from a geographic point of

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<sup>45</sup>See, *Star v. Rookesby* (1711), 1 Salk. 336; 91 E.R. 295.

view, is that it is something *out of place*. It is also something brought about by industrialisation and modern technology.<sup>46</sup>

Trespass law, of course, has much to say about things that are out of place. Nevertheless, in general, the control of pollution and the protection of the environment from its effects are beyond the scope of trespass law. These objectives are more usually attained today through specific legislation.<sup>47</sup> There are, however, examples where the trespass action has been used for environmental suits. Writing in 1973, McLaren reported that there was only one decision in Canada in which "that theory has been used."<sup>48</sup> This was the case of *Young v. Fort*

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<sup>46</sup> Peter Haggett, in answering the question, What do pollutants have in common?, writes: "Perhaps the simplest answer is that each represents a substance which, in terms of man's environment, is in the wrong place, at the wrong time, in the wrong amounts, and in the wrong physical or chemical form." *Geography: A Modern Synthesis*, 2nd edn., p. 183.

<sup>47</sup> Thus in most, if not all, modern Common Law jurisdictions there is legislation to control water and atmospheric pollution, nuclear 'pollution' and waste disposal, and, more often at the local level, regulations dealing with the abatement of noise.

<sup>48</sup> J.P.S. McLaren, "The Law of Torts and Pollution", (special lectures of the law society of Upper Canada) in *New Developments in the Law of Torts* (Toronto: Richard de Boo, 1973), p. 310. I have no evidence to dispute McLaren's statement, but nevertheless I find it difficult to accept.



*Francis Pulp and Paper* (1919) in which soot and carbon from the defendants chimney was deposited on the plaintiff's property. Justice Masten indicated that the plaintiff had a cause of action in trespass.<sup>49</sup>

A further, and more recent decision is that of *Kerr et al. v. Revelstoke Building Materials Ltd.* (1977).<sup>50</sup> Mr & Mrs Kerr built a motel in 1951 in an area of tranquility and beauty in southwestern Alberta. It attracted a clientele who appreciated the rustic log cabins and the natural environment. In 1958, a lumber company built a planing mill and teepee burner across the road from the motel. Mr & Mrs Kerr complained about the smoke, sawdust, ash, and noise, and although the lumber company tried to improve the situation, the Kerr's eventually closed the motel in 1971. They then brought an action for damages for trespass, nuisance and negligence, and also sought an order to restrain the lumber company from continuing its earlier actions.

The Alberta Supreme Court found the lumber company liable for trespass and nuisance, but not for negligence.

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<sup>49</sup> *Young v. Fort Francis Pulp and Paper Co.* (1919), 17 O.W.N. 6, affirmed 17 O.W.N. 466 (C.A.).

<sup>50</sup> *Kerr et al. v. Revelstoke Building Materials Ltd.* (1977) 71 DLR (3rd) 134.

The court awarded damages of \$30,000 but denied the order restraining the company from carrying on its business. It held that it was trespass to cause any physical object or noxious substance to enter another's land. It also found nuisance (interference with the use and enjoyment of land) primarily because of the noise which came from the mill, which was loud enough to interfere with ordinary conversation nearby and which was described as "whining" and "earpiercing".

The eminent American jurist, Prosser, points out that in the United States some courts insist upon the entry of something tangible, with appreciable mass, and visible to the naked eye, before trespass can be found, so that industrial dust or noxious fumes will not be enough.<sup>51</sup> He suggests that this may be a result of the refusal of ancient courts to take into account what could not be seen. In any case, there are now a number of decisions where the entry of invisible gases and microscopic particles that do harm are found to be a trespass.<sup>52</sup> Prosser suggests that

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<sup>51</sup> William L. Prosser, *Handbook of the Law of Torts*, 4th edn.

<sup>52</sup> *Ibid.* Prosser quotes the following examples: *Gregg v. Delhi-Taylor Oil Corp.*, 1961, 162 Tex. 26, 344 S.W.2d., 411 (gas); *Martin v. Reynolds Metals Co.*, 1959, 221 Or. 86, 342 P.2d 790; cert. denied 362 U.S. 918 (gas and

there is even a possibility that light rays falling upon the land might be a trespass.<sup>53</sup>

It would appear from the American cases that the use of trespass actions in dealing with pollution is potentially more extensive than in Commonwealth countries. This is borne out by Prosser's observation that *The Restatement of Torts* has abandoned any distinction between direct and indirect invasions where there is an actual entry of a person or thing upon the plaintiff's land, and classes both as trespass.<sup>54</sup> In Oregon and Idaho crop dusting law permits recovery against the aerial applicator "based on a trespass theory, without a showing of negligence, where damage to property is caused by a drift of chemicals applied on other land."<sup>55</sup> In *Loe v. Lenhardt*

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microscopic deposit); *Reynolds Metals Co. v. Martin*, 9 Cir. 1964, 337 F.2d 780 (same); *Hall v. De Weld Nica Corp.*, 1956, 244 N.C. 182, 93 S.E.2d 56 (dust); *Zimmer v. Stephenson*, 1965, 66 Wash. 2d 477, 403, P.2d 343 (spark); *Martin v. Union Pac. R. Co.* Or.1970, 474 P.2d 739 (fire).

<sup>53</sup> Ibid.

<sup>54</sup> Ibid., p. 65. See, *Restatement of the Law, Second: Torts*, 359, s.158, 2d. [Rev. & Enl.], (St. Paul: American Law Institute, 1965), 2 v.

<sup>55</sup> L.S. Carsey, "Crop Dusting - The Evolution and Present State of the Law", *The Forum* 6, 1970, 1, p. 15. I have drawn from this article in the brief discussion of crop dusting.

(1961) the Oregon Supreme Court asked the question: "Specifically, upon what theory, if any, is one liable for the miscarriage of aerial spraying activity...?"<sup>56</sup> The plaintiff, whose crops were defoliated by drift, brought his case in trespass without alleging negligence. The court first cited Prosser to the effect that at Common Law every unauthorised entry upon the soil of another was a trespass, and then it drew upon the *Restatement of Torts* for the proposition that "liability will be imposed in the case of an unintentional intrusion only when it arises out of negligence or the carrying on of an extra hazardous activity."<sup>57</sup> In the court's opinion the dangerous character of aerial spraying had been sufficiently well recognised to bring it within the proposition.

This position is analogous to the blasting cases.<sup>58</sup> Some American courts have held that injuries due to blasting vibrations were indirect (as opposed to the actual

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<sup>56</sup> *Loe v. Lenhardt* (1961), 362 P.2d. 312.

<sup>57</sup> *Restatement of Torts*, 359 s.158 and 390 s.165.

