

### III.—MR. HERBERT SPENCER'S THEORY OF SOCIETY.

#### II. THE LAW OF EQUAL LIBERTY.

IN the last number of *MIND* I ventured to question whether the law of equal liberty which Mr. Spencer now some thirty years ago set forth in his *Social Statics* can in any guise or form find place in that "ideal code of conduct formulating the behaviour of the completely-adapted man in the completely-evolved society,"<sup>1</sup> to determine the contents of which is the task of Absolute Ethics. It remains to consider this law as a rule prescribing the behaviour of men who are not yet perfect, for "when, formulating normal conduct in an ideal society, we have reached a science of absolute ethics, we have simultaneously reached a science which, when used to interpret the phenomena of real societies in their transitional states, full of the miseries due to non-adaptation (which we may call pathological states), enables us to form approximately true conclusions respecting the natures of the abnormalities, and the causes which tend most in the direction of the normal".<sup>2</sup> Now in *Social Statics* the law in question, the "First Principle," was thus stated—"Every man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man."<sup>3</sup> Mr. Spencer did not regard this as a complete statement of the whole duty of imperfect man. A man is bound to obey this law and in obeying it he is just; but he ought also to be positively beneficent, negatively beneficent and prudent. The field of positive beneficence grows ever narrower; still in some cases a man ought to sacrifice himself in doing good to others. He ought again to be negatively beneficent, for "various ways exist in which the faculties may be exercised to the aggrieving of other persons without the law of equal freedom being overstepped. A man may behave unamiably, may use harsh language, or annoy by disgusting habits; and whoso thus offends the normal feelings of his fellows, manifestly diminishes happiness."<sup>4</sup> This he ought not to do, for in the last resort happiness is the chief good. Again there are the self-regarding virtues; one ought to be sober

<sup>1</sup> *Data of Ethics*, § 105.

<sup>2</sup> *Ib.*

<sup>3</sup> *Soc. Stat.*, c. 6, § 1.

<sup>4</sup> *Soc. Stat.*, c. 4, § 4.

and so forth. But these "supplementary restrictions," imposed by negative beneficence and by prudence, "are of quite inferior authority to the original law. Instead of being, like it, capable of strictly scientific development, they (under existing circumstances) can be unfolded only into superior forms of expediency."

These "supplementary limitations involve the term *happiness*, and as happiness is for the present capable only of a generic and not of a specific definition, they do not admit of scientific development. Though abstractedly correct limitations, and limitations which the ideal man will strictly observe, they cannot be reduced to concrete forms until the ideal man exists."<sup>1</sup> . . . "Indeed we may almost say that the first law is the sole law; for we find that of the several conditions to greatest happiness it is the only one at present capable of a systematic development; and we further find that conformity to it ensures ultimate conformity to the others."<sup>2</sup>

Almost supreme in ethics, it is absolutely supreme in politics. In other words, though the exercise I make of the liberty which this law allows me is not morally indifferent, still it can not be right for any man, prince, potentate or parliament to restrict my freedom within any narrower bounds. Whether we be sovereigns, or whether we be subjects, we must leave every man free to do all that he wills provided that he infringes not the equal liberty of any other man.

Mr. Spencer apparently still holds by this law. It is true that in the *Data of Ethics* he nowhere states it in such plain terms as those cited above. However he tells us that the maintenance of equitable relations between men (and 'equitable' means 'equal') is "the condition to the attainment of greatest happiness in all societies; however much the greatest happiness attainable may differ in nature, or amount, or both," and that "this pre-requisite to social equilibrium," "this universal requirement," was what he had in view when he chose for his first work the title *Social Statics*.<sup>3</sup> He has also, at least as lately as 1868, told us that he "adheres to the leading principles set forth" in that book, though not "prepared to abide by all the detailed applications of them," and further that "the deductions included in Part II." (the Part which contains that deduction of proprietary rights which forms the main subject of this paper) "may be taken as representing in great measure those which the author would still draw; but had he now to express them he would express some of them

<sup>1</sup> *Soc. Stat.*, § 5.

<sup>2</sup> *Ib.*, § 6.

<sup>3</sup> *Data*, § 61.

differently."<sup>1</sup> We have reason therefore for believing that Mr. Spencer adheres to the "First Principle" (which must be among the leading principles) of *Social Statics*, and that he is still ready to deduce from it proprietary rights in somewhat the same fashion in which he set about that task in his earliest work. Nor is this all, for in his very last work, the *Political Institutions*, he recurs to the distinction which he took in 1850 between property in land and property in other things, with the result of finding a new justification for one of the most marked peculiarities of the treatment which property received in *Social Statics*. It seems therefore fair to infer that the doctrine here to be criticised is in the main Mr. Spencer's present doctrine; but in any case the fact that it once was his is a sufficient claim to respectful attention, though, should the law of equal liberty disappear from any Deuteronomy that may yet be forthcoming, this would certainly remove a difficulty from the way of some who would much rather agree than disagree with Mr. Spencer.

