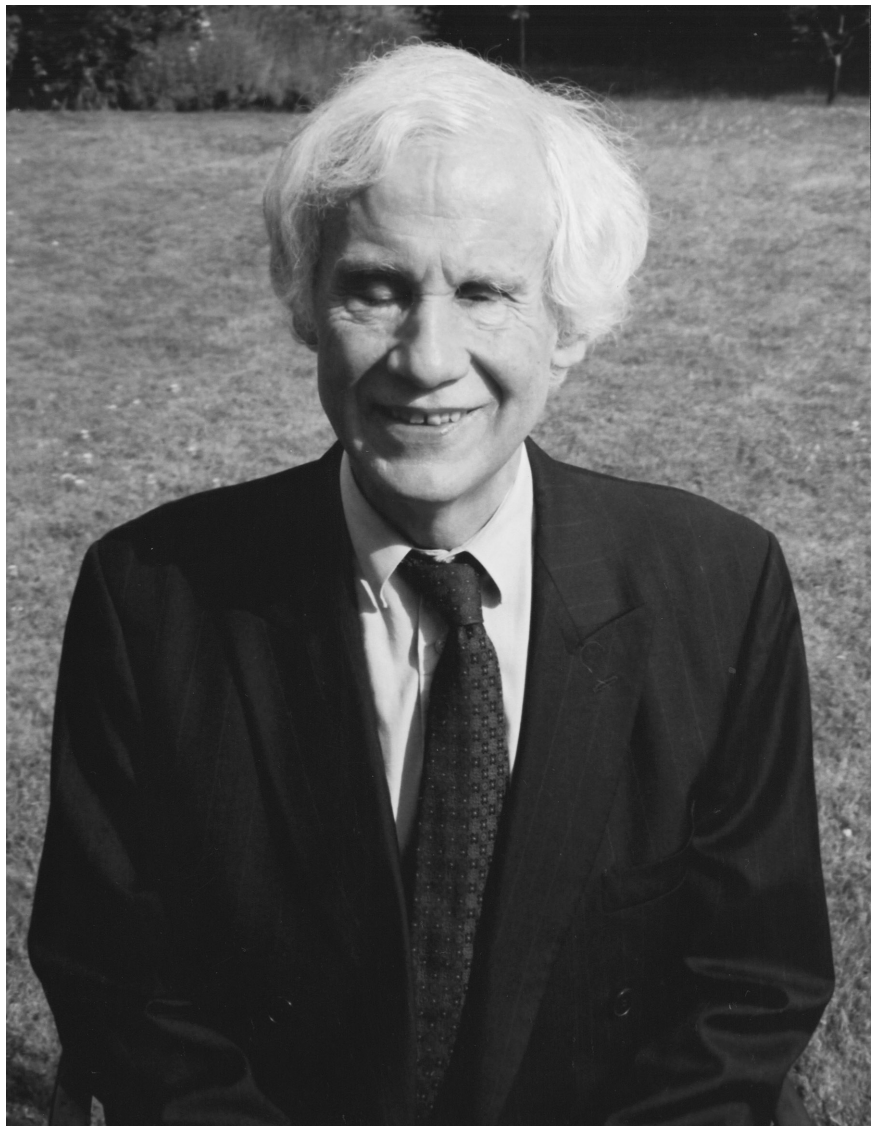

JAMES HARRIS

James William Harris
1940–2004

ENGLISH LAWYERS WHO VENTURE into the realms of ethics and philosophy find themselves open to attack on two flanks. On the one, equipped with ancient Greek, modern German, and Polish symbolic logic, stands a host of austere thinkers. On the other, fortified by the three certainties of trust law, the rule against perpetuities, and the latest Miscellaneous Provisions Act, is arrayed a band of practising attorneys. In the eyes of the first group, many legal philosophers are mere dabblers, while the legal practitioners suspect them of knowing no hard law.

Jim Harris, however, was proof against such attacks. He was most unusual in combining the training, techniques and craft of a conveyancer with the concerns and the learning of a philosopher. His abiding interest in ethical theory was thus strengthened by his sound grasp of thorny and frequently litigated legal problems. He used this experience, not only to illustrate theses conceived in the abstract, but also as a means of explaining issues which, for the sake of justice, deserved patient consideration; while his grasp of the practical problems thrown up by legislation, litigation, and modern medicine led him to reflect deeply on the many differing accounts of law and justice given by more cloistered minds. In addition it was his lived experience of the routine of private law—the contracts, conveyances, mortgages, testaments, statements of claim and such like (the kind of work solicitors do all day)—which led to his fascination with the school of thinkers who attempt a general account of how that unglamorous process all adds up: his thoughts and writings returned to legal positivism again and again.

Jim Harris was born during a very bad air-raid on 17 March 1940 and was always proud, not so much of the bombs or the date (St Patrick's

Proceedings of the British Academy, **138**, 125–143.