<sup>58</sup> See the comment by Helferich, "Blasting in New York: A Reappraisal of the Trespass - Vibration Distinction". For cases on the subject refer to Prosser, *Handbook Law of Torts*, p. 65. See also the Alberta case, *Phillips v. California Standard Co., Seismotech Ltd. and Sohio Petroleum Co.*, (1960) 31 W.W.R.

entry of rock) and so not actionable without proof of negligence or intent.<sup>59</sup> Prosser, however, maintains that in the United States this distinction is now rejected by most courts "and would appear to be slowly on its way to oblivion".<sup>60</sup>

In English courts, however, the distinction between trespass and case is still maintained, and it is felt by many that the difference is important and has practical consequences.<sup>61</sup> An excellent illustration of this is *Esso Petroleum Co. Ltd. v. Southport Corporation*.<sup>62</sup> An oil

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<sup>59</sup> As Lord Denning said in England, "In order to support an action for trespass to land the act done by the defendant must be a physical act done by him directly on to the plaintiff's land. That was decided in the year 1498 in the *Prior of Southwark's* case which is conveniently set out in Fifoot's *History and Source of the Common Law* at p. 87." *Southport Corporation v. Esso Petroleum Co. Ltd.*, [1954] 2 Q.B. 195.

<sup>60</sup> Prosser, *Handbook Law of Torts*, p.65

<sup>61</sup> Heuston, *Salmond on The Law of Torts*, p. 6., writes: "many lawyers, think that there is still a difference between trespass and case, and that that difference has important practical consequences..."

<sup>62</sup> *Esso Petroleum Co. Ltd. v. Southport Corporation* [1956] A.C. 218; [1956] 2 W.L.R. 81; 120 J.P. 54; 100 S.J. 32; [1955] 3 All E.R. 864; *sub. nom. Southport Corporation v. Esso Petroleum Co. Ltd.* [1955] 2 Lloyd's Rep. 655; reversing *sub. nom. Southport Corporation v. Esso Petroleum Co. Ltd.* [1954] 2 Q.B. 182; [1954] 3 W.L.R. 200; J.P. 411, 98 S.J. 472; [1954] 2 All E.R. 561; [1954] 1 Lloyd's Rep. 446; restoring [1953] 3 W.L.R. 773; 118 J.P. 1; 97 S.J. 764; [1952] 2 All E.R. 1204; [1952] 2 Lloyd's Rep. 414.

tanker ran aground in an estuary, and in order to minimise the danger to the ship and the lives of the crew, the master jettisoned some 400 tons of oil. This was carried by wind and tide to the shore of Southport Corporation, who sued for trespass, nuisance, and negligence. The case gave rise to a great deal of interesting argument concerning these three actions and was finally decided adversely to the plaintiffs in the House of Lords, which found that in the circumstances the master had not been negligent, and that neither would the action for nuisance lie. Nor did these circumstances amount to trespass, although there may be trespass if matter is deliberately placed where natural forces will carry it to the land of the plaintiff, as, for example, if oil had been jettisoned so that the winds and waves must inevitably carry it to the foreshore of the plaintiff.<sup>63</sup>

While it is clear that trespass actions have a role in dealing with pollution issues (and one which it seems to me could be enlarged) it is also apparent that pollution is a pervasive problem that frequently goes beyond the local effects on a particular plaintiff and adversely affects large sections of the community. At this level the problem has to be dealt with by legislation and appropriate

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<sup>63</sup>See Heuston, *Salmond on the Law of Torts*, p. 38.

government action. At the local level much of the work of regulating the accessibility of land to the invasion of pollutants is being done by the tort of nuisance, which has historically been used to counteract this sort of problem by requiring defendants to conform to the interests and values of the community with regard to the quality of life. Nuisance is a wider class than trespass and includes invasions that do not constitute direct physical interference.

Trespass law, then, is only a small part of a culture's armoury which can be used to respond to the tensions brought about by new environmental and social conditions. It is in no way a fortress by itself, and where the genius of the Common Law lawyers is unable to adapt it to the exigencies of contemporary life the challenge is taken up by other cultural institutions such as legislatures.

Privacy - Just as industrial pollution shows little respect for the adage that the law is a fence around every man's property, so is this true of some of the techniques of modern technology which, through various electronic devices, "greatly increase the possibilities of surreptitious supervision of people's private activities and of spying upon business rivals."<sup>64</sup> In today's complex, industrialised

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<sup>64</sup> Report of the Committee on Privacy (London: H.M.S.O., 1972) p. 6. The committee suggested that "to some extent

societies, many unwanted contacts and intrusions are unavoidable, part of the price we must pay for the intensity and mobility of modern urban living. But some retreat from the world is desirable, some interest in being left alone must be protected, and conduct which oversteps the bounds of propriety in this regard will inevitably be resisted.<sup>65</sup>

In a recent Canadian article, Peter Burns argues that 'privacy' is really a "cultural state or condition, directed towards individual or collective self-realisation, varying from society to society."<sup>66</sup> He quotes

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the new public concern on this subject is the direct result of new technological developments."

<sup>65</sup> One of the best known legal definitions of privacy is "the right to be let alone." T.M. Cooley, *Torts*, 2nd edn., (Boston: Little Brown & Co., 1895), p. 188. It is clear that privacy has much to do with the proper safeguarding of individual freedom that was discussed in the earlier part of this chapter, which, of course, is also a social value. As such it must compete with the value of 'freedom of information'.

<sup>66</sup> Peter Burns, "The Law and Privacy: The Canadian Experience", *The Canadian Bar Review*, 54, 1976, p. 3. This article of sixty-four pages is stimulating and it has some good references. One of these is an anthropological study of forty-two societies by Roberts and Gregor. They suggested that those societies with domesticated plants and animals were likely to value privacy more highly than those based on hunting, gathering and fishing. They concluded that: "Perhaps privacy as we know it is a neolithic development... Appearing in the old world and associated with the Near Eastern cultural complex which later diffused to all areas of high culture in the old world." See, "Privacy: A Cultural View," *Nomos* 13, 1971, p. 199.