Now some of the applications which in *Social Statics* were made of this first principle were, so far as I am aware, quite new, and certainly they were very striking. But the principle itself was not new, for it had been stated and adopted by no less a person than Kant. It seems to me probable, if such a guess may be allowed, that in 1850 Mr. Spencer was not aware of this, for on the several occasions on which he has argued that his law is a precise expression of that idea of Justice or Equity which is more or less clearly apprehended by others, he has cited authorities very much less to the point than Kant's political or juristic writings. The dogma of equal liberty is not at all an unnatural outcome of a theory of Natural Law, or (as, to prevent all ambiguity, we may say) of Natural Right. From of old it stood written that all men are by nature free, and that all men are by nature equal, and when it had at length become plain that men clamouring for natural liberty and natural equality were not to be put off with stories about an original contract, to say that all men ought to be equally free must have seemed an obvious mode of reconciling the possibly conflicting claims of these two ideals of Natural Right. It may well be, therefore, that some exponent of *Jus Naturæ*, some natural lawyer had already hit on Mr. Spencer's first principle before it was stated by Kant. At any rate, however, it was stated by

<sup>1</sup> Preface to American edition of 1864, and Preface to English edition of 1868.

Kant, and that very plainly. Already in an essay published in 1793 we find this passage:—

“Ein Jeder darf seine Glückseligkeit auf dem Wege suchen welcher ihm selbst gut dünkt, wenn er nur der Freiheit Anderer, einem ähnlichen Zwecke nachzustreben, die mit der Freiheit von Jedermann nach einem möglichen allgemeinen Gesetze zusammen bestehen kann (d. i. diesem Rechte des Andern), nicht Abbruch thut.”<sup>1</sup>

Kant contrasts this principle of freedom with the utilitarian doctrine that a ruler should directly aim at making his subjects happy, and this latter, much in Mr. Spencer's manner, he pronounces despotic. Then in the *Rechtslehre* this rule of equal liberty stands forth as the general principle of all law (Recht).

“Das Recht ist also der Inbegriff der Bedingungen, unter denen die Willkür des Einen mit der Willkür des Anderen nach einem allgemeinen Gesetze der Freiheit zusammen vereinigt werden kann.”

“Eine jede Handlung ist *recht*, die oder nach deren Maxime die Freiheit der Willkür eines Jeden mit Jedermanns Freiheit nach einem allgemeinen Gesetze zusammen bestehen kann.”<sup>2</sup>

“Das angeborene Recht ist nur ein einziges. Freiheit (Unabhängigkeit von eines Anderen nöthigender Willkür) sofern sie mit jedes Anderen Freiheit nach einem allgemeinen Gesetze zusammen bestehen kann, ist dieses einzige, ursprüngliche, jedem Menschen kraft seiner Menschheit zustehende Recht.”<sup>3</sup>

Had the *Rechtslehre* fallen into Mr. Spencer's hands ere he wrote *Social Statics*, he might have had the satisfaction of appealing to a high philosophical authority in support of his first principle, but had he watched Kant's struggles to get out of this formula a coherent system of Natural Right, his satisfaction would probably have been alloyed with some misgivings as to the hopefulness of an undertaking which cost his great predecessor many a curious contortion. Coleridge knew well this law of equal liberty. In *The Friend*<sup>4</sup> he says that all the different systems of political justice, all the theories of the rightful origin of government are reducible in the end to three classes, correspondent to the three different points of view in which the human being itself may be contemplated. That being may be regarded as an animal, and we fall into Hobbism; or as endowed with understanding, and utilitarianism follows; or as rational, and we must have politics of the pure reason, or “metapolitics”. Coleridge professing himself an advocate of the second system (he was

<sup>1</sup> *Ueber den Gemeinspruch: Das mag in Theorie richtig sein, etc.* (Kant's *Werke*, ed. Hartenstein, vol. vi., pp. 322-3).

<sup>2</sup> *Ed. cit.*, vol. vii., p. 27.

<sup>3</sup> *Ib.*, p. 34.

<sup>4</sup> *The Friend*, First Section:—“On the Principles of Political Knowledge” (ed. 1863, vol. i., pp. 179 ff.).

utilitarian in politics though not in ethics), gives a sketch of the metapolitical system, and in doing so expressly identifies it with the French revolutionary philosophy; but as it seems to me, the theory which he states in order to refute is really an eclectic mosaic of theories part English, part French, part German. But whether or no this sketch fairly represents the opinions which had been held by any one theorist, Coleridge in the following passage not indistinctly foreshadows the main doctrine of *Social Statics*.