Day), as of the place: Southwark, but within the sound of Bow Bells and sight of Kennington Oval cricket-ground. His forebears on both sides were what used to be known as 'respectable working-class', his mother's family being Irish stevedores, his father's small tradesmen and skilled artisans, originally from Cornwall. At the time of his birth his father, in peacetime an engineer with the GPO, was serving in the Royal Engineers, and after Dunkirk Jim and his mother were evacuated to North Yorkshire where his younger brother and sister were born. At the age of four he lost his sight and, after the war, attended Linden Lodge in Wimbledon, a primary boarding school for blind and partially sighted children. There he flourished, winning a national children's poetry prize personally presented to him by T. S. Eliot, and starring as 'Sandra the Sea Princess' in a children's pantomime at St Pancras Town Hall. At home in the holidays he displayed a confident physical and intellectual independence, grappling with young bullies in Kennington Park, enjoying the thrills on the rides of Battersea Funfair, pedalling away at the back of a tandem, and beating all comers at chess. In all of this he was encouraged and supported by his own family who took his disability in their stride and encouraged him to enjoy the greatest possible freedom.

In 1951 he won a scholarship to the Royal Worcester College—also a specialist boarding-school for blind children which, like Linden Lodge, provided an educational environment designed to encourage pupils to the limits of their mental and physical abilities. The school excelled in the teaching of classics, history and mathematics so that he was soon able both to tutor his brother in Latin syntax and to astonish his father the engineer by resolving in his head quite complex problems of geometry. Outside the family home Jim's intellectual and scholastic prowess soon showed itself. His school reports were always glowing and he was a member of the Worcester College team that competed in the Top of the Form radio competition of the 1950s. He also pursued his acting career in such roles as Coriolanus and the prosecuting attorney in the Caine Mutiny Court Martial, attended dances at local girls' schools, and acquired his lifelong passion for cricket. Above all, from the moment he mastered Braille, he devoured books and, at home, unaffected by the maternal injunction 'stop reading boys, lights out', was able to send his fingers gliding over the pages under the bedclothes into the early hours. Rather than sampling superficially a wide range of topics, Jim liked to know things in detail. His particular interests included prehistory, 'popular' accounts of physics and astronomy, the history of ancient Rome and of the English

civil war, the classic nineteenth-century English, French and Russian novels, and of course, again and again, the plays of Shakespeare, large stretches of which he knew by heart. He was also very fond of the music of Wagner and loved to sit through operatic performances reading the Braille libretto in the dark.

After leaving school he spent four months travelling on his own in different parts of France, and stayed with a variety of hospitable hosts: among them the Marquise de St Roc de Rocquentin in the Haute Savoie, Father Jean Remond in Bordeaux, and the Brignonan family in Finistère, from whom he learnt his excellent colloquial French and whom he revisited over many years. Acting was likewise a lifetime hobby, Jim's last theatrical performance coming forty years later as the corrupt proprietor of a tabloid newspaper empire in a north Oxford amateur production.

These interests, though always maintained, inevitably took second place to what became his main passion: the law, in both practice and theory. On going up to Wadham College, Oxford, in 1959 this was not perhaps his ideal choice of subject, but it did offer the prospect of secure employment. His tutor was Peter Carter, a man with a remarkable (and cultivated) talent for simultaneously terrifying and inspiring his pupils. Other undergraduates thought Jim unique in not being afraid of 'Magna Carter', though in truth Jim dreaded the verdict on his weekly essays: 'Oh no, not Harris's peculiar brand of mysticism again!' Of all the intellectual influences on Jim's development as a lawyer, Carter was certainly the most powerful: both positively, by insisting on the highest standards of accuracy and rigour, and negatively by inhibiting him for years from striking out with confidence in more speculative directions.

Outside the tortures of the tutorial, Jim immensely enjoyed his days as an undergraduate, riding on Port Meadow, rowing for his college in a Gentlemen's VIII, continuing his vacation travels in France and, during term, enjoying the company of the numerous young women who volunteered to read for him in those pre-electronic days (being rewarded with a meal every term), introduced him to their social circles, and helped him to his First in the Final Honour School. One of his many extra-curricular activities involved helping at a horse-riding school for disadvantaged children. It was through this that he met his future wife Jose, then a first-year undergraduate at Newnham College, Cambridge. At first slightly shocked by the apparent insouciance of this carefree socialite, she later realised that his life was built around an iron self-discipline, in which a regular and highly organised work routine was the *sine qua non*. In fact, beneath Jim's apparent and extraordinary self-confidence, lay a persistent

sense of anxiety about letting himself and his family down by becoming dependent on them or on anyone else.

For a blind person aiming at a professional training in law, the solicitors' branch was more welcoming than the Bar. Several City firms were happy to offer Jim 'articles of clerkship' (nowadays called training contracts) but in those days they all expected the novice to pay them a premium of several hundred guineas and then work for nothing for three years. Fortunately, through the good offices of Professor Sir Rupert Cross (himself a blind Oxford lawyer and Fellow of the Academy), Jim found a firm in Hertfordshire which waived the premium, paid him six guineas a week, and, most importantly, provided an excellent working environment with no fuss over his disability. There he was soon given a good deal of responsibility and learned both the day-to-day routine of an office and the common legal problems of ordinary clients (most of whom were human beings, not big business corporations).

