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De Re and De Dicto

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DE RE AND DE DICTO

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I will begin this account with a dozen cases, real, hypothetical, or in between. They cover a broad range of topics, and their relation to one another is far from obvious. They have in common, though, a certain kind of puzzlement. Each case presents a question for decision, with arguments on both sides, but we have a certain feeling that the two sets of arguments are not addressing the same question. Each set seems totally plausible on the question it is addressing, but we are not quite sure that that question is the real one. I propose to show that all these cases involve legal rules with the same built-in ambiguity. As the ambiguity relates to alternative logical forms, no logical analysis can resolve it. But once it is brought into the open, we can see that either alternative is consistent with the logical structure of the rule we are applying. We are therefore free to decide the cases by looking to considerations outside the rules.

Here, then, are the cases:

1. In 1970, David Smith became the tenant of a flat on the ground floor of a house in London. He put in new flooring, wall panels, and wiring for a stereo set. When he left, he removed some of the flooring and wall panels so he could take the wiring with him. He did not know that under the traditional law of fixtures they had all become the property of the landlord. He was tried under a statute making it an offense intentionally to destroy or damage someone else's property. His defense was that he thought it was his own property. The trial court convicted him, saying that the material was the landlord's and Smith had intentionally damaged it. But the Court of Appeal reversed, saying that the intention must apply to the ownership as well as to the damage.[1]

2. In February, 1983, Lubelyn Caddali, a citizen of the Philippines, entered the United States as the fiancée of a man whom she intended to marry upon her arrival. Unfortunately, he had been murdered a few days before. Instead of a marriage, she attended his fu-

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1 *See* Regina v. Smith, [1974] 2 Q.B. 354 (C.A.).

neral. She remained in the United States, however, and the status of her original entry did not become an issue until the INS brought deportation proceedings a few years later. At that time, the INS argued that she could not have entered the United States for the purpose of marrying her fiancé because he was dead. She argued that she did not know he was dead, so her purpose at the time she entered was the same as it had been when she set out.[2]

3. A federal statute imposes fine or imprisonment on anyone who "knowingly" violates a regulation of the Interstate Commerce Commission regarding the transportation of corrosive substances. A trucker carried sulfuric acid and other corrosives without the shipping documents required by such a regulation. The trucker knew he was carrying the acid, and knew what documents he had and had not. But he did not know of the regulation. He claimed he could not knowingly violate a regulation he did not know existed. The government argued that ignorance of the law is no excuse.[3]

4. In *Screws v. United States*,[4] defendant police officers were convicted under the federal Civil Rights Act for willfully violating rights protected by the federal Constitution. They objected that the statute under which they were convicted was too vague. No one but a constitutional scholar with an up-to-date copy of the United States Reports can know which rights are and are not protected by the Constitution. But the Court limited the statute to cases where the accused knew that they were violating a constitutional right. These defendants, who had beaten a theft suspect to death, cannot have failed to realize that the Constitution forbade what they were doing.

5. In the case of *Regina v. Chapman*,[5] the accused ran off with a sixteen-year-old girl who became his mistress. He was tried under a statute that made it a crime to take a girl under eighteen away from her home for the purpose of having unlawful sexual intercourse. He argued that with the repeal of the laws against fornication with girls between sixteen and eighteen, the intercourse he intended the girl to have was not unlawful. The court rejected that argument and construed "unlawful" in the applicable statute to mean the same as "nonmarital."

6. Indiana Code 35-44-3-4(3) makes it a crime to alter, damage, or remove "any record, document, or thing, with intent to prevent it

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2 *See* Caddali v. Immigration & Naturalization Serv., 975 F.2d 1428 (9th Cir. 1992).

3 *See* United States v. International Minerals & Chem. Corp., 402 U.S. 558 (1971).

4 325 U.S. 91 (1945).

5 [1958] 3 All E.R. 143 (C.A.).

from being produced or used as evidence in any official proceeding or investigation." Your client has some letters in his files that might indicate that he has violated the antitrust laws, although no one has yet accused him of doing so. Should you advise him to burn the letters?