"Justice, austere, unrelenting justice is everywhere holden up as the one thing needful; and the only duty of the citizen, in fulfilling which he obeys all the laws, is not to encroach on another's sphere of action. The greatest possible happiness of a people is not, according to this system, the object of a governor; but to preserve the freedom of all, by coercing within the requisite bounds the freedom of each. Whatever a government does more than this, comes of evil: and its best employment is the repeal of laws and regulations, not the establishment of them. Each man is the best judge of his own happiness, and to himself must it therefore be entrusted. Remove all the interferences of positive statutes, all monopoly, all bounties, all prohibitions, and all encouragements of importation and exportation, of particular growth and particular manufactures; let the revenues of the state be taken at once from the produce of the soil; and all things will find their level, all irregularities will correct each other, and an indestructible cycle of harmonious motions take place in the moral equally as in the natural world. The business of the governor is to watch incessantly, that the state shall remain composed of individuals, acting as individuals, by which alone the freedom of all can be secured."<sup>1</sup>

Now Coleridge, certainly not biased against the claims of pure reason, rejected the law of equal liberty because, as he thought, it must condemn property. "It is impossible," he says, "to deduce the right of property from pure reason."<sup>2</sup> To this he appends a characteristic foot-note, "I mean practically and with the inequalities inseparable from the actual existence of property. Abstractedly, the right to property is deducible from the free agency of man. If to act freely be a right, a sphere of action must be so too." We may doubt whether a kind of property, the *esse* of which is *abstrahi*, can be of much value to its owner, but probably Coleridge has his eye on Kant and means that between proprietary rights and the law of equal liberty there is no formal, though there is of necessity a practical contradiction. Kant, as it seems to me, had evaded rather than solved the problem by introducing alongside of his "Allgemeines Princip des Rechts," a "Rechtliches Postulat der praktischen Vernunft". Every external object of desire must, he argues, be capable of appropriation. In order that it may be used, it must be appropriated, and it would be absurd to say that anything

<sup>1</sup> First Section, Essay 4 (vol. i., pp. 219-220).

<sup>2</sup> *Ib.* 222.

useful can not rightfully be used. The easy reply is that doubtless this is so, that a political theory which condemns to eternal uselessness things that are useful condemns itself as worse than useless; but this does not prove that an admission of this postulate of practical reason is not an infringement of the inborn right of every man to have equal liberty with each of his neighbours. Kant, as I understand him, thought it enough to say that there is no formal contradiction between his postulate and his principle. Certainly there is none, for neither formal logic nor any principles which Kant could discover *a priori* can prove that we are not living in a world wherein it is possible for each of us to satisfy his every wish and yet leave unappropriated as many objects of desire as his fellows can possibly want. Such will perhaps be our condition when we are fully-adapted men in a fully-evolved society, but we happen to know substantially, if not formally, that such is not our present condition and that were it our condition the idea of property, of exclusive right, would be absurd. Who, asks Coleridge, ever thought of property in heaven, property among angels and glorified spirits, beings of pure reason? And why, asks Hume,<sup>1</sup> raise landmarks between my neighbour's field and mine when my heart has made no division between our interests, but shares all his joys and sorrows with the same force and vivacity as if originally my own? Property means that the world being what it is and men being what they are, every man cannot have all that he wants.

The real problem which has to be faced by any scheme of Natural Jurisprudence which rejects arguments based on mere expediency, is just the old problem which Locke set before him, though the terms in which it has to be stated may be new. God made all men free and equal and gave the earth to them in common; it is required to find a justification for exclusive proprietary rights. It is required to find a justification; the conclusion to which the theorist must come is a foregone conclusion, for, as Locke pointed out in memorable words, proprietary rights there must be if the human race is to exist. Carry our socialism never so far, we must end with appropriation, and appropriation by individuals. When did the acorns become the property of the natural man—"when he digested? or when he eat? or when he boiled? or when he brought them home? or when he picked them up?"<sup>2</sup> At latest they must be his when

<sup>1</sup> *Inquiry concerning the Principles of Morals*, sec. 3, pt. 1.

<sup>2</sup> *Of Civil Government*, § 28.

they are fairly in his stomach. Mr. Spencer knew well how to use this argument against "M. Proudhon and his party," and of course there is a plain absurdity in saying that no appropriation can be just. It does not follow, however, that the law of equal liberty is not committed to this absurdity and merely refrains from declaring that property is theft because the use of a word like *theft*, which commonly imports some blame, might seem to imply that property is at least possibly rightful.

We may now consider how Mr. Spencer, in 1850, sought to avoid this ugly and impotent conclusion. Most certainly he meant to avoid it; every man would so mean, but he more than others, for his practical teaching in politics requires that proprietary rights shall be built on a foundation so sure that they can resist the attacks of any occasional exceptional expediency. He begins, as I venture to think, very logically by making large, but not too large, concessions to the anarchist.

"Given a race of beings having like claims to pursue the objects of their desires—given a world adapted to the gratification of those desires—a world into which such beings are similarly born, and it unavoidably follows that they have equal rights to the use of this world. For if each of them has freedom to do all that he wills, provided he infringes not the equal freedom of any other, then each of them is free to use the earth for the satisfaction of his wants, provided he allows all others the same liberty. And, conversely, it is manifest that no one, or part of them, may use the earth in such a way as to prevent the rest from similarly using it; seeing that to do this is to assume greater freedom than the rest and consequently to break the law. Equity, therefore, does not permit property in land."<sup>1</sup>