To increase his income, and because the topic appealed to him, he applied to the local Workers' Education Association which was recruiting tutors for adult evening classes in 'clear thinking'. Despite his outstanding qualifications, he was rejected on the explicit grounds that no blind person could do the job. This was a profound shock to him and was his first (though by no means his last) encounter with the prejudices of a supposedly educated quarter of the sighted world.

He returned to Wadham College, taking his BCL in 1966, and was then appointed a lecturer at the London School of Economics where he taught the technical subjects of property and commercial law. His interest in what his Wadham tutor had called 'mysticism', however, led him to a doctoral thesis (supervised by Lord Lloyd of Hampstead) in legal philosophy. This work, polished by his experience of then lecturing on the topic, formed the subject-matter of his first book, *Law and Legal Science*.[1]

On 26 October 1968—the LSE being closed because of student unrest—Jim and Jose were married at St Bride's Church in Fleet Street, where the Revd Dewi Morgan, with a due sense of the current mood, explained in his sermon that marriage was 'a revolutionary moment'. The bride was then just finishing her doctorate, and later, thanks to her rapid achievements as a social historian, became a Fellow of the Academy seven years before her husband. One of Jim's stipulations about married life was that they always live in a place where he could travel to work

[1] J. W. Harris, *Law and Legal Science* (Oxford, 1979).

under his own steam, so they bought an almost derelict house opposite the Arsenal football ground, on the direct Piccadilly line to the LSE. When his mother first saw it she burst into tears, but his father, who was by then in charge of the GPO's apprenticeship scheme, soon found a stream of young workmen to put matters right.

In 1973 Jim was elected a tutorial fellow at Keble College, Oxford, (later his wife became fellow of St Catherine's College) and he threw himself into college life and the much closer relationship with his pupils than had been common at LSE. His teaching style had none of his own tutor's ferocity, and indeed the most common sign of a Harris tutorial was the bursts of laughter of both him and his pupils. At the appropriate moment in the afternoon he would advise them to put the lights on, leaving them to wonder 'how did he know?' Yet behind the ease lay a certain rigour and a knack for stretching the minds of his pupils—indeed one of them, now a member of the South Africa Supreme Court of Appeals, remembers his hours with Jim as 'austere but exhilarating', and 'dedicated to clear productive thought'.

In college he played a crucial role in promoting the admission of women and, both there and at home, was eloquent in defending the rights of people he greatly disliked to do what they chose, provided they did not interfere with him. A son, Hugh, was born in 1983 and developed early an obsession with boats, graduating from models to a Freeman Mark Two five-berth river cruiser, on board which his father took on a new life as quarter-master, purser and second mate. Unlike the first London home, their Oxford house met more readily with the approval of their families: Belbroughton Road is bonny. At the end of a working day, Jim's lean figure with its shock of white hair could be seen striding across the road from his college and setting out along the quietest paths to his home. Anyone who walked with him would be warned in advance of the protruding branches of a hedgerow, or advised to cross the road to avoid the places where, for Jim, the smell of canine urine was too pungent. A companion might also hear one of Jim's rare outbursts of irritation as he encountered a motor-car parked selfishly on the pavement.

During these years at Keble, Jim read wisely, thought deeply, and wrote lucidly. Looking back on his writings, his topics can be arranged (more or less) into four categories: legal philosophy, the notion of precedent in common-law jurisdictions, property theory, and the jurisprudence of human rights. It must be remembered, however, that he was frequently working on more than one issue at a time and, inevitably, his reflections in one area illuminated those in another.

Legal philosophy

Jim's book *Legal Philosophies*[2] was written for undergraduates, and gives a straightforward account of certain basic thinkers and topics in the field of legal theory. But his 1979 book on *Law and Legal Science: an enquiry into the concepts 'legal rule' and 'legal system'*[3] goes much deeper, and seeks to explain the logical status of statements made by those who describe, or advise on, the current law of a given system—the legal profession, whether practitioners or pedagogues. Harris makes it clear that he is attempting no more than this; he is offering a positivist, not a political, cultural, or historical, account. A somewhat similar approach was initiated in this country by Jeremy Bentham and John Austin, but Harris adopts essentially the view put forward by the great Austrian jurist, Hans Kelsen: that legal rules are entities identifiable neither with the events which give rise to them nor with those which constitute their application or enforcement.

Lawyers of all kinds have what Jim calls a 'caste' tendency towards formal reasoning, that is an insistence that new legal problems be referred not to 'extra-legal' policy considerations but to some feature of the already given legal materials. (There is a mythical, but much admired, Queen's Counsel who is said to have addressed the highest court saying 'Your Lordships will be pleased to hear that my argument has nothing whatever to do with the merits of this lawsuit.') When lawyers advise their client as to what 'the law' is on a given subject they assume that the following is the case: that legal duties (and hence, at the end of the day, the possibility of official coercion) arise in this jurisdiction *only* if imposed by rules originating in a certain limited number of sources or by rules subsumable thereunder, and that relationships among these rules are governed by a certain ranking. Thus the lawyer may say that the money must be paid because it is required by the tax demand of an official appointed and empowered by regulations issued by the executive as required by an Act of the Parliament; or, in this country, that the sum of money owing is a debt recognised as due by a decided case of a court whose ruling other courts are bound to apply and which no statute has impaired. In doing so the lawyer is acting *as if* he or she is dealing with a non-contradictory field of meaning underpinned by a basic norm excluding all sources of

[2] (London, 1980), 2nd edn., 1987.
[3] See above, n. 1.

coercion save those legitimated by or under the relevant constitution. This basic norm itself is *causa sui*, it is assumed just as causality is taken for granted by the mechanic who advises you that the rain will rust your bicycle.

