

The Core of the Biological basis of Law

Hugh Gibbons with Kee Kim and Shannon Synan
Franklin Pierce Law Center, Concord NH

1.0 Law emerges from biology

Any body of law is based upon several things, most obviously upon the culture and history from which it has developed, and upon the desires of the people it governs. The biological basis of law identifies the universals that underlie all law. Just as the great variety of human languages obscures the common biological basis of language, so also the variations in bodies of law mask a common biological process upon which all law is based. That basis and the underlying legal structure that results from it is the subject of this theory.

1.1 Brains cause minds

According to the American Heritage Dictionary the mind is “the consciousness that originates in the brain and directs mental and physical behavior.” The very definition of mind attributes it to the brain. The biological basis of the mind provides the framework by which we can make objective statements about the mind. It allows us to make the following definition: A reasonable person is one with a fully grown, healthy brain.

- 1.1.1 Mind is the consciousness that originates in the brain and directs mental and physical behavior; the mind is itself biological.

1.2 Minds cause wills

Will is the subjective experience that each one of us has of ourselves as the cause of our own actions. To say that we “will” something is to say that we perceive that our desire causes our action and our action causes change. Will is the basis for individual responsibility. Willed beings claim responsibility for their successes and, while they may try to avoid it, are equally responsible for their failures. For beings who are aware that they are causes, responsibility follows any action that they chose. Where one has a number of alternative actions to choose from, one experiences freedom.

- 1.2.1 Will is the experience of being the cause of one’s own actions.
- 1.2.2 A person is responsible for the effects of his or her willed actions.
- 1.2.3 Freedom is the experience of having a number of lively alternatives that one may choose from.

1.3 Wills cause undertakings

Undertakings are actions that cause a change in the world. Undertakings are driven by desire, by an intention to change the world into one that satisfies the desire. A desire is a mental picture of the world. Actions that are produced by seizure disorders, hallucinations, and the like are not undertakings. The action is not produced by a willed actor and no responsibility follows from it.

1.3.1 An undertaking is an action to achieve a desire.

1.3.2 A desire is a mental image of the world.

1.4 Undertakings cause risks

A risk is the potential that the causal capacity of another person will be diminished or destroyed by one's undertaking. A person's causal capacity is the ability to bring about changes in the world. Causal capacity can be reduced by physical, emotional or reputational injury, by the failure of something that one had come to expect, by physical restraint, or by damage to one's self-concept. In all cases, the risk, if it occurs, will make it more difficult for another to pursue his or her desires. Risk is a quality of the action, not of the status of the actor. The risk posed by prince and pauper for the same action is identical.

1.4.1 A risk is the potential that the causal capacity of another person will be diminished or destroyed by one's undertaking.

1.4.2 A person's causal capacity is the objective measure of the person's ability to cause changes in the world.

1.4.3 The status of the actor has no bearing upon the risk created.

1.5 Risks create duties

The person who is anticipating an action has a duty that is defined by the risks caused by that action. The duty arises out of the risk. The duty is dependent upon the context of the action. The universal duty is to use "reasonable care"—that level of care that a reasonable person would exercise under the same circumstances. Put in terms of the Golden Rule, the duty is to treat others as the actor would have them treat him. Where it is feasible, the duty of care requires the actor to gain the willing acquiescence of any who will be put at risk.

1.5.1 The duty of care is universal.

1.5.2 The duty of care requires the actor to gain the willing acquiescence of any who will be put at risk, if that is feasible, and to act with reasonable care for those who will be put at risk if willing acquiescence is not feasible.

1.6 Breaches of duty create rights

The failure of the actor to use reasonable care creates a right in those who are put at risk. The breach has a profound emotional impact, not simply on the victim but generally upon those who perceive the breach and identify with the victim, suggesting the existence of a sense of justice. The emotional impact of the right makes it a public act.