This we must allow to be very sound argument, very much more logical than anything in the *Rechtslehre*. By *world*, however, Mr. Spencer must mean the material universe, and when the *world* of the first sentence becomes the *earth* of the second, and the *land* of the fourth, we think that he is but drawing by way of example a particular conclusion from general premises. So with *property*, this word in our ears connotes some large and permanent right, for we are not accustomed to say that the man in the street is proprietor of the spot upon which he is standing. What "Equity" really does not permit is the exclusive possession by one man of any particle of matter which any other men wish to possess, or the exclusive, though but temporary, occupation of any part of space that any other men wish to occupy. There follows a *reductio ad absurdum* of any contrary opinion. "If *one* portion of the earth's surface

<sup>1</sup> *Soc. Stat.*, c. 9., § 1.



may justly become the possession of an individual, and may be held by him for his sole use and benefit, as a thing to which he has an exclusive right, then *other* portions of the earth's surface may be so held, and eventually the *whole* of the earth's surface may be so held." This truth of course holds good of other things besides the earth's surface. If one atom may be owned, all atoms may be owned. "Observe now the dilemma to which this leads. Supposing the entire habitable globe to be so enclosed, it follows that if the landowners have a valid right to its surface, all who are not landowners, have no right at all to its surface. Hence such can exist on the earth by sufferance only. They are all trespassers."<sup>1</sup> Worse is behind if theft be worse than trespass, for should we concede property in one molecule inexorable logic may eventually drive us to concede property in all molecules, and our dilemma will then be theft or suicide.

It is true that Mr. Spencer, for some reason or another, spends most of his indignation on property in land. This however does not prevent him from dealing out, in a later passage, impartial though less rhetorical condemnation against such property in movables as now exists. In the meantime he disposes briefly of the existing titles of landowners. It can never be pretended that they are legitimate. "Should any one think so, let him look in the chronicles. Violence, fraud, the prerogative of force, the claims of superior cunning—these are the sources to which those titles may be traced. The original deeds were written with the sword, rather than with the pen: not lawyers, but soldiers, were the conveyancers: blows were the current coin given in payment; and for seals, blood was used in preference to wax. Could valid claims be thus constituted? Hardly." A title originally bad can not be made good by transfer. Sale or bequest can not generate a right. Nor can lapse of time validate the invalid. Clearly the law of equal liberty can not recognise any particular term of years as sufficient to turn trespass into ownership. Then we are told that "not only have present land-tenures an indefensible origin, but it is impossible to discover any mode in which land *can* become private property". The pleas of title by first occupation, by improvement, by, in Locke's phrase, "mixing one's labour" with the land, are dispelled in a spirited dialogue between a "cosmopolite" and a backwoodsman who has made unto himself a clearing.

<sup>1</sup> *Soc. Stat.*, § 2



"The world is God's bequest to mankind," says the former, all men are joint heirs to it; you amongst the number. And because you have taken up your residence on a certain part of it, and have subdued, cultivated, beautified that part—improved it as you say, you are not therefore warranted in appropriating it as entirely private property."<sup>1</sup>

This is equally true of all things other than land. We may subdue, cultivate, beautify, work up into this form or that form, but matter we can not make, and it belongs to mankind. "The world is God's bequest to mankind; all men are joint heirs to it"; and if no one has a right to take a bit of it, cultivate it, and call it his own, still less can he have a right to carry a bit bodily away in his hands, his pocket, or his stomach and thus consummate a constructive theft by actual asportation. For this conclusion we must wait until the next chapter: but we get it in good time.

"The reasoning used in the last chapter to prove that no amount of labour, bestowed by an individual upon a part of the earth's surface, can nullify the title of society to that part, might be similarly employed to show that no one can, by the mere act of appropriating to himself any wild unclaimed animal or fruit, supersede the joint claims of other men to it. It may be quite true that the labour a man expends in catching or gathering, gives him a better right to the thing caught or gathered, than any one other man; but the question at issue is, whether by labour so expended he has made his right to the thing caught or gathered, greater than the rights of all other men put together."<sup>2</sup>

Besides, his right can only be admitted if after the appropriation there is, in Locke's words, "enough and as good left in common for others". "A condition like this gives birth to such a host of queries, doubts, and limitations, as practically to neutralise the general proposition entirely," and out of this inquisition "it seems impossible to liberate the alleged right without such mutilations as to render it in an ethical point of view entirely valueless".

"Abstractedly," then, as Coleridge said, there may be a right of property, but practically this is entirely valueless. Property might be rightful in certain conceivable or inconceivable circumstances (circumstances, by the way, that would render the notion of property absurd), but these circumstances are not ours. The landowner and the owner of movables are in the same position, and (though Mr. Spencer does not emphasise this conclusion) all existing titles to property of every kind are bad. Indeed in almost all, if not all, cases no title can be made to a movable that does not involve an admission that there may be property in

<sup>1</sup> *Soc. Stat.*, c. 9, § 4.

<sup>2</sup> *Ib.*, c. 10, § 1.

land. Whence the title to an apple, a shilling, a coat? Exchange or gift has not generated it; time has not consecrated it. It is null.