If lawyers—insofar as they think about it—presuppose that the constitution was authorised and so their derivative advice is sound, what are they to make of political upheavals? Jim returned to this problem and to what he called 'Kelsen's pallid normativity' in a dozen or so articles published in this country and abroad and prompted by events ranging from the 1965 'Unilateral Declaration of Independence' in Southern Rhodesia to the birth of the Special Administrative Region of China in the once British colony of Hong Kong. He points out that if the UK were foolish enough to repeal the Hong Kong Act 1985 and purport to legislate for the territory, no Hong Kong official would enforce such legislation and no local lawyer would advise compliance. They would continue to behave as if the Basic Law, enacted by the National People's Congress of China, ought to be obeyed, and the legal positivist, neither approving nor disapproving, would describe this behaviour. Whether he or she was happy with it is a quite separate matter. Thus for some years and in many ways Jim—in opposition to his Oxford colleagues such as Joseph Raz and John Finnis—perceived the legal duty as being quite distinct from that of a moral order.

Precedent in the common-law world

By the 1980s, Jim's work was known world-wide and, with his family, he enjoyed visiting professorships in Sydney, Hong Kong and Princeton—and it was in the last of these that he discovered the facilities of scanning and digitalised voice-recording made available by the latest computers. The family travels fed his curiosity about the structure of legal systems and led him to consider a general and persistent feature of 'common-law' countries: the doctrine of precedent, whereby a single decision of a superior court is normally taken to indicate a general norm to be followed, where applicable, by lower courts and officials. He had first dealt with this in a chapter of his book on *Legal Philosophies*, written 'for the beginner', but a decade or so later returned to the topic in the wider context of conflicting decisions within the British Commonwealth. He also brought out, in 1991, a new edition of the masterly textbook on *Precedent in English Law* first written by the colleague who had arranged his articles

of clerkship years before: Professor Sir Rupert Cross.[4] Thereafter he published notes on a number of English and Commonwealth cases which sought to solve emerging problems in the application of the hallowed doctrine.

Property theory

However, the area of interest which Jim maintained all his life and to which he made probably his most valuable contributions is one that has intrigued moralists, philosophers, economists and lawyers for many centuries: the institution of property. The topic has recently enjoyed a renewal of popularity among anglophone writers, and indeed an English translation of Pierre-Joseph Proudhon's 'What is Property' has been reprinted four times in the last decade.[5] The classical studies, however, tend to look only at landholding and to discuss it in elevated terms. By contrast Jim's earliest articles deal deftly with a number of intensely technical problems of entitlement to assets in general, including investment portfolios. The very first were written for a leading practitioner's journal and tackle the 280-word sentence of section 1 of the Variation of Trusts Act 1958 which had provoked wealthy families into making hundreds of applications to the Chancery Division. In 1969 Jim's two-part article in the *Conveyancer and Property Lawyer* provided the profession with a subtle and confident account of the effects of the statute, and six years later he followed this with a short but penetrating book on the subject.[6]

His second early paper addressed another very practical problem of property relations but went beyond a mere analysis of the relevant law to give a hint of the intellectual development Jim was undergoing. The issue arises where an owner of land allows another person to occupy it; the latter then claims to be a tenant, and so legally protected, while the former maintains that this was just a friendly arrangement. The courts state that their task is to decide what the parties intended but, as Jim drily pointed out, 'intention in this context cannot mean real intention, in the sense of an aim of which the parties could have been conscious, since what is posed as the content of the intention is a legal classification: and

[4] R. Cross and J. W. Harris, *Precedent in English Law*, 4th edn. (Oxford, 1991).
[5] Cambridge University Press, 1994, 1999, 2001, 2002.
[6] *Conveyancer and Property Lawyer*, 33 (1969), 113–34, 183–202. J. W. Harris, *Variation of Trusts* (London 1975).

achieving legal status (as distinct from achieving the consequences of such status) is not part of normal human motivation'. The courts' conceptual reasoning, he says, 'conceals a simple development in the law brought about by judicial revolution, namely that there are certain circumstances to which the courts will not apply the statutory and common law of landlord and tenant'. The most compelling such circumstance is the element of generosity on the part of the landowner.[7]

He then turned to the questions posed in the distribution of a fund where someone is given the power—or saddled with the duty—to select the recipients either at large or within a class designated by whomever established the fund—for instance, in a business context, a choice among employees, ex-employees, and their relatives or dependants.[8] In later years (assisted by an Academy research grant) he widened his range to address the views of Robert Nozick and other American 'libertarians' on the one hand, and the advocates of 'critical legal studies' on the other. He also took issue with the agile arguments of Ronald Dworkin, confronting Dworkin's superjudge Hercules[9] with Jim's own creation, a character whose name deliberately evokes the workaday world of the ordinary lawyer: Humdrum, a person who believes that it is possible to arrive at conclusions of law while remaining agnostic about the justice of his society. Jim uses actual—and difficult—reported cases about competing entitlements to a home to argue that Humdrum has, not only the ability to achieve some, if partial, alleviation of social distress, but also the prosaic merit that he can exist.[10]