Herbert Marcuse's notion of a 'private space' in which man may become and remain himself, and he concludes that modern concern with privacy "is the product of the rise of the middle class which in turn is the result of the drift from village to urban life during the industrial revolution."<sup>67</sup>

This concern, Burns suggests, varies from culture to culture so that, for instance, it is highly developed in a democratic state such as the United States, but "regarded as a low social value and relatively unprotected by law" in closed societies like Spain and the Soviet Union.<sup>68</sup>

Although this may be correct, the brief discussion by Burns of the relations between culture and privacy makes some assertions which are unconvincing, and which invite

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<sup>67</sup> Burns, *Ibid.*, p. 4. See also Marcuse, *One-Dimensional Man*, p. 10. According to Simmel, "Privacy boundaries are self-boundaries in the sense that we live in continual competition with society over the ownership of ourselves and a territory is staked out which is peculiarly our own. Its boundaries may be crossed by others only when we expressly invite them to do so. This condition of insulation we call privacy". (Italics added). See "Privacy is Not an Isolated Freedom", *Nomos* 13, 1971, p. 71. This is very similar to Irwin Altman's definition of privacy as "selective control of access to the self or to one's group." Altman proposed that "the concept of privacy is central to understanding *environment and behavior relationships*; it provides a key link among the concepts of crowding, territorial behavior, and personal space." (Italics added). *Environment and Social Behavior*, p. 6.

<sup>68</sup> Burns, *Law and Privacy: Canadian Experience*.

comparative cultural studies.<sup>69</sup> One of the apparently intractable problems that must be resolved before such a comparison is undertaken is the definition of privacy itself. The literature is far from clear on this and it is no wonder therefore that the law takes an "open-textured" and functionalist, rather than theoretical approach, when dealing with 'privacy'.<sup>70</sup>

Where there is an actual physical intrusion into the plaintiff's possession, such as the planting of electronic surveillance equipment, trespass provides a satisfactory remedy against invasions of privacy. But if the

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<sup>69</sup> Burns seems to draw his opinion from the well-known work on privacy by Alan Westin. Westin argued that privacy depended on the political and cultural system of a society: "Totalitarian systems deny most privacy claims of individuals and non-governmental organizations to assure complete dedication to the ideals and programs of the state, while the totalitarian state's own governmental operations are conducted in secrecy. Democratic societies provide substantial amounts of privacy to allow each person widespread freedom to work, think and act without surveillance by public or private authorities and to provide similar breathing room for organizations; but they try to strike a delicate balance between disclosure and privacy in government itself." See Westin, "Science, Privacy and Freedom: Issues and Proposals for the 1970's", *Colorado Law Review* 66, 1966, p. 1003, and also *Privacy and Freedom* (New York: Atheneum, 1967).

<sup>70</sup> It has been suggested that, "it may be useful as a legal concept to regard the 'right to privacy' as a principle, having a high order of generality, [rather] than a rule which will govern specific cases." Freund, "Privacy: One Concept or Many", *Nomos* 13, 1971, p. 182.

eavesdropping is done from outside the boundaries by some long-range microphones there is no trespass. This applies also, of course, to watching a neighbour through binoculars or a telescope.<sup>71</sup> It is clear, therefore, that modern technological developments, together with the circumstances of modern urban life, have created a notable gap in the ability of trespass law to protect an individual's interest in seclusion. This gap may be filled to some extent by actions for nuisance, but this generally has to do with some interference to the plaintiff's enjoyment of his land, usually by such things as polluted air, or water, or noise.<sup>72</sup>

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<sup>71</sup>*Hickman v. Maisey* is an interesting case in this regard. The defendant published a racing paper and had been watching the trials of race-horses on the plaintiff's land from an adjoining highway. In English Law the adjoining landowners have possession of the highway subject to its dedication for the purposes of passing and repassing. It was held that the defendant had "exceeded the ordinary and reasonable user of a highway as such to which the public are entitled, and he therefore was guilty of a trespass on the plaintiff's land." See also *Harrison v. Duke of Rutland*. The Texan case of *Thompson v. State* (1969) 447 S.W. 2d. 175 dealt with the observation of incriminating acts by a trespassing police officer. See *Baylor Law Review*, "Search and Seizure and Law Regarding Trespass."

<sup>72</sup>An exception relates to 'watching and besetting.' In *Poole and Poole v. Regan and the Toronto Harbour Commissioners* [1958] O.W.N. 77, the Toronto Harbour Police had followed the plaintiff's vessel to and fro across Toronto Harbour for some three months. Justice McLennan granted an injunction and \$2,000 damages to the plaintiff, and he stated that the conduct of the Harbour Police was an affront to the dignity of the plaintiffs, and that it was an actionable nuisance on the principle "that to watch or

In some jurisdictions, where these and other existing torts seem unable to deal with certain classes of interference in the private lives of citizens, "a new Common Law tort of privacy is emerging, helped along in some instances by legislation."<sup>73</sup>

Prior to 1890 no Common Law courts had expressly recognised a general right of privacy.<sup>74</sup> In that year a now famous article was published by Samuel D. Warren and Louis D. Brandeis in the *Harvard Law Review* and after reviewing a number of cases (almost entirely early English authorities) it concluded that the broad principle of a 'right to privacy' was entitled to separate recognition.<sup>75</sup> Partly as a result of this article the right of privacy has

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beset a man's house is a nuisance unless justified."

If the proposition in this case, that unreasonable surveillance constitutes a nuisance, is followed it would represent a significant development in the protection of privacy. However, in the Australian case of *Victoria Park Racing Co. v. Taylor* (1937) 58 C.L.R. 479, the High Court refused to restrain the broadcasting of horse races from a high viewing platform alongside the race course.

<sup>73</sup> See Heuston, *Salmond on the Law of Torts*, p. 34 on "Emergent Torts."

<sup>74</sup> Prosser, *Handbook of the Law of Torts*, p. 802.

<sup>75</sup> Warren and Brandeis, "The Right to Privacy", *Harvard Law Review*, 1890, 4, 193.

come to be widely accepted by American courts.<sup>76</sup> Outside the United States, however, no Common Law right of privacy has been explicitly recognised. As Fleming states the position (and his remarks apply equally well to other Commonwealth countries):<sup>77</sup>

The right of privacy has not so far, at least under that name, received explicit recognition by British Courts. For one thing, the traditional technique in tort law has been to formulate liability in terms of reprehensible conduct rather than of specified interests entitled to protection against harmful invasion. For another, our courts have been content to grope forward, cautiously, along the grooves of established legal concepts, like nuisance and libel, rather than make a bold commitment to an entirely new head of liability.

As a result of the failure of the Common Law to deal adequately with problems associated with 'privacy' three Canadian provinces have enacted legislation: British Columbia, Manitoba, and Saskatchewan. In addition the Federal Government has taken legislative action under its criminal jurisdiction.<sup>78</sup> The situation in Canada, according to Burns,

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<sup>76</sup> Prosser reports (1971) that there are over 400 cases in the books. *Handbook of the Law of Torts*, p. 804.

<sup>77</sup> Fleming, *The Law of Torts*, p. 526.

<sup>78</sup> For a fuller discussion of the relevant statutes see Burns, "Law and Privacy: The Canadian Experience."

is that:<sup>79</sup>

Although many provinces lack general privacy legislation, the combined effect of the extant common law, and provincial and federal legislation, grants Canadians a fair measure of protection against invasion of privacy. More so than any other Commonwealth or European country and perhaps as great as the United States where the countervailing interest in "the right to freedom of expression" is much more highly developed.