The outlook now seems hopeless, and we are beginning to think that Mr. Spencer's "cosmopolite" was really a chaopolite in disguise. But the law of equal liberty having sufficiently proved its power as an engine of impartial destruction, the time for reconstruction has come, and Mr. Spencer has ready for us a scheme which shall give to proprietary rights a legitimate foundation; in theory a very simple scheme, whatever may be the practical difficulties which will impede its accomplishment. He did not recommend what is called "the nationalisation of the land"; that would have helped him but a little way, if any way, towards establishing an equitable system of property. Englishmen can have no better title to England than has Lord A to his deer-forest. We must not exclude Germans or Frenchmen, or the Chinese or the Chinooks from sharing in the rents and profits of our fertile island. The surface of the earth is to be owned by "the public," "the great corporate body—Society," "the community," "mankind at large," and is to be let out upon leases at the best rent. This done, "all men would be equally landlords; all men would be alike free to become tenants". Under this system of land-tenure all difficulties about property in movables disappear "and the right of property obtains a legitimate foundation".<sup>1</sup>

Does it? This is a serious question; for, however far distant may be the time when mankind at large will "resume" the ownership of the soil, even a theoretical deliverance from our apparently incurable immorality would be of some value. Now suppose that the resumption has taken place. All men are equally landlords, but are all men equally free to become tenants? All men, it is true, are "equally free to bid" for a farm, just as all men are even now equally free to bid for whatever lands or goods are in the market. If all that the law of equal liberty requires in the matter of land-tenure is that every man shall be equally free to bid for land that law is perfectly fulfilled in this country at this moment. But existing titles, it may be said, are bad, and men can not at present purchase an "equitable" title. The answer is that this truly unfortunate state of things will not be improved by the resumption. Mr. A will outbid his fellows for a site in the best quarter, for the best farm, the best moor. What will enable him to do so will

<sup>1</sup> *Soc. Stat.*, c. 10, § 2.

be his superior wealth, and his wealth will be then as now illgotten. In whatever it may consist, coin or cotton or what not, it will consist of matter subtracted from the common stock of mankind. Sale or bequest can not turn wrong into right, lapse of time will not legalise what was once unlawful, and the long and short of it is that A or his predecessors in title must have robbed mankind and he is to be left in possession of the stolen goods and even suffered to acquire by means thereof a lease of public land. Our original sin of wrongful appropriation is not thus to be purged away.

An equal division of all wealth, which Mr. Spencer would strenuously resist, seems at first sight a more hopeful project. Once let there be an equitable distribution of all desirable things, then, it might be thought, we could leave the future to the law of equal liberty. But to a similar proposal (restricted however to an equal division of land) Mr. Spencer has given a very noteworthy answer. After urging the difficulty of making a really fair allotment, he asks :—

“Is it proposed that each man, woman, and child, shall have a section? If so, what becomes of all who are to be born next year? And what will be the fate of those whose fathers sell their estates and squander the proceeds. These portionless ones must constitute a class already described as having no right to a resting-place on earth—as living by the sufferance of their fellow-men—as being practically serfs. And the existence of such a class is wholly at variance with the law of equal freedom.”<sup>1</sup>

The same, be it observed, will happen after as before the “resumption” of the land. Portionless ones will be born with no more chance of holding land for years than they now have of owning land absolutely. But it is more important to notice that here Mr. Spencer throws away the last hope of squaring property with the law of equal liberty. Were it not for the claims of children yet unborn we might harden our hearts and say that this law is not retrospective. Let us sanction existing titles, or let us make some fresh distribution of wealth that seems better than the present, then pass a sponge over the past and abide by our law for the future. But “until it can be proved that God has given one charter of privileges to one generation, and another to the next,” or to adopt other terms, until it can be proved that men hereafter to be born are not *men* within the meaning of our law, we shall find no answer to Mr. Spencer's question, what is to become of all who are to be born next year? They will come into an appropriated world, appro-

<sup>1</sup> *Soc. Stat.*, chap. 9, § 5.

priated without their consent. Redistribution of wealth on the birth of every child is what our law requires. To find Mr. Spencer sanctioning the claims of those "whose fathers sell their estates and squander the proceeds" may surprise us. His usual doctrine is that the sons of the industrially unfit shall not be heirs with the sons of the fit. If the fathers eat sour grapes we must not hinder the salutary process of evolution which sets the children's teeth on edge. Very possibly this argument about portionless ones may have escaped him unadvisedly in the course of controversy with an imaginary opponent, but it is a sound argument, one sanctioned by the law of equal freedom. If we are to tell the child of penniless parents that he is just as free as the rest of us to acquire property by contract or gift we must make exactly the same remark to Mr. Spencer when he denounces "landlordism".

In short, if we are going to be really serious about our law of equal liberty, and think it capable of a "strictly scientific development," we must prepare some scheme which will equalise the advantages of all children hereafter to be born. Any such scheme would be ridiculous enough and, what is more, would be condemned by Mr. Spencer as worse than ridiculous. There remains but one other course; we may adopt the good old device of a constructive contract to which most of Mr. Spencer's predecessors in the attempt to square property with natural liberty and equality have found themselves sooner or later reduced. But much experience has warned us that if once we take to constructive contracts, we may indeed by the exercise of a little metaphysico-legal legerdemain construct whatever pleases us, but it is easiest and simplest to reconstruct pure Hobbism and then our Law of Nature becomes *Quod principi placuit*.