It is clear, however, that Jim's finest and most sustained achievement is his book *Property and Justice*, first published in 1996, the year in which he was appointed to a professorship at Oxford.[11] Around that time a number of anglophone writers were producing works which examined anew the idea of, and the justifications for, the institution of property; and, as always, there were dozens of texts addressed to more technical, but not less troublesome, matters of practice. The two types of work were

[7] 'Licencies and Tenancies—the generosity factor', *Modern Law Review*, 32 (1969), 92–6.

[8] 'Trust, Power and Duty', *Law Quarterly Review*, 87 (1971), 31–65.

[9] Ronald Dworkin, *Taking Rights Seriously*, chap. 4 (London, 1978).

[10] 'Legal Doctrine and Interests in Land', in J. Eekelaar and J. Bell (eds.), *Oxford Essays in Jurisprudence, 3rd Series* (Oxford, 1987), pp. 168–97. 'Unger's Critique of Formalism', *Modern Law Review*, 52 (1989), 42–63. 'Is Property a Human Right' in I. McLean (ed.), *Property and the Constitution* (Oxford, 1999), pp. 64–87. 'Rights in Resources—Libertarians and the Right to Life', *Ratio Juris*, 15 (2002), 109–21.

[11] (Oxford, 1996), reprinted 2002. The work was supported by the British Academy, both through the award of a research readership and the allocation of a grant to meet costs.

written for different purposes and by differing authors. It is probably fair to say that you would be unlikely to hire anyone in the first category to draft a non-exclusive know-how licence, nor look to the second for a refutation of Hegel. As we have seen, however, Jim combined a critical understanding of the philosophers with an up-to-date interest—born of experience as solicitor and then tutor—in the day-to-day problems of the practitioner. Furthermore he was well aware that both of these groups have only words to work with, yet the second make their living by producing results in the real world, affecting the lives, liberty, and happiness of particular individuals.

So Jim resolves to take account of the real-life complexities overlooked by the philosophical accounts while avoiding being drowned in the morass of detail which is the practising lawyer's everyday concern. The task he set himself was twofold: to enquire into those reasons which allegedly justify property institutions and also to look at concrete problems of resource allocation; in a given case each may shed light on the other. On the way arise questions as to what kinds of things can we own—land and most tangible objects, yes, but what about our doodles, our fame, our contribution to a computer program, our detached body parts?

The book sets out to confront the fact that, not only is justice a greatly disputed topic, but so also is property. Both are legal and social institutions in which practical decisions have constantly to be taken, at macro- and micro-levels, about entitlements to things and about the powers to be exercised over them—and so, necessarily, over others. So, with an approach which is modest, lucid, and patient, Jim begins afresh with each. He doubts the merit of drawing deductions from some grand universal definition of property. The first half of the book addresses the question 'what is property', and the second considers whether it is just.

By using concrete examples Jim is able to show that there are certain features which are necessary but not sufficient conditions for property. The first is relative scarcity of the object in question—or, in the case of intellectual property, the artificial scarcity created by the very act of attributing property rights in the laws of copyright, patents and the like. It does not follow, of course, that all scarce resources should be allocated by property rules and transactions. For many reasons the welfare solution may be preferable—for instance education, health care, fire and police services are available without regard to property claims. The second essential is some kind of trespass rule imposing negative obligations (whether criminal or civil) on an indefinite number of people forbidding

interference with what is allocated to someone else. But this again is not necessarily enough. For instance, in English law, the deserted wife may be entitled to stay in her husband's home and, if she registers this right so as to give notice to everyone, no one may interfere. But she cannot, by virtue of this protection, lease or give away her rights in the home. Her entitlement derives more from status and desert than from ownership. A further stage is reached when something that pertains to a person is, maybe within limits, theirs to use as they please and therefore to neglect it or to permit others to use it. And finally, full-blooded ownership occurs when the holder's relationship with the object is protected by trespass rules and also includes the power both to do as they please—to use, neglect, destroy it—or to transfer the thing (or a share in it) together with the same range of privileges over it plus the power, in turn, to transfer anew. That this last version is the default status for ownership is shown by our relationship with our most common possession: money. It works as money only by being transferred.

At this stage Jim has shown the necessity of trespass rules and of what he calls the ownership spectrum. Armed with this, he investigates actual modern property institutions. He does not limit his discussion to land but ranges from intellectual property through money, shares, goodwill, and the beneficial interests held behind a trust, showing that it is much more helpful to see ownership as a spectrum than as a single dominant and exclusive concept. Against this background one can see that property vested in public agencies or charities is held in 'quasi-ownership' because its holders may not destroy, or even neglect, it. But we describe such entitlements in terms of what the holder may not do—conceptions of private property are logically prior to those of non-private property. Similarly communitarian property (much beloved by some philosophers) can be described by its contrast with private property. Trespass rules protect the community against strangers, but, within the community, allocations and the powers of use and transmission are determined by internal regulations arising from the mutual sense of community.