The British Columbia statute creates a tort, actionable without proof of damage, for the unreasonable violation of the privacy of another person, wilfully and without claim of right. Section 2(3) states that privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.<sup>80</sup> The impetus for the British Columbia Statute (the first in the Commonwealth) came from an incident in Vancouver in November, 1966. Burns described what happened:<sup>81</sup>

An officer of the Pulp and Paper Workers of Canada publicly alleged that electronic listening and recording devices had been used to "bug" rooms in a Vancouver hotel where the union was holding its convention. A private detective, who had formerly been with the Royal Canadian Mounted Police had been

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<sup>79</sup>Ibid., p. 64.

<sup>80</sup>The British Columbia Privacy Act, S.B.C., 1968.

<sup>81</sup>Burns, "Law and Privacy: The Canadian Experience".

engaged by the rival International Pulp and Sulphite Workers Union to plant the bugging devices and two officers of the Security and Intelligence Branch of the Royal Canadian Mounted Police were actively involved in the affair.

In Britain, on the other hand, there have been at least four unsuccessful attempts at enacting privacy legislation. Fleming suggests that British reservations "relate to the subordination which this would in many instances involve for the dissemination of news and public discussion which are thought to be at least equally vital for the welfare of a democracy."<sup>82</sup>

The most widely accepted categorisation of the law of privacy is that of Prosser. In his view there are four kinds of invasion of privacy which affect four different interests of the plaintiff, and which have very little in common, except the right of the plaintiff 'to be let alone'.<sup>83</sup> The four kinds of invasion that Prosser sees as comprising the law of privacy are: (1) *intrusion* upon the plaintiff's physical and mental solitude or seclusion; (2) *public disclosure* of private facts; (3) *publicity* which places the plaintiff in a *false light* in the public eye;

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<sup>82</sup>Fleming, *Law of Torts*, p. 532.

<sup>83</sup>Prosser, *Handbook of the Law of Torts*, p. 804.

(4) *appropriation*, for the defendant's benefit or advantage, of the plaintiff's name or likeness. In the very broadest sense all of these relate to questions of accessibility; to intrusions into the private or personal space of the individual or of his family, although the traditional geographic interest would be largely restricted to intrusions upon a plaintiff's physical seclusion.

It is impossible for the geographer to ignore the fact that as technological developments reduce the friction of distance and as mankind, through urbanisation, moves closer together, physical distance becomes less and less important as a regulator of social interaction. It seems reasonable to forecast that as a result of this, man-made 'territorial' barriers will become more and more significant. In this respect the recent developments in the law of privacy can be usefully and properly thought of as an extension of trespass law, whereby the personal space and thus the personality of the individual is protected. As such it is an adaptive response to the environmental pressures of modern society.<sup>84</sup>

I want now to return more directly to the overall

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<sup>84</sup> There is an enormous amount of material on the concept of privacy, most of it of recent origin. The brief comments on privacy in this chapter cannot begin to do justice to this literature.



theoretical perspective of this work, and to indicate the breadth of its potential application in explaining the things that happen in the geographic world - in particular those things that have to do with both territory and culture.

## CHAPTER VII

## LANDSCAPE THEORY

Need for Theory in Cultural Geography

Cultural geography is dangerously weak in theory, and if it is to survive in the academic world it must develop its theoretical underpinning. It can be argued, of course, that cultural geography does not lend itself to theory; that theory cannot cope with the complexity of the naive landscape forms and content that cultural geographers start with;<sup>1</sup> that "critical perceptions" are what is needed not the "axiom systems" of social geography. Such an argument is not unproductive, for it contains insights and warnings that should not go unheeded. Nevertheless, one of the inevitable implications of this line of thought is that *theorising* about 'landscape' is a "betrayal" of cultural geography, and I think that such a belief is in error.<sup>2</sup>

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<sup>1</sup>'Landscape' is used here to refer to the naive reality on the surface of the earth, at whatever scale. In some contexts it may refer to a specific area.

<sup>2</sup>If nothing else, one must bear in mind, what is now becoming a cliché, that facts are theory-laden.

An attempt to develop an acceptable theory will need to begin by asking, what is the thing to be explained (the geographic *explicandum*)? For cultural geographers, and perhaps all geographers, it is the landscape itself, or naive reality, which provides the problem. It presents us with something that is going on, and which invites both description and explanation. If we are to understand this 'going on' we must consider it in its context, that is in its various *relations*, including its relation to the observer himself. Indeed, this latter relationship, where the landscape is viewed from a particular standpoint, might well be the primary focus of a study. But such a focus, valuable and interesting as it might be, is nonetheless isolated to some degree, disengaged as it were from life itself; a tantalising partial glimpse, which in the end only serves to heighten curiosity and intellectual dissatisfaction. The broader theoretical problem remains, what is it that explains the sorting out (and elimination) of things on the landscape? What is it that determines why one thing is going on here and something else over there? Why is there this content, and this meaning?

The argument throughout this study is that an evolutionary perspective provides at least tentative answers to such questions. In this chapter the fundamental

problem of understanding and explaining spatial order will be re-addressed. Firstly, it will be argued that the evolutionary and semiotic approaches to the study of landscape are compatible. This is of considerable importance if the notion that *cultural* landscapes evolve is to be maintained, for culture has a great deal to do with 'meaning' - indeed one might well say that 'meaning' is the essence of culture. Furthermore it follows, that if such a compatibility can be established the prospects for a theoretical and humanistic geography are greatly improved.

#### Compatibility of Evolutionary and Semiotic Perspectives

Culture is, as Geertz said, a set of control mechanisms - plans, recipes, rules, instructions - for the governing of behaviour.<sup>3</sup> It has to do with proprieties, with doing the right thing in the right place at the right time, and that includes the proper placement of things. As such it has great explanatory power in the geographic quest for understanding spatial organisation.

For Geertz, the task of anthropology is "the comprehension of the frames of meaning in which other peoples

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<sup>3</sup>Geertz, *Interpretation of Cultures*, p. 44.

move and the communication of that comprehension to others."<sup>4</sup> In other words, the elements of a situation can only be properly understood in their context, in their fit to the particular circumstances. This understanding requires not "easy glosses or strained analogies, ... but texts and contexts, dozens of them patiently brought into conjunction with one another."<sup>5</sup> Meaning, then, comes from the proper placement of an element in its cultural context, and both culture and meaning are inevitably public, and thus rule-governed.<sup>6</sup> Such interpretation requires the enormous care that Geertz advocates, because if the interpretation does not fit the circumstances, if it is not supported by them, if it is not a wheel that engages another part of the mechanism, as Wittgenstein might have said, it will have no real significance. Meaning thus reflects, and is part of, a functioning world. If we want to know what is going on in a situation we must discover what it all means, how all the parts are functioning with each other, how in other words they 'fit' together.