We have seen that according to *Social Statics* the title which any one can now have to movable goods is "in an ethical point of view entirely valueless". Perhaps on this point Mr. Spencer has changed his mind. In *Political Institutions* he insists on the distinction between property in land and property in other things. The one is still "established by force," but the other is now "established by contract". This is presented to us not as guesswork or declamation, but as the sober result of scientific sociology. That this theory is groundless might, in my opinion, be shown even from the evidence which Mr. Spencer brings for its support, but a discussion of history would here be quite out of place. We are concerned with what has been only in so far as it determines what ought to be, and all Mr.

Spencer's historical generalisations shall therefore be taken as true. We must ask then what inferences he draws from the history of property as to the relations which will exist between men in the ultimate stage of human progress and therefore in that ideal society which it is the business of Absolute Ethics to describe. The answer shall be given in his own words.

"At first sight it seems fairly inferable that the absolute ownership of land by private persons, must be the ultimate state which industrialism brings about. But though industrialism has thus far tended to individualise possession of land, while individualising all other possession, it may be doubted whether the final stage is at present reached. Ownership established by force does not stand on the same footing as ownership established by contract; and though multiplied sales and purchases, treating the two ownerships in the same way, have tacitly assimilated them, the assimilation may eventually be denied. The analogy furnished by assumed rights of possession over human beings, helps us to recognise this possibility. . . . Similarly at a stage more advanced it may be that private ownership of land will disappear. As that primitive freedom of the individual which existed before war established coercive institutions and personal slavery comes to be re-established as militancy declines; so it seems possible that the primitive ownership of land by the community, which, with the development of coercive institutions lapsed in large measure or wholly into private ownership, will be revived as industrialism further develops. The *régime* of contract, at present so far extended that the right of property in movables is recognised only as having arisen by exchange of services or products under agreements, or by gift from those who had acquired it under such agreements, may be further extended so far that the products of the soil will be recognised as property only by virtue of agreements between individuals as tenants and the community as landowner."<sup>1</sup>

The extreme caution of this prophecy will not escape notice; "it may be doubted," "may eventually be denied," "this possibility," "it may be," "it seems possible," these phrases expressive of hesitation and doubt seem to me most appropriate. Certainly "it may be doubted whether the final stage" of property-law "is at present reached," and for my own part I do not wish to deny that some day the state (possibly mankind at large) may make itself the supreme landlord and let out the land on leases. But the final stage is the ideal stage, and the success of Absolute Ethics depends upon our knowing something, and something precise about the final stage. It is really a matter of some importance to know whether property in land is demanded, or sanctioned, or tolerated, or condemned by the law of equal liberty, and if from Absolute Ethics we get no more than leave to doubt whether such property is rightful, it is to be feared that after all we must fall back on the "moral infidelity" of utilitarianism. Mr. Spencer compares the

<sup>1</sup> *Political Institutions*, § 540.

ownership of land to the ownership of slaves, and the comparison is apt for our purpose. As to the latter the law of equal liberty speaks unequivocally ; for the right to personal freedom is perhaps the only right, save the right to life, that can be deduced therefrom. Even if we find some difficulty in persuading our law to condemn slavery founded upon contract, there is always open the way of escape to which Kant resorted, that, namely, of saying that the man who sells himself into slavery makes himself a thing, and being a thing can not be bound by his contract. But we must, if possible, prevail on the law to yield us as definite a conclusion about the ownership of lands and goods.

We must perforce admit for the sake of argument that property in land was "established by force"—the first deeds shall be written not with the pen but with the sword if Mr. Spencer so pleases. Nor will we dispute that property in movables is "established by contract," but to this phrase we must give some plausible meaning. It is true that in every civilised community the title to chattels is very often a title by contract, a title by sale. The *régime* of contract, to quote Mr. Spencer's words, is at present so far extended that the right of property in movables is recognised only as having arisen by exchange of services or products under agreements, or by gift from those who had acquired it under such agreements. This is not quite true, for the only title a proprietor has may have arisen from long-continued peaceable possession, and the easy admission that such a title is good is a characteristic mark which distinguishes late from early law. Still Mr. Spencer's proposition is in the main true, but then it is already just equally true of property in land. Purchase, gift, inheritance, undisputed possession, these are the titles to land as well as to goods. As a matter of fact, for the last three or four hundred years illegal force has had just as little to do with the transfer of land in this country as with the transfer of goods, and legal force has had quite as much to do in protecting the owner of chattels as in protecting the landowner. But of course it is not of the title to existing chattels that Mr. Spencer speaks, for trace that title but two or three stages back and it is seen to involve a title to land and therefore to be established by force. It must be of property as an institution and of the beginnings of that institution that he speaks, and it must be here that he finds reason for the antithesis of force and contract. Men have agreed that there shall be property in movables, they have not agreed that there shall be property in land. Now we must not seriously impute to Mr. Spencer the queer old notion that