Having, in the first part of the book, sketched what property institutions are like, Jim Harris then turns to examine the justice reasons for them. He stipulates a minimum for a just human association—while accepting that stipulations are never correct only more or less serviceable. His minima are: an acceptance of the natural equality of humans, so that like cases are to be treated alike; the assumption that autonomous choice over some range of actions is of value to all humans; and that prima facie all unauthorised invasions of bodily integrity are to be banned. But none

of these leads readily to a justification of property. It is difficult to discern how, independent of social convention or law, a relationship between a person and a thing should be privileged and protected. Something linking the fact to a right must be found. Locke identified two arguments. The first, with which Jim strongly disagreed is the assertion of 'self-ownership' which runs: I am not a slave therefore I must own my body and my actions including those which create or improve resources, therefore I own the resources. The major unstated premiss here must be: what no one else owns I own; but this is manifestly false. Similarly Locke's and Mill's assertion that ownership arises from creation without wrong is flawed because it does not lead inexorably to the imposition of a negative obligation on others. Granted that the product would not have existed without my creation, it must be of potential use to others or legal protection against trespass would not be needed. So standing alone this argument fails. But it can be combined with others to give a justification for ownership.

If we accept that autonomous choice has a value it may follow that a person whose labour confers a benefit on others deserves to be rewarded—this forms a shell whose content may well vary: the reward may be determined by convention and be a knighthood (which is not a resource) or a Nobel Prize (a different resource) or simply the according of ownership rights and protections over the thing created (Blenheim Palace). This—together with an incentive argument—provides a basis for the recognition of intellectual property. (For instance the EU Council Directive of 14 May 1991 says: 'in respect of a computer program created by a group of natural persons jointly, the exclusive rights shall be owned jointly'.)[12]

Jim concludes his examination of justifying theories by arguing that there are no natural rights to full-blooded ownership, but that the notions of desert and of privacy provide the shells of claims which need to be filled in by other considerations. One is freedom: does the autonomous choice principle lead to the conclusion that property interests confer freedoms which otherwise would not exist? If so, this would go beyond the kinds of objects that might fall under a privacy principle since private ownership not only increases the freedom of individuals, it saves the costs of devising and policing a regime of communal use. The autonomous choice value also supports freedom to transfer the object. The choice to

[12] Council Directive 91/250/EEC article 2.2.

give away or sell the thing is prima facie as deserving of respect as the choice to keep or destroy it. This must, above all, be true of money.

So far Jim has shown that, to fulfil the basic justice requirements, everyone can insist that his or her society maintain a property institution of some kind. It must allow for the ownership of chattels and dwellings and money. But this discloses no good reason for intellectual property. So we turn to see if there are desirable social goals which cannot be achieved without a property institution. If incentives and markets increase social wealth then the costs of justice in the wider sense (defence, homeland security, public services) can be better met by taxation. Yet private ownership might be justified where it provides greater incentives than would public ownership and where its exploitation leads to greater overall wealth. Intellectual property is a clear example of the importance of incentives.

So, beginning with a minimalist conception of justice which did not include property Jim reaches the conclusion that its abolition would treat everyone unjustly. But is there any over-arching vision of justice which might determine what form the institution should take? Proudhon argues for equal division, but considers only land (as in fact do most of the modern 'libertarian' school). It is difficult to square this with the value of autonomous choice. Jim does accept that if a resource is a genuine windfall (with no desert or incentive considerations in play) then equal distribution is a just outcome. Thus an expired patent or copyright falls into the public domain. The wealth of a person who dies intestate without kin goes to the Treasury and is, presumably, used for the benefit of all. (Jim might also have pointed out that a similar principle ('general average') apportions equally the 'windfall' loss caused by a necessary jettison at sea.) Against this equality argument is that from existing social convention. This is no more a valid dominant principle than is equal distribution, but it may be relevant if a change to the current practice will involve costs and will, admittedly, produce no more benefit than the status quo: then the onus is on the proponents of change. This may be one reason why the gnarled conventions embedded in the technicalities of judicial precedent are so resistant to alteration.

Jim thus demonstrates that there are no natural rights which of themselves entail full-blooded ownership. He refutes the arguments from self-ownership and observes that speculations about prehistory have little to contribute. We are left with a mix of reasons which justify the variant forms of ownership: the need to fill basic needs, notions of desert, freedom, privacy, incentives, markets, and the moral independence which

property may bring. Trespass rules underlie the institution as a whole: thou shalt not steal. The present state of property institutions in a given society deserves support if it is an honest attempt to meet the mix of property-specific justice reasons analysed in the book. But a just property institution alone and of itself is not a guarantee of a just society.