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<sup>4</sup> Clifford Geertz, foreword in Gary Witherspoon, *Language and Art in the Navajo Universe*, p. vii.

<sup>5</sup> *Ibid.*, p. ix.

<sup>6</sup> See Geertz, *Interpretation of Cultures*, p. 12. This, of course, reflects Wittgenstein's later position.

This study is about rules, specifically the law, and the interpretation of the factual elements (or evidence) of reported cases. What lawyers and judges attempt to do is very much like what Geertz does, namely constructing an exact reading of what has happened. The question that has to be asked, however, is whether anthropologists or cultural geographers should be satisfied with this, or whether, instead, they should seek to ground their understanding of this "public document" on some broader theoretical base. Geertz, himself, is clearly greatly concerned with "the problem of how to get from a collection of ethnographic miniatures ... to wall-sized culturescapes."<sup>7</sup> He sees the lack of theory as "the besetting sin of interpretive approaches to anything" because "imprisoned in the immediacy of its own detail" it escapes "systematic modes of assessment." In his view, there is no reason "why the conceptual structure of a cultural interpretation should be any less formulable, and thus less susceptible to explicit canons of appraisal, than that of, say, a biological observation or a physical experiment"<sup>8</sup>, although he clearly feels that such formulation is most unlikely. Yet I find a statement by Geertz himself suggestive of a solution to this

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<sup>7</sup> Ibid., p. 21.

<sup>8</sup> Ibid., p. 24.

problem. Thus, in discussing the limitations of using cultural theory to predict rather than merely to explain, he writes: "But that does not mean that theory has only to *fit* (or, more carefully, to generate cogent interpretations of) realities past; it has also to *survive* - intellectually survive - realities to come" (italics added).<sup>9</sup> It is plain that the vocabulary that he himself uses to comment on the problem, fits a theory, that of evolution, which is not incompatible with his semiotic approach (although, of course, Geertz may not agree with this). More support for the compatibility of this evolutionary perspective can be culled from Gary Witherspoon's *Language and Art in the Navajo Universe*, which Geertz praises in a foreword.<sup>10</sup> Witherspoon spends some time elaborating on the conditions symbolised by the Navajo phrase *sq'ah naagháii bik'eh hózhó*. He quotes Gladys Reichard as follows:<sup>11</sup>

Consideration of the nature of the universe, the world, and man, and the nature of time and space, creation, growth, motion, order, control, and life cycle includes all these and other Navajo concepts expressed in terms quite impossible to translate into English. The synthesis of all the beliefs detailed

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<sup>9</sup> Ibid., p. 26.

<sup>10</sup> Gary Witherspoon, *Language and Art in the Navajo Universe*, (Ann Arbor: University of Michigan, 1977).

<sup>11</sup> Ibid., p. 19.

above and of those concerning the attitudes and experiences of man is expressed by *sa'q na-yáí* usually followed by *bik'e xójó-n*.

He also reports<sup>12</sup> that:

Robert Young considers *sa'ah naaghdii* to represent the capacity of all life and living things to achieve "immortality" (perpetuate the species) through reproduction. He feels *bik'eh hózhó* represents the peace and harmony essential to the perpetuation of all living species. He further notes that these perfect prototypes, along with the prototypes of rain and other requisite elements of life, were placed in the Sacred Mountains and function now to make the reproduction and sustenance of all living things possible.

If this Navajo expression is indeed a "synthesis of all beliefs" and if Young's translation is correct, it would indicate a remarkable compatibility with an evolutionary perspective on culture. Indeed, if the semiotic approach did not fit with evolutionary theory it would be extraordinary, for at its most fundamental culture must have a lot to say about the survival of individuals. To act contrary to both social contingencies and other environmental pressures would over the long term preclude survival. But even though the evolutionary view is deterministic (and, in a sense, superorganic too), variation is also of the essence of evolutionary theory. In the same way, the semiotic approach is characterised by both normality and

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<sup>12</sup> Ibid., p. 18.



particularity.<sup>13</sup>

There is something else that is common to both the evolutionary view inspired by Darwin and the semiotic approach as inspired by Wittgenstein, and that is the emphasis on localised contexts. Darwin's finches of the Galapagos Islands found their environmental niches, and in a similar sort of way symbolic action derives its support (or meaning) from its environmental niche. So that as Wittgenstein intimated:<sup>14</sup>

We ... say of some people that they are transparent to us. It is, however, important as regards this observation that one human being can be a complete enigma to another. We learn this when we come into a strange country with entirely strange traditions, and, what is more, even given a mastery of the country's language. We do not *understand* the people. (And not because of not knowing what they are saying to themselves). We cannot find our feet with them.

It is when we forget the significance of the localised context and view culture and meaning as unduly uniform, and their development as unilineal rather than multilinear, that the controversies associated with both cultural evolution and the superorganic notion of culture seem to

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<sup>13</sup> I am thinking here of the arguments in Wittgenstein's *Philosophical Investigations*.

<sup>14</sup> Wittgenstein, *Philosophical Investigations*.

arise.<sup>15</sup> For differential development is an inevitable response to the different constraints of a varied and changing environment. Unilineal development will only result when man's environment is merged into a single niche.

To some extent, of course, this is what is happening. The development of technology and communications shrinks distances, and ideas and goods diffuse more and more easily over the landscape. At the same time, the demands of efficiency lead to standardisation and the reduction of regional variations in culture.<sup>16</sup> The decline in ecological and geographical separation inhibits divergent evolution ('racial' and cultural), and therefore the development of separately identifiable cultural environments. But there are also 'negentropic' forces. Human territoriality reinforces geographical separation, and, through specialisation, it increases ecological separation too.

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<sup>15</sup> Julian Steward emphasised a multilinear approach to cultural evolution, but in the context of the *natural* environment. He believed, as did Leslie White, that cultural evolution was developmental, that is to say that it went through certain stages. It seems to me that, at least in its present form, this is in error, because it places undue emphasis on the determinant role of the environment and far too little emphasis on the wide range of possible variations.

<sup>16</sup> For a stimulating discussion of this topic, see E. Relph, *Place and Placelessness*, (London: Pion, 1976).

### Towards a Theory of the Cultural Landscape

I now want to draw together more explicitly the various strands of thought that pervade this work. Although it would be an overstatement to claim that, taken together, these strands constitute a theory in the grand sense, they do amount to a useful framework for comprehending what happens on the landscape. Until now, too much of geography has been disconnected detail which has not induced any genuine understanding of what theoretical issues are involved. Yet without some theoretical overview the ability to ask significant questions is impaired.