men did not respect property in movables until, in due form of Natural Law, they had agreed to respect it, but he shall have the advantage of every hypothesis, however extravagant, as to the past. Suppose even that all men met together and made solemn compact that there should be property in movables. Suppose also that this display of ancestral wisdom demands our humblest reverence. All this is not to the point when we are considering the question raised in *Social Statics*, whether our present or any other distribution of proprietary rights can be sanctioned by that impracticable First Principle. How, we are driven to ask, are you to make good your right to the money in your purse, the wine in your cellar, the cotton in your warehouse? Some one owned a mine, a vineyard, a plantation, and you (to put your case at its best) have bought from him. But his property was established by force, his land was part of the common inheritance. "Would the original claimants be non-suited at the bar of reason because the thing stolen from them had changed hands? Certainly not."<sup>1</sup> Your right is "in an ethical point of view entirely valueless," and no historical theory can give it any value, unless, indeed, we are to suppose that property in land as well as property in movables is somehow or another "established by contract". At least this can not be done by any theory that will bear one moment's consideration. This qualification I add because in his latest work Mr. Spencer contrasts private property in "things produced by labour" with private property in "the inhabited area which can not be produced by labour".<sup>2</sup> Of course, however, after his refutation of Locke and the backwoodsman he does not intend to base property on labour. The author of *First Principles* has not yet to learn that man does not make matter, the author of *Social Statics* has not yet to learn that mixing our labour with matter does not make that matter ours.

If this reasoning be sound it is hardly worth while to suggest any further difficulties. In these pages, at least, it would be unnecessary to say that should we deduce from our law of equal liberty the rightfulness of something called *property*, little is thereby accomplished. We want to know very much more than this before we can admit the success of Mr. Spencer's method. We want, for instance, to know something about the extent of testamentary power which this law permits or prescribes, and there is still, outstanding, that old question which Locke put to Sir Robert Filmer—Who is heir by the law of

<sup>1</sup> *Soc. Stat.*, c. 9, § 3.<sup>2</sup> *Pol. Inst.*, § 541.



nature? One remark must suffice to show the nature of these difficulties. It does seem, as Mr. Spencer himself thought, quite out of the question, that his principle should permit a man to gain a right simply by persistent wrongdoing. But to admit that a right may thus be gained, is, as already said, a marked characteristic of civilised law, and the more civilised, the more industrial we become, the easier we make it for men to acquire property in this way. We do not even feign that the rightful owner has acquiesced in the usurpation or been negligent about the assertion of his rights. At one moment a man is a trespasser; the clock strikes, and he is the rightful owner. How can the law of equal liberty sanction or tolerate this, without sanctioning, or, at least, tolerating whatever rules imposed by prince or parliament prove for the convenience of mankind?

So much has here been said of proprietary rights, that little, if any, space remains for the consideration of those other rights which Mr. Spencer proposed to deduce from his First Principle. His treatment of property has particular claims upon our attention both because it is, as yet, the most fully worked-out example of the results that may be expected from Absolute Ethics, and because the practical part of his political teaching requires that he should place proprietary rights beyond the reach of any assaults that may be made by socialist or opportunist. But a very brief glance may be cast at his deduction of some other rights.

The first rights which he sought to obtain were "the rights of life and of personal liberty".<sup>1</sup> These, as I think, must be conceded to him. If A kills B it is physically impossible that B should kill A, and if A puts B under lock and key, then so long as the restraint lasts, B is not free to do the same by A. One naturally expects that Mr. Spencer will next deduce that right to be free from bodily injury, from wounds and blows, which is nearly related to the rights just mentioned. It may be by an accident that he has omitted to do so, or he may not have thought it worth doing, but none the less the task has its difficulties. If A smites B, the latter not unfrequently finds himself perfectly free to repay the blow with interest. This is not always the case, and very antique law does draw a marked distinction between an injury that does and an injury that does not deprive the injured person of the power of fighting; but it would be a curious justification of semi-barbarism were maiming, condemned by our First Principle, the only

<sup>1</sup> *Soc. Stat.*, c. 8.

principle at present capable of scientific development, while mere "dry blows" were subjected only to the empirical restrictions of negative benevolence. A way of escape might seem to be open to us in the doctrine that "every pain decreases vitality,"<sup>1</sup> that every pain involves some loss of power and therefore some loss of liberty. But Mr. Spencer distinctly refuses to avail himself of this refuge, and could hardly do so without falling into the unscientific utilitarianism. "A man may behave unamiably, may use harsh language, or annoy by disgusting habits; and whoso thus offends the normal feelings of his fellows, manifestly diminishes happiness."<sup>2</sup> Nevertheless we are told that his conduct is not condemned by the law of equal liberty; he merely fails in negative beneficence. What is true of the pain occasioned by harsh language is seemingly true also of the pain occasioned by a cuff or a kick; each, if Mr. Spencer's biology and psychology be correct, will decrease vitality, but the latter need no more than the former prevent him who is hurt from having equal liberty with him who hurts.