This major work does not address in any detail the insistence on, and persistence of, a stern documentary formality within the law of property. This is a feature with a long history and a bad reputation, as Hamlet notes when he finds a skull: 'a great buyer of land with his statutes, his recognisances, his fines, his double vouchers, his recoveries'.[13] It is still current, and most of the formality is imposed by legislation, so that for instance land contracts must be in writing and signed, a deed needs one witness to the signature, and a will requires two. In a number of perceptive articles, Jim comes to this question by examining those situations where people have intended to carry out some transaction but have failed to comply with the requisite formalities and have then fallen out. This is especially common where couples share a home whose formal paper title is vested in one of them ('Jack') but the other ('Jill') has been told, or led to believe, that she will have some right to the house. In a claim by Jill, we are not required to decide a challenge to Jack made by anyone else—i.e. it is not a question of an owner's rights against the world, but instead a matter of what Jim calls 'situated justice'. Jill's claim to the house—or a share in it—may arise from a number of grounds: Jack gave it her (he should have executed a deed of gift); Jack promised it her (he should have used a deed of covenant); she bought it by paying the previous owner or the mortgagee; she earned it by working on the house; Jack induced her to expect a share (in reliance on which she may have given up her own home); she deserves a share; she needs a home. Depending on the facts Jill may—as against Jack—win some interest in the dwelling on any of these grounds. But if Jill claims against Paul who has bought from Jack in good faith reliance on his paper title, the case is altered. She should win if, in compliance with the requisite formalities, she has been given or promised the house or a share, or if she paid for it. But other grounds such as desert or need will not suffice to deprive Paul of his ownership. In these articles Jim applies his general and well-argued perceptions of the difficult moral and ethical questions about reliance, labour, desert and the like to frequently litigated scenarios and offers a number of patiently rational and judicious arguments. He also seems to be moving away from his earlier

[13] *Hamlet*, V. 1. 114.

positivist insistence on the clear distinction between legal and moral duties.[14]

Even more difficult—and much more dramatic—are the problems posed by advances in the medical and biological sciences. Perhaps the law of property should not be called upon to answer them, but that is not how things have turned out: questions about entitlement to, or 'ownership' of, body parts are now constantly before the courts in many countries. In addressing such issues, Jim starts from an explicit—even vehement—refutation of the Lockean proposition that 'every man has property in his own person'. In a paper with the splendid title 'Who owns my body?' he contends that the 'self-ownership' tradition, whether in its libertarian or Marxist versions, is entirely spurious and its effects baleful.[15] From the proposition that I am not a slave, the conclusion that I own my body does not follow. With the abolition of slavery, human beings have been removed from the class of ownable assets. Only philosophers have sought to keep them there.

But our body parts, if severed with our consent, do seem to be physically capable of being the object of property relations and transactions. Presumably I could lawfully and effectively sell my hair-clippings if I could only find a buyer. In less trivial cases the problem is one of selecting the most appropriate regime to govern them. The common law refused to recognise the ownership of corpses, but we do not say that because no one owns a dead body anyone can take it. Instead we impose protection by conferring disposal powers and duties on certain persons (next-of-kin, religious functionaries, public authorities) but we deny them the full range of ownership powers. Similarly nowadays specific duties are laid upon public authorities in relation to human embryos and live gametes, and commerce in human organs is made a crime; but it is perfectly feasible to dictate what is to be done with such body parts without making anyone their owner.

In his novel *Virtual Light*, William Gibson's characters observe 15 November as 'a sort of Mardi Gras' to commemorate the birthday of J. D. Shapely, the promiscuous homosexual from whose viral strain was developed the vaccine that 'saved uncounted millions'. Shapely, we are told, 'had been very wealthy when he died'.[16] In real life, John Moore was not so fortunate. From his excised spleen the University of California

[14] 'Doctrine, Justice and Home-sharing', *Oxford Journal of Legal Studies*, 19 (1999), 421–52.
[15] *Oxford Journal of Legal Studies*, 16 (1996), 55–84.
[16] (London, 1994), p. 294.

(in whose medical centre the organ had been removed) developed and patented a cell-line which was said to be the basis of a three-billion dollar industry. Moore sued, arguing that in exercising dominion over the materials taken from his body the defendants had infringed his ownership thereof. The plaintiff did not claim the cell-line which became the subject of the patent, for that included inventive ideas contributed by the medical team. He claimed to own the materials from the moment they were removed, and his loss would have been measured by reference to their golden potential at that time. The California Court of Appeals found for Moore; the California Supreme Court, by a majority, found for the University.[17] Jim notes that, because of the way in which the action was framed, the courts were not free to construct a new category of entitlement to separated body parts: they were compelled, by the judicial role, to allocate to one side or the other full-blooded ownership carrying powers of transmission and thus of commercial exploitation. Given those constraints, Jim argues that Moore should have won: by the creation-without-wrong argument of Locke and Mill, it was Moore's consent which led to the appearance of a valuable resource. Any competent surgeon could have done the excision, but no other patient could have provided such a valuable cell-line. For Jim, however, it does not follow that this should mean full ownership over the separated body part. Since such entitlement does not apply before the operation, something more than mere excision is required to create it. The Supreme Court majority found this in the incentive to conduct important and beneficial medical research, and so awarded ownership to the Medical Centre. But Jim suggests an alternative attribution: to treat the discovery as a windfall and vest it in some appropriate agency mandated to exploit it for the public good. His general conclusion is that each person has a limited property interest in separate body parts; if he consents to their removal he creates them as a separate thing. But their potential as a commercial commodity should accrue to the community.