Unfortunately in advocating a position based on evolutionary ideas it is all too easy to be misunderstood and I would, therefore, like to make it especially clear at the outset, that I am not upholding a 'competitive' and deterministic world. Adaptation may, quite clearly, be based more on cooperation than competition. Indeed, a commitment to the 'culture' concept inevitably embraces the former. Just as clearly, variation ('freedom') is one of the *essentials* of adaptation. Similarly, I have already expressly argued that a 'theory' of adaptive fit in no way negates a humanistic perspective, where 'meaning' and value and subjective standpoints are exalted - indeed, I believe it reinforces such a perspective.

I would like in these concluding remarks, and in keeping with the study as a whole, to focus principally on the three notions of territory, culture, and evolution, and especially on their inter-relatedness. Although it is not something that is easy to articulate, it would appear that in the totality of things that interest cultural geographers there is something special about 'territory' and 'culture'; the former, accompanied as it is by the exclusivity and specificity of places, and the latter representing the fundamental rules of the game. Firstly, with regard to territory, we can say that spatial order seems inseparable from some form of territorial control; from the 'political' organisation of space at various scales, ranging from the state to such micro-territories as classrooms. At the very least it can hardly be doubted that territories form a major part of the basic environmental infrastructure in many, if not all, societies, significantly affecting spatial sorting through the regulation of access and exclusivity. The fence and wall, the gate and door, are just some of the many elements in the expression of this territorial power. The framework that arises is so important in understanding and explaining human landscapes that it is difficult to see how it can be ignored in geographic studies.

This worldly mosaic of territories is closely linked with the specialisation and diversity of the cultural

environment. A multitude of behaviours and objects are characteristically preserved, cherished, and housed within these bounded places. Specialisation, in comparison to animal territories, is intense, and although man himself adapts to a wide-ranging niche his discrete behaviours must fit these norm-specific territories. Unwanted behaviours and unwanted social interaction are finely screened, in a way that is not characteristic of other species.

Yet despite its obvious significance, the territorial basis of spatial sorting provides only a part of the explanation of what is happening on the landscape. Complex systems of social norms also 'dictate' to some considerable degree what goes on. Some of the more powerful of these can be characterised as 'bureaucratic' and they impart a characteristic and, to some, an unpalatable flavour to the landscape. Other norms, characterised not so much by government direction as by corporate efficiency, impart a similarly marked standardisation.<sup>17</sup> These norms, together with others operating on smaller scales, give to landscapes a typical expression. As arbiters of what goes on there, they warrant special geographic attention. The

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<sup>17</sup> Once again such landscapes may be anathema to some and especially to intellectuals, perhaps because their own specialisation in 'creativity' fits and favours richly-varied landscapes.

law is one such system which, in conjunction with its institutional structure, has a considerable and wide-ranging effect. Like territories, these cultural norms constrain and guide landscape events, and in exerting this environmental pressure they, too, invite much closer geographic attention.

Obviously, territories and cultural norms are just two of numerous 'factors', of which climate is one, that act upon landscape events. Their selection as particularly significant determinants provides no more than a useful simplification of reality, a model, as it were, of what goes on. Indeed it is necessary to put this point in even sharper perspective. For territories and norms, significant as they may be, are nevertheless only part of a complex and extraordinarily richly-varied world, in which there is a constant and often very subtle interplay between related things, each adjusting (often very slowly) to the changing nature of the other. Whether something is envired or environment, therefore, depends merely on the focus of the analysis. Thus, we 'construct' territories (whether through a genetic drive, as Wilson categorically asserts,<sup>18</sup> or not)

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<sup>18</sup> See Edward O. Wilson, *On Human Nature*, Ch. 5.

and systems<sup>19</sup> of social norms, and then, in a strange way, they 'construct' us. We create cultural environments, but, at least to some extent, we are also "culture's domesticates". Indeed some commentators fear that things have gone so far that mutual symbiosis has given way to cultural domination. Thus Cloak writes:<sup>20</sup>

... with the 'neolithic revolution' culture began to take over. Environmental features resulting from the enactment of cultural instructions came more and more to dominate further human genetic and cultural evolution ... So here we are - culture's domesticates.

Although there is a germ of truth in this the analysis can be misleading. In an ecological world dominance in this sense refers to a temporary imbalance. The lynx may dominate the hare both on a one to one basis and in the total scheme of things, but such a dominance brings its own repercussions and the hare will, by its very absence, come to 'dominate' the lynx. Worldly things, in other words, do not exist in isolation, they depend upon environmental support. Territoriality may have been

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<sup>19</sup> 'System' is the term we use to refer to those things that relate most closely, and which are in some way separated from other things.

<sup>20</sup> F.T. Cloak, Jr. "The Evolutionary Success of Altruism (and Urban Social Order," *Zygon* 11, 3, 1976, pp. 219-240. This is a stimulating article.

programmed by our genes, a very long time ago, as a behavioural strategy that contributed to our survival, but *its* continued survival (or existence) will depend on present and future circumstances. Similarly we *depend on* culture, or more specifically on language, social regulations, tools, and the transmission of learning - they are essential for our survival - but they, in turn, depend on our 'construction'. The development of the law well illustrates this ongoing interrelatedness and gradual adjustment.

It is central to this study that territory and culture are closely related, and the law of trespass to land epitomises this. Human territoriality is shaped, at least in its finer details, by a set of evolving cultural norms, particularly in this case the law. At the same time these sets of cultural norms find their respective places within a framework of territorial powers, powers from which they are derived and by which they are maintained. Territories thus constitute *specific* environments or *ecotones* which *support* norms, that is to say, environments into which the norms *fit* or to which they are adapted. These specialised environments 'attract' and 'repel' specific behaviours, then, because of the consequences they entail. Thus movement over the surface of the earth, a prime interest of geographers, can be thought of as a search for places that are



appropriate (hospitable) for certain intended behaviours or for the location of certain things, and the avoidance of inappropriate places. The proprieties that are associated with these places draw their sustenance from territorial regulation, from the localised territorial context.<sup>21</sup>

It is this *interrelatedness* of things on the surface of the earth which is of particular geographic interest. It constitutes, after all, the essence of what we mean by both 'environment' and 'context'. Traditionally, in geographic studies, the focus has been on the horizontal or spatial component of these relations. It was this focus which, since it was first delineated by Kant, served to set geography apart, and gave it a *raison d'être*. But the partial insights gained, by what became an almost exclusively spatial perspective, have proved inadequate for building a deeper understanding of landscape events.