Thus among the acts causing bodily pain for which men now are punished or compelled to make reparation we must distinguish those which do from those which do not infringe the law of equal liberty; for it is only the former that the state may use its power to suppress, and any attempt to suppress the latter by coercive action would itself be a breach of the law. The result will be not a little strange, but there seems no choice except to hold either that he who beats his neighbour is not to be punished or that he who speaks harshly to his neighbour may rightfully be punished if pain will be saved thereby.

A similar difficulty occurs when we pass to "the right of property in character".<sup>3</sup> Mr. Spencer argues that a good reputation may be regarded as property, but in the end admits that possibly his reasoning may be thought inconclusive.

"The position that character is property may be considered open to dispute; and it must be confessed that the propriety of so classifying it is not provable with logical precision. Should any urge that this admission is fatal to the argument, they have the alternative of regarding slander as a breach, not of that primary law which forbids us to trench upon each other's spheres of activity, but of that secondary one which forbids us to inflict pain on each other."

This, he says, illustrates a remark previously made, namely, that the division of morality into separate sections,

<sup>1</sup> *Data*, § 36.<sup>2</sup> *Soc. Stat.*, c. 4, § 4.<sup>3</sup> *Ib.*, c. 12.

though needful for our due comprehension of it, is yet artificial.<sup>1</sup> Now it may at once be allowed that were this a question of mere classification, a question whether the rule which forbids slander looks best under the heading of Justice or the heading of Beneficence, it would hardly be worth discussing, being a matter of taste; but the question whether slander be forbidden by the First Principle is surely one of substantial importance, for on our answer to it depends whether or not the community may rightly strive to prevent slander by punishing the slanderer and giving the slandered a claim for reparation. To use coercion when it is not needed for the maintenance of equal liberty is to infringe the sovereign rule.

It may seem easy at first sight to get from this rule that "right of property in ideas,"<sup>2</sup> for which Mr. Spencer vigorously pleads, but really in this case there is just the same difficulty to be met as that which faced us when discussing property in material things. The poet, the artist, the inventor, the discoverer, has but like the confuted backwoodsman made unto himself a clearing, improved some part of the common inheritance and mixed his labour therewith. The cosmopolite must explain to him also, that appropriation is only lawful when "enough and as good is left in common for others". A man who wrote a book and could conscientiously say of it that nothing therein contained was due to any one but himself, would assuredly need no law of copyright to protect him in the enjoyment of his perfect originality. Mr. Spencer does not say this, but he does grant that this proprietary right cannot be admitted without limitation, for it is highly probable that the causes leading to the evolution of a new idea in one mind will eventually produce a like result in some other mind. "Such being the fact, there arises a qualification to the right of property in ideas which it seems difficult and even impossible to specify definitely."<sup>3</sup> "Such a difficulty does not," we are told, "in the least militate against the right itself," and yet another important department of law seems here handed over to the empiricist.

Of the rights of women, the rights of children and, above all, that crowning right, the right to ignore the state, it would hardly be fair to speak at present, since here we have both warning in the preface to *Social Statics* and some indications in other books that we are not yet in full possession of Mr. Spencer's mature opinions. He perhaps would now say that

<sup>1</sup> *Soc. Stat.*, § 3.

<sup>2</sup> *Ib.*, c. 11.

<sup>3</sup> *Ib.*, c. 11, § 5.

the right to ignore the state will never exist as a right, but that the time will come when no society or community will wish to retain a member who wishes to be quit of it. Apparently he does not think that we have yet reached the stage when the law of equal liberty should without reserve be applied to women, and the liberties of children are certainly not what they were in 1850. "While an average increase of juvenile freedom is to be anticipated, there is reason to think that here and there it has already gone too far. I refer to the United States."<sup>1</sup> In mitigating his claim for a free nursery Mr. Spencer has, as it seems to me, made a large concession to common opinion, but at the same time thrown fresh doubt upon his First Principle. "For, if it be asserted that the law of equal freedom applies only to adults; that is, if it be asserted that men have rights, but that children have none, we are immediately met by this question—When does the child become a man? at what period does the human being pass out of the condition of having no rights, into the condition of having rights? None will have the folly to quote the arbitrary dictum of the statute-book as an answer."<sup>2</sup> The temptation to quote the arbitrary dictum is not overpowering, but some sort of answer is now required of Mr. Spencer himself, and it seems likely that the word *man* in our supreme rule must be subjected to an interpreting clause which will be no better than a piece of most empirical utilitarianism.

It is still however possible to hope that Mr. Spencer will make over, or has already made over, the law of equal liberty to its true owners, the metapoliticians, the people who would solve ethical and political problems by juristic methods. They know what to do with it, and by implying a contract here and inventing an estoppel there can turn out a result sometimes ingenious and not always anarchical. But Mr. Spencer is much too great a philosopher to stoop to these little tricks of the trade, and will find, or perhaps has already found, that his practical teaching in politics has nothing to gain from alliance with this unmanageable formula.

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<sup>1</sup> *Principles of Sociology*, § 341.

<sup>2</sup> *Soc. Stat.*, c. 17, § 1.