Jim's growing achievement as a theorist of justice who actually had a practical experience of its relations with property was recognised by the conferral of Oxford's Doctorate of Civil Law and his election to the British Academy in 2001. It also meant that he was much in demand as a supervisor of doctoral theses. He had a sense of humour, was genuinely interested in his pupils' ideas and—not surprising given his disability—

[17] *Moore* v. *Regents of the University of California*, 249 Cal. Rprtr. 494 (1988), 271 Cal. Rprtr. 146 (1990).

was a very good listener. In addition, developments in computer technology and the support of the RNIB and the Oxford University Recording Service made his work much easier, and his students were often amazed at how quickly he absorbed and responded to their drafts. He rarely questioned them about details, instead forcing them to think through the larger implications of any given argument or text. Several books published in the last decade or so began life as theses written under his supervision. His graduate seminar in property theory showed how this apparently worn-out subject could be a key to urgent modern questions of moral and political theory, and it was common to have the class double in size as students of politics and philosophy came from all over Oxford to hear him.

Apart from his work in his study and the Oxford classrooms, Jim was an excellent, indeed a compelling, lecturer to a wider public. He was invited to China, Japan, and South Africa to debate Western conceptions of property, and in 2001 he delivered the Academy's Maccabaean Lecture in Jurisprudence entitled 'Reason or Mumbo-Jumbo: the common law's approach to property' in which, in an apparently effortless and lucid discourse, he investigated some of the underlying ethical justifications for the common lawyers' apparently hidebound and jargon-ridden approach.[18] Many of his admirers were hoping that he would now turn his attention to other developments in this area such as the partial exclusion of animals from, or the inclusion of one's image within, the domain of property law.

The jurisprudence of human rights

But Jim was growing more and more interested in the 'human rights' concepts that in many jurisdictions now shape legal thought and practice, and his disciplined curiosity remained unabated throughout his final illness. His projected work on Resources and Human Rights—based on an exploration of how far different jurisdictions treat scarce resources as 'human rights'—regrettably remained unfinished at the time of his death.[19] In September 2003, however, he rose from his hospital bed to lecture to the Society of Legal Scholars meeting in Oxford on how 'human rights' might avoid becoming noisy 'mythical beasts' signifying nothing (as claimed by rights-sceptics such as Hayek and MacIntyre). This was

[18] *Proceedings of the British Academy*, 117 (2002), 445–75.

[19] This project was supported by a major award from the Leverhulme Foundation.

achieved by a penetrating analysis of the differing ways in which the words are used in argument. The brilliance of that lecture transfixed his large audience and is marked by a rather drier tone of wit than is found in his earlier works. He observes that a humanist universal ethics has come to occupy the public space that official proclamations of religious allegiance once occupied and in some cultures still do: proclamations of human rights constitute supranational articles of faith. But—as with the older commitments—sincerity is not assured.[20]

With Jim himself, however, sincerity was palpable. He was eloquent in the defence of the rights of people he disliked, and whose practices he disliked very much, to do what they like provided they did not interfere with him. His students noted that he combined a strong personal sense of duty with a strong reluctance to argue for the imposition of duties on others. Although his family background was not particularly devout he acquired, from his schooling, a strong interest in religion both as an intellectual problem and as a way of life. As a child he had been baptised in Southwark Cathedral and, at the age of sixteen, he had, quite out of the blue, what he called a 'vision' of the immanent presence of God. He rarely referred to this but, when he did so it was obvious that it was a crucial moment in his life. He became a lifelong, if low-key, Anglican with a strong intellectual interest in all other kinds of religious belief. He had some unusual views about certain aspects of Christian doctrine—for instance, borrowing from J. L. Austin, he thought that Christ's crucifixion should be viewed as a 'performative statement' about God's eternal relation to man. He was an avid and critical reader of both modern and traditional theology and, just two weeks before his death on 22 March 2004, was working his way through a complete text of Aquinas's *Summa*, having become convinced that the select-extract editions he had previously read were inadequate. At about that time a number of his colleagues and former pupils had been planning a book of essays entitled *Properties of Justice*, stimulated by his writings and his teaching, and including a bibliography. It was to have been published in his honour and has now appeared in his memory.[21] He is buried in Wolvercote Cemetery, Oxford, under a large tree that also shelters two other lawyers and Fellows of the Academy: Herbert Hart and Barry Nicholas.

[20] 'Human Rights and Mythical Beasts', *Law Quarterly Review*, 120 (2004), 428–56.

[21] Timothy Endicott, Joshua Getzler, Edwin Peel (eds.), *Properties of Justice: essays in honour of Jim Harris* (Oxford, 2006).

A final and charming paradox for such a philosophical and practical property lawyer is Jim's attitude to his own belongings. Despite his intellectual obsession with 'ownership' as a legal and philosophical construct he was almost entirely uninterested in possessions, except as they made his life and work easier. He practised charity, both in looking after his family, students and friends, and in giving away his wordly goods, during his lifetime and by his will, to worthy (and in his wife's view often quite unworthy) causes.

BERNARD RUDDEN
Fellow of the Academy

Note. In writing this I have drawn on information kindly provided by Jim Harris's family, pupils, readers, and colleagues.