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<sup>21</sup>An unpublished paper by Jim Duncan, "Men Without Property: The Tramp's Classification and Use of Urban Space," illustrates this well and his theme is especially relevant to this study. Duncan writes about "survival" and carving "out a niche" and I find that his overall argument fits well into an evolutionary paradigm. Nevertheless, in other writings Duncan advocates an atemporal, symbolic-interactionist, perspective and his position is different from that of this study. See for example, James S. Duncan, "The Social Construction of Unreality: An Interactionist Approach to the Tourist's Cognition of Environment," in *Humanistic Geography: Prospects and Problems*, David Ley and Marwyn Samuels, eds., (Chicago: Maaroufa Press, 1978).

Insights into spatial distributions and spatial interaction must now be alloyed with a complementary temporal perspective which incorporates the idea of change. And this in turn must be informed by a more careful consideration of 'process' if its value is not to be seriously curtailed.<sup>22</sup>

It is in this regard that a theoretical position derived from evolutionary ideas commends itself. Not only did Darwin draw his inspiration from the naively-given reality and from geographic distributions,<sup>23</sup> he also focussed attention on the dimension of time. More than this, he offered a theoretical logic of potentially wide applicability. This logic can be used to shed some light on geographic thought itself. 'Environmental determinism', for example can be seen as the application of what now seem crude ideas of environmental selection to geographic problems. As such it was a partial use of the evolutionary

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<sup>22</sup>The writings of W.M. Davis in geomorphology suffered from this lack of attention to process. As Stoddart aptly points out, "what for Darwin was a process became for Davis and others a history." See "Darwin's Impact on Geography", p. 57. See also the very relevant article by Allan Pred, "The Choreography of Existence: Comments on Hägerstrand's Time-Geography and its Usefulness", *Economic Geography*, 53, 2, 1977, pp. 207-221.

<sup>23</sup>It is worth remarking that Darwin's theory already provides part of a 'landscape theory' by its explanation of the form, and spatial arrangement, of plants and animals in their natural habitats.

perspective. 'Possibilism' was a somewhat more sophisticated idea that attempted to incorporate both *variation* and *selection*, although the effective emphasis still remained on the environmental determinants. However, reaction to the unwarranted stress on a crude environmentalism was so strong that it soon became almost impossible to consider environmental constraints at all. The pendulum, as is its wont, had swung too far and all the emphasis was now to be on variation, on stochastic processes.

In contemporary geographic thought both locational analysis and diffusion studies (two of the more prominent developments) can be easily incorporated into the evolutionary approach. The study of 'location' is essentially a study of the fitment of things to idealised types of place, and less frequently to actual places. What is usually at issue is the most *efficient* or *optimum* location, and what is sought is the definition of the ideal supportive environment or *econiche*, that is to say where things can best survive in a competitive world - where in other words they can expect to be replicated. Diffusion studies, no less explicitly, demonstrate a concern with questions about the replication of certain events and the nature of their

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<sup>24</sup> D.R. Stoddart, "Darwin's Impact on Geography." He points out that variation was a neglected dimension of Darwinian thought.

supportive environments.

It is not only in geographic thought, of course, that evolutionary principles are drawn on, whether explicitly or not. The work of B.F. Skinner, one of the most influential psychologists of all time, is cast in an evolutionary mould, whereby behaviour is selected by its consequences. Unfortunately, Skinner has attracted unnecessary criticism by decrying the notion of 'freedom', yet 'freedom' doesn't seem to represent anything other than *variation* (whether planned or not), and rather than not existing at all as Skinner maintains it is an essential part of evolution itself.<sup>25</sup> No wonder we prize it so highly! The work of Clifford Geertz, a leading anthropologist, fits into a similar 'ecological' mould.<sup>26</sup> I have already argued at length that in the more esoteric realm of meaning the work of Wittgenstein fits such a paradigm. This is of particular importance, because 'meanings' constitute the storehouse of knowledge, the very instructions and information that have to evolve in conformity with environmental pressures if a

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<sup>25</sup> Skinner, *Beyond Freedom and Dignity*.

<sup>26</sup> See C. Geertz, "Two Types of Ecosystems" in *Agricultural Involution: The Processes of Ecological Change in Indonesia*, (University of California, 1963), pp. 12-37.

culture is to survive at all.<sup>27</sup>

I want to conclude this section by stating more succinctly what I think is happening overall. I will refer primarily to behaviour because concrete expression on the landscape flows directly from this. To begin with we can say that if a specific behaviour is not 'successful' it is unlikely to be replicated, that is to say it will not become a *norm*. Culture, as norms, is essentially a set of instructions for replicating successful behaviour. To this limited extent at least it parallels the 'instructions' of genes.

It hardly needs to be emphasised, of course, that cultural instructions, like genetic ones, are not necessarily 'good' for all people in all circumstances, that is to say in some absolutist sense. On the contrary, they only fit a certain type and range of conditions, and they benefit some, not all. They can quite clearly involve relative setbacks as well as relative progress. Furthermore, cultural instructions, like genetic ones, are *inherited* from the past and they may therefore not meet the needs of the present. Thus it is that some cultural instructions that

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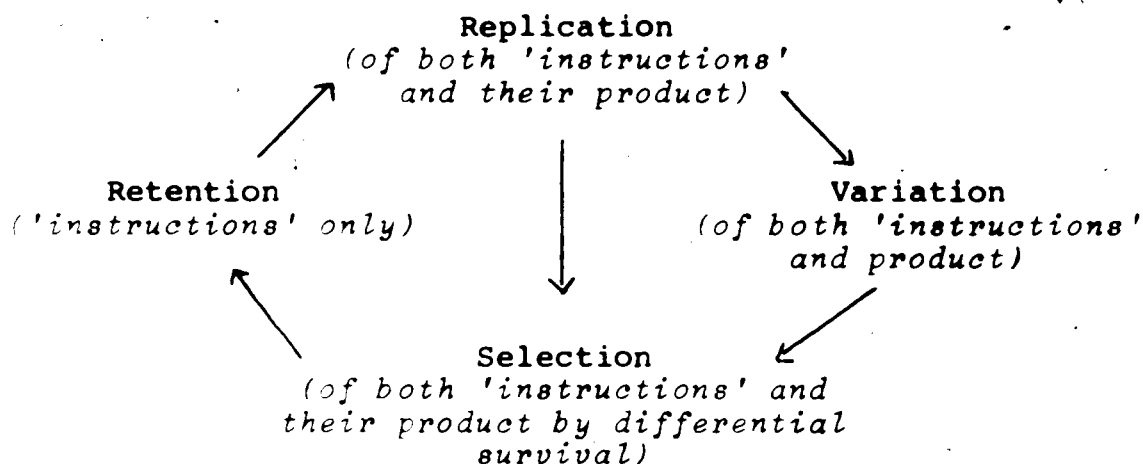
<sup>27</sup> In the same sort of way, genetic 'instructions' have to evolve if a population is to survive.

have, at one time, been spectacularly successful are no longer around. Some are preserved in the specialised environments of books or, through their concrete expression, in cultural artifacts that end up, along with dinosaurs, in the protective environments of museums. In the same sort of way, those cultural objects that seem to be in the process of 'failing' are preserved in collections and the genetic ones in zoos.