7. The police catch a thief with stolen goods. With the owner's permission, they send the thief to fence the goods, hoping to catch the fence. They are successful, and Jaffe, the fence, is tried for attempting to purchase stolen goods. But he argues that the goods he attempted to purchase were not stolen: they were being used with the permission of the owner.[6]

8. A pickpocket is caught with his hand in an empty pocket, and is accused of attempted theft. He denies that he attempted to steal anything.

9. Smith allows a six-year-old child to play with a live hand grenade. The child drops it on his foot and breaks a toe. The parents sue Smith, contending that he created an unreasonable risk of harm to the child, and that harm ensued. He points out that the harm that ensued was not the one unreasonably risked. The hand grenade is no heavier than a book, a pop bottle, or a toy truck, any of which the child might have played with and dropped without causing tort liability.

10. Richard Clarke enters a dark bedroom, and climbs into bed with Jane, who thinks he is her husband, John, and permits him to have sexual intercourse with her. When she discovers her mistake, he runs away, and when caught is prosecuted for rape. The prosecution contends that Jane did not consent to have intercourse with Richard. The defense contends that he did not have intercourse with her without her consent.[7]

11. In 1894, Pope Leo XIII ruled that Anglican clergy after the Reformation were not validly ordained. Since the authors of the Book of Common Prayer did not believe in the sacrifice of the Mass, they eliminated all reference to it from their ordination rite. Thus, in ordaining according to this rite, they cannot have intended to do what the church does—which is the intention required for the validity of a sacrament. The Anglicans responded by referring to the Preface to the Ordination rite, which expressed an intention to continue the

6 *See* People v. Jaffe, 78 N.E. 169 (N.Y. 1906).

7 *See* Regina v. Clarke, 169 Eng. Rep. 779 (Crim. App. 1854).

three orders of bishop, priest, and deacon as they had always been in the church.[8]

12. Joe, a disreputable Talmudic scholar and undutiful son, tells his parents that whatever of his property is available for their support is dedicated to the Temple. Since anything the owner says is dedicated to the Temple is thereby so dedicated, and since nothing dedicated to the Temple is available to support his parents, Joe has freed himself from any obligation to support them. Furthermore, since he dedicated nothing to the Temple except what was available for parental support, i.e., nothing at all, he has no obligation to the Temple either. A number of rabbis evidently believed that this reasoning, however reprehensible, was logically inescapable. Jesus, however, condemned it.[9]

My claim here is that the rule of law involved in each of these cases can be expressed in either of two alternative logical forms—the same two in every case—that logic offers no basis for deciding which form should be preferred, and that the way is accordingly open to choose the form that best serves our policy in the particular case.

Before we get to the cases, I will illustrate the alternatives with a simple non-legal paradigm. Assume a big trial is about to begin. Sam, lead counsel for the plaintiff, comes down to breakfast wearing a necktie with a spot on it. Susie, his wife, tells him his necktie has a spot, so he goes and changes it. As he is going out the door, she asks him, "Did you really intend to go to court wearing a necktie with a spot?"

"Of course not," he says.

"But you would have if I hadn't stopped you," she points out.

Assume that wearing a soiled necktie to court is forbidden, not by a court rule, but by a principle of effective advocacy. Did Sam intend to violate that rule? Not really, because he did not know there was a spot on his tie. On the other hand, whatever unfavorable impression the tie would have made on the judge and jury would in fact have been made if Susie had not gotten him to change it.

So was Sam guilty of disrespect for the court? No. Would he, but for Susie's intervention, have incurred the consequence of impaired forensic effectiveness? Yes. Was he guilty of sartorial carelessness? Probably. Which of these questions we want to answer will affect the way we describe the incident. If we want to stress Sam's carelessness and the bad effect on his advocacy, we will point out that he had put

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8 There is an extensive literature on the question of Anglican orders. ANTHONY A. STEPHENSON, ANGLICAN ORDERS (1956) assembles the arguments as well as any.

9 *See Matthew* 15:3–6; *Mark* 7:9–12.

on a necktie with a spot, and that he had every intention of going to court without changing it. On the other hand, if we want to stress the fact that he meant no disrespect for the court, we will point out that his standing in front of the court with a spotted necktie was not something that he wanted to make happen. So Susie's question whether he intended to go to court wearing a spotted necktie can be put in either of two ways, and answered accordingly:

> One: Was there a necktie that he intended to wear to court, and did that necktie have a spot? Yes.
> Two: Did he intend for it to be the case that he appeared in court wearing a spotted necktie? No.