The risk need not result in injury for the right to emerge. It is the breach of duty that creates the right. The right allows the victim to treat the actor in a way that would otherwise breach the duty of care. That is, the victim can use coercion upon the actor for self-protection and to redress the wrong.

- 1.6.1 A breach of duty creates a right, whether or not the risk has resulted in an injury.
- 1.6.2 Rights demand enforcement.
- 1.6.3 The right entitles the victim to breach the duty of care to redress the wrong.

1.7 Rights cause sovereignty

A sovereign is entitled to use coercion. The victim of a breach of duty becomes the sovereign of the wrongdoer, entitled to use coercion to redress the breach. Sovereignty is transferable. One who comes to the aid of a victim is entitled to exercise sovereignty on behalf of the victim to redress the wrong.

- 1.7.1 Sovereignty grants the sovereign the ability to use coercion without breaching the duty of care
- 1.7.2 One may exercise sovereignty on behalf of the victim of a breach of duty.

1.8 Sovereignty causes law

Sovereignty is not self-enforcing. With only the victim's enforcement powers to worry about, the wrongdoer would prosper by any action that: (1) harmed the victim so badly that he could not respond; or (2) made it difficult to determine who had breached the duty. The inherent weakness of self-help creates an incentive which requires the intervention of others. Law is the name of the institution that emerges to exert the sovereignty of victims of a breach of duty. Law assumes the victim's sovereignty, the right to use coercion.

- 1.8.1 Biology alone provides no effective mechanism for the enforcement of rights.
- 1.8.2 Law is a formal institution that addresses the limitations presented by biology to the protection of human freedom.

2.0 The purpose of law is to protect and expand freedom.

As with any institution, the purpose of law is constituted by the purposes of those whose actions animate it. That is the sense in which any institution can be said to have a purpose. Historically, law has been used to expand the freedom of individual rulers, oligarchies, dominant classes, and the like, all supported by the particular history and beliefs of the society. The biological basis of law supports the use of law to provide for the freedom of any who have the capacity for freedom.

2.1 Freedom is the experience of having a number of different actions that one can undertake.

The experience of freedom is the perception of one's repertoire of possible actions, of choices. The broader the range of possible actions and the greater one's resources, the broader the range of desires that one may realistically pursue. Action is triggered by the choice to pursue one desire rather than another.

2.1.1 The Freedom Set is a person's list of perceived alternatives at a given time.

The experience of freedom is the experience of having a lively Freedom Set. That perception may be wrong, so that one or more elements of the Set are not objectively possible. The person who chooses to pursue one of them will fail.

2.1.1.1 The vitality of the Freedom Set is measured by both the number of desires that can be pursued and the potential satisfaction associated with each of them.

2.1.2 Freedom is the union of one's Freedom Set with one's causal capacity.

Freedom is inhibited by both objective and subjective constraints. The objective constraints consist of limitations on one's causal capacity. No matter how strongly you may desire to visit Mars, you lack the causal capacity to do so (though the advent of new technology can make an undertaking that was not possible feasible in the future, thereby increasing freedom). The subjective constraints are knowledge and desire. Even if something is possible, if a person is not aware of it or does not desire it, it does not exist as a lively option.

2.1.2.1 The union of the Freedom Set and the causal capacity set establish one's prospects, the person's realistic set of alternative actions.

2.2 Freedom is caused.

One's causal capacity is largely a function of the actions of others. It is increased by the invention of new possibilities and of improvements in existing possibilities. It is improved by new forms of cooperation that make it simpler to gain the acquiescence of others. It is improved by curing disease, teaching new skills, explaining that which was previously mysterious. Along with other social institutions, law can increase causal capacity.

2.2.1 Law protects freedom by enforcing rights.

In this role, law protects each person from the willed actions of others. Law defends liberty, where liberty is the state of being free from the willed actions of others. Willed actions that diminish individual Freedom Sets become willed constraints. Like the natural constraints of gravity and disease, willed constraints diminish freedom. But willed constraints have the added emotional impact of injustice. Enforcing rights addresses injustice and expands liberty.