In order to survive, cultural instructions, like genetic ones, must change as the world they are in changes. We have seen this happening in trespass law. The form of their survival is scarcely predictable, however, for the selection of variations is effected *ex post facto* by their consequences. Those cultural variations that meet environmental tests and are 'proved' will, like genes, be replicated and thus preserved, and their 'messages' retained in human brains, in books, and in artifacts.

I am suggesting, then, that cultural norms, like widely-copied blueprints and like genes, constitute something special, for they are essentially instructions for replicating successful behaviour. These instructions are inevitably mis-copied at times, or perhaps deliberately varied, and although these variations are often unhelpful and even harmful some, through differential survival, are

selected and replicated in their turn.<sup>28</sup> Their product is a cultural (replicated) expression on the landscape. The following model puts the matter simply:



Throughout this study the human condition has been portrayed in the form of two fundamental tensions. Firstly that between the individual and society, and secondly that between stability and change.<sup>29</sup> These fundamental tensions in cultural evolution can be better understood if they are

<sup>28</sup> For example, students try to replicate their instruction in exams. Most of their many variations in these exams will be harmful and selected out. Occasionally, a variation will improve on an original instruction and this will then be taken up by the instructor and replicated in its turn. Initially, then, the best students are those who replicate well, but eventually they will be those who vary well.

<sup>29</sup> Gunnar Olsson, *Birds in Egg*, p. 154, sees the human condition as "a relentless struggle between the forces of the individual and society ... ambiguity and certainty."

thought of as special cases of a single, ongoing, dialectic between propriety and expediency.<sup>30</sup> The development of landscape theory is itself, part of such a dialectic.

### Future Landscapes

There has been a noticeable shift in geography in recent years away from an interest in present and past environments to a concern for future ones. This is a concern that a large part of society shares. In a world that is changing rapidly, anxiety about the future is bound to grow. Not only is mankind faced with the task of deliberately having to alter environments in order to make them more suitable for some purpose, he is also faced with the growing problem of dealing with the repercussions that result.

I want to suggest that at least one version of the contemporary geographic paradigm is, in its present form, unsuited to these tasks, and that it needs to be informed by evolutionary ideas. The version that is being

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<sup>30</sup> I obtained this insight from Fred Plog and Daniel G. Bates, *Cultural Anthropology*, (New York: Alfred Knopf, 1976), p. 15. They write: "When we take both smart [i.e. expedient] and the proper behavior into account, the dichotomy between individual actions and social patterns as well as between stability and change begins to evaporate." Expediency may, of course, give rise to a new propriety.



promulgated is summarised in the statement that today's "geographers are more concerned with optimisation - with finding the 'best' location for things and making the 'best' use of areas."<sup>31</sup> Unfortunately, this interest in utopian spatial arrangements suffers from the same sort of defects as utopias themselves - they are not so much simplifications of reality itself, as simply unreal. Yet despite this, there is a lingering and somewhat mystical belief that there are principles of proper geographic ordering which constitute some sort of geographic 'law'. But these principles are not so much descriptive as prescriptive. What is not sufficiently realised is that the value of 'efficiency' which they embody, is a limited rather than a comprehensive value. What is 'efficient' for the lion is unlikely to be so for the deer. The geographic 'proprieties' of spatial order cannot be fixed and law-like but instead they must be constantly adjusted to cope with both the conflicting demands of separate and disparate interests, and the need for expediency in a varied and unpredictable world. They must, in short, change along with other cultural 'instructions' in conformity with changing circumstances.

In general, such cultural changes will be gradual as

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<sup>31</sup> Haggatt, *Geography: A Modern Synthesis*, p. 20.

in the Common Law.<sup>32</sup> The reason for this lies in the general tendency towards replication (for example, precedent or codification in the law) as opposed to variation.<sup>33</sup> For variations will more often than not create instability and disharmony, and increase risk, although paradoxically they are essential for adaptation to a changing world. Thus some caution is in order, for the transformations we effect may have impacts that will be unintended and unwanted. Government policies on family life could conceivably, for example, run counter to biological 'instructions' and incur costs that might be higher than expected. In short, artificially constructed environments designed to support beneficial things may protect harmful ones as well. Or to put this yet another way, we can say that what is 'good' for one system is not necessarily so for another.<sup>34</sup>

Despite all these worrisome complexities we should

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<sup>32</sup> More substantial changes in the law are made by legislative fiat.

<sup>33</sup> One of the constraints on rapid cultural change may be genetic directives. Thus Edward Wilson maintains that "the genes hold culture on a leash." *On Human Nature*, p. 167.

<sup>34</sup> Asbestos mills, for example, 'benefit' the economic system, but they are also the reason for the high rates of lung cancer amongst their workers.

be cautiously optimistic about our future. Human nature, after all, remains remarkably open in relation to that of other living things, and environments are capable of considerable transformation. It is here that evolutionary theory comes into its own, for it is an open theory, incorporating both 'freedom' and 'necessity', and in this regard, at least, unlike 'positivist' theory.<sup>35</sup> It promises not only to bring diverse facts and partial theories into meaningful relationships, it also offers a directional logic (although not a unilineal one) which can be consciously utilised. For geographers, in particular, it provides a paradigm for both the explanation and the understanding of the sorting-out process on the earth's surface, including a rationale for movement and for the placement of things.

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<sup>35</sup>As Ley and Samuels point out in *Humanistic Geography*, "man-environment relations, ... assume their distinctive character precisely because of the circumstances of context, which positivism so carefully removed." p. 12.

David Ley argues that there are two emerging paradigms in contemporary social geography - structural marxism and a humanist posture (essentially a broadly based existentialism), (p. 43). It is interesting to note firstly, that at least in one respect, these are complementary, for marxism is a historical perspective, and existentialism is ahistorical, and secondly, that the evolutionary paradigm takes into account both historical 'necessity' and present 'freedom'.

The role of the academic in the competition for the space in our heads is that of an entrepreneur of ideas. In fulfilling this role I can do no better than leave the last word to Ludwig Wittgenstein:<sup>36</sup>

It is always by favour of Nature that one knows something.

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<sup>36</sup> Wittgenstein, *On Certainty*, paragraph 505.

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