We will call the first question and its answer *de re*, that is, pertaining to the thing, and the second *de dicto*, that is, pertaining to the statement. The two assertions whose truth or falsehood we are considering may be put into logical form as follows:

> *De re:* $(\exists x)(Nx \,\&\, Sx \,\&\, Csx)$: There is an x such that x is a necktie, x has a spot, and Sam intended to wear x to court.
> *De dicto*: Isp: Sam intended to make true proposition p, the proposition that Sam appears in court wearing a necktie with a spot.

In this particular case, as we have seen, the *de re* statement is true and the *de dicto* statement is false, and which statement we consider the more important depends on what we want to know about Sam and why.

With these alternative logical forms in hand, let us turn to our twelve cases. Here is how I believe they should be analyzed:

1. The question here is whether Smith intentionally damaged the property of his landlord. The *de re* answer, adopted by the trial court, is that, yes, there is an x such that x is the property of the landlord, and Smith intentionally damaged x. The *de dicto* answer, adopted by the Court of Appeal, is that no he did not intentionally cause it to be the case that his landlord's property was damaged. I suppose in a tort case or an action to make the landlord return Smith's deposit I would go for the *de re* answer because that answer would enable the landlord to put the wall and the floor back and relet the flat. But I think the Court of Appeal was right to choose the *de dicto* answer in the criminal case, because that relates to Smith's subjective guilt.

2. The question here is whether Caddali entered the United States for the purpose of marrying her American citizen fiancé. The *de re* version adopted by the court was whether there was an x such that x was an American citizen and her fiancé, and she entered the United States for the purpose of marrying x. Her version, the *de dicto*

one, was whether she came for the purpose of making true the proposition that she married her fiancé, an American citizen. If the existential assertion required by an affirmative answer to the *de re* version refers to the present world, then the *de re* version must be answered in the negative. With the death of the fiancé, it was no longer the case that there was an x such that she came for the purpose of marrying x. On the other hand, the *de dicto* version continued to require an affirmative answer as long as she did not know her fiancé was dead. Since her purpose in entering the United States could not in any event be accomplished, I suppose it makes sense to opt for the *de re* version, as both the INS and the Court of Appeals did.

3. *De re*: Is it the case that there is an x such that x is an act forbidden by a regulation and the trucker knowingly did x? Yes. *De dicto*: Is it the case that the trucker knowingly made true the proposition that he violated a regulation? No. The majority favored the *de re* version of the question, because it was only ignorance of the regulation that kept the *de dicto* version from being true, and ignorance of the law is no excuse. The dissenters, by opting for the *de dicto* version, treated an administrative regulation differently from a statute. The case can be seen, therefore, as one of those establishing the status of administrative regulations.

4. Under a *de re* interpretation of the Civil Rights Act, the defendants will be guilty if there is an x such that x is a right protected by the federal Constitution, and the defendants knowingly violated x. Under the *de dicto* interpretation, they will be guilty only if they knowingly made true the proposition that they violated a right protected by the federal Constitution. There is a point in the defendants' argument that the *de re* interpretation makes the statute too vague to stand as part of the criminal law. The court was right to save the statute, and punish a particularly brutal abuse of power, by choosing the *de dicto* version.

5. If we interpret the statute *de re*, we will ask if there was an x such that x was an act of sexual intercourse, x was unlawful, and Chapman intended the girl to engage in x. Yes to all three, as the court determined. The only serious issue was whether x was unlawful even if not punishable, and the court decided that it was. But as Chapman did not know that the nonmarital but nonpunishable act would be considered unlawful, he did not intend to make true the proposition that the girl had unlawful sexual intercourse. So on a *de dicto* interpretation of the statute he would have been acquitted. As he seems a rather unpleasant sort of sexual predator, I am happy to go with the *de re* interpretation and agree with the court in finding him guilty. Interestingly enough, the defense put its entire effort into arguing that the

intercourse was not unlawful, and never brought up the *de dicto* interpretation of the statute.