2.2.2 Law expands freedom by providing entitlements and entitlement systems.

Entitlement systems, like property and contract law, provide the infrastructure for cooperation. Entitlement programs, like public works and education, deliver cooperation itself by providing goods that would be difficult or impossible to achieve without it. These systems are the means by which Freedom Sets are enhanced.

2.2.2.1 Entitlements establish the formal basis for the interaction between the members of a society through the creation of duties.

Property law and public benefits law, for example, both create duties, duties over and above those defined by the duty of care. Property law creates the duty to treat one's property as if it were an extension of the owner's person, so it extends the duty of care to things. Public benefits programs create duties in administrators to act for the benefit of designated people.

2.2.2.2 Failure to shoulder the duties created by entitlements is a breach that creates rights.

The entitlement-creation aspect of law is linked to the rights-enforcement aspect of law through the enforcement of rights that are created when duties created by entitlements are breached.

2.2.2.3 The fundamental entitlements created in law are those that assure the proper function of the system itself (i.e. "civil rights").

The system entitlements (e.g., access to courts for the enforcement of rights, voting, and so on) force law to conform to the pursuit of freedom.

3.0 Law is bounded by two principles implicit in biology.

The duty of care applies to those who wield the power of law, just as it applies to all. But the sovereignty they wield requires a special content to the duty. The role of the principles is to supply the content of the sovereign's duty of care.

3.1 Relative to the enforcement of rights: The principle of greatest liberty.

In enforcing rights, the law must exact a remedy that is proportional to the magnitude of the breach of duty. The magnitude of the wrong is measured by the risk it presents to the causal capacity of others and by the ease with which it could have been reduced or eliminated. The risk of multiple deaths that could have been avoided by a simple act will support a remedy of great severity.

3.1.1 The principle of greatest liberty: Each person is entitled to the greatest liberty consistent with the same entitlement in others.

As it enforces rights the law must balance the severity of the constraints that it places upon the wrongdoer ("public constraints") against the severity of the constraints created by the breach of duty ("private constraints"). Both sources of constraint diminish liberty, but the constraints imposed by law will, on balance, increase liberty if they diminish more private constraint than they impose. Every action of law must be justified by an equal or greater reduction in constraints caused by breaches of duty.

- 3.1.1.1 Liberty is the condition of being free from the willed constraints of others—of wrongdoers or of those exercising sovereignty.
- 3.1.1.2 The greatest liberty is achieved when the sum of constraints by wrongdoers and of those exercising sovereignty is at its minimum.

3.2 Relative to delivering entitlements: The principle of greatest freedom.

Entitlement rules establish the framework for cooperative interaction. The cooperation rules that most expand the prospects of some—say, the fastest learners—may not expand the prospects of others. The principle of greatest freedom provides both the purpose of entitlement law and its distribution.

3.2.1 The principle of greatest freedom: Each person is entitled to the greatest freedom consistent with the breach of no duties.

This is a general principle, applicable to every person in whatever capacity they act. The private actor can do anything that is not delimited by duty. For public actors, those wielding the power of law, the principle sets out the duty itself: They must act for the greatest freedom of those for whom they define entitlements.

- 3.2.1.1 The principle of greatest freedom is the duty of care applicable to the creation of desire-based laws
- 3.2.1.2 An entitlement that diminishes the freedom of one or more does not breach the principle of greatest freedom if:
 - (a) Those whose freedom is diminished are compensated for the diminution in their causal capacity; or
 - (b) It is the result of a rule-making system from which that person is as likely to benefit as any other; or
 - (c) There is no other rule that would create equal freedom and avoid the diminution of the claimant's freedom

3.3 The failure of those who administer law to adhere to these principles is a breach of their duty of care and subjects them to action for the redress of the wrongs thus created.

No one, as they say, is above the law, though the method of enforcing rights will depend upon the context of the breach of duty.