6. Suppose your client were to burn the letters at once. On the one hand, it would not be the case that there is an x such that x is an official proceeding or investigation, and your client intends to keep the letters from being produced or used in x. On the other hand, your client would intend to keep from being true the proposition that the letters are produced or used in any official proceeding or investigation. Here the decision is a little difficult. Everything within the scope of the *de re* interpretation is also within that of the *de dicto*, and only the *de dicto* encompasses the full range of the policy concern behind the statute. On the other hand, the *de dicto* interpretation is more intrusive, more subjective, and harder to administer. The prevailing view, I believe, opts for the *de re* interpretation, but gives a fairly extensive scope to the existential "there is . . ." so as to include any case where a proceeding or investigation is anticipated in the near future as well as one where it is now going on.[10] This seems to be the best approach to take.

7. This is the famous case of *People v. Jaffe*, decided by the New York Court of Appeals in 1906. On a *de dicto* interpretation of the applicable law, Jaffe would have been found guilty. He attempted to make true the proposition that he bought stolen goods. But the Court adopted the *de re* interpretation and exonerated him. It was not the case that there was an x such that x was stolen and he attempted to purchase x. It seems too bad in a way to let Jaffe off, but I suppose the court is right not to punish people for bad attitudes when they have not done anything wrong.

8. Here, most courts seem to adopt the *de dicto* interpretation.[11] The defendant attempted to make true the proposition that he stole something from the victim's pocket, although it was not the case that there was an x such that he attempted to steal x. This seems to be a reasonable approach. By putting his hand in the victim's pocket, the defendant has done something wrong that the police did not put him up to. Furthermore, if we adopted the *de re* interpretation, we could probably not convict a pickpocket even if there was something valuable in the pocket he was caught trying to pick. Unless he knew in advance what he would find in the pocket, it would not be the case that there was an x such that he was trying to steal x.

9. The plaintiff here invokes a *de dicto* version of the law of negligence: where the defendant's act creates an unreasonable risk of mak-

10 *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 643–44 (1986).

11 *See* 50 AM. JUR. 2D *Larceny* § 57 (1995).

ing true the proposition that the plaintiff is harmed, and does make true that proposition, the defendant is liable. This is the version Lord Scrutton adopted in the *Polemis* case,[12] staple fare in most first-year Torts classes. Later generations, led by the Privy Council in the *Wagon Mound*[13] case, have preferred the *de re* version: the defendant is liable if there is an x such that x is a harm to the plaintiff, the defendant's act creates an unreasonable risk of x occurring, and x does occur. On that version, of course, the defendant in our hand grenade case will win. Despite my admiration for Scrutton, I think I go with the judges who see the *de re* version as more in keeping with the idea of holding people liable for the consequences of their negligence.

10. Cases like this come up often enough to be of more than academic interest. Unfortunately, and I think quite wrongly, the courts have almost always refused to convict defendants of rape in these cases.[14] They apply a *de re* version of the applicable law. The defendant is guilty of rape if and only if there is an x such that x is an act of carnal knowledge of the victim by the defendant, and the victim did not consent to x. I think this lets the defendant off too easily. I would use a *de dicto* version. If the defendant made true the proposition that he had carnal knowledge of the victim—in this case, the proposition that Richard had carnal knowledge of Jane—and she did not consent to make true that proposition, then he is guilty of rape. That this ought to be the law is borne out by many statutes making it the law. Courts that have let defendants off have felt themselves to be compelled by the logic of the rule they were applying. I do not believe they are so compelled.

11. The issue here is what is meant by intending to do what the Church does. Leo interpreted the rule *de re*. The sacrament is valid only if for every x, if the Church in administering the sacrament does x, the minister intends to do x—or at least does not expressly exclude the intent to do x. Since one of the things the church does in ordaining priests is confer the power to offer the sacrifice of the Mass, and the first generation of Anglican prelates expressly excluded the intention to do that, their ordinations were invalid. The Anglicans responded with a *de dicto* interpretation. The sacrament is valid if the minister intends to make true the proposition that he does what the church does. The language in the Prayer Book about continuity

12 *In re* An Arbitration Between Polemis and Furness, Withy & Co., [1921] 3 K.B. 560 (C.A.).

13 Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co., 1961 App. Cas. 388 (P.C.).

14 *See* B.K. Carpenter, Annotation, *Rape by Fraud or Impersonation*, 91 A.L.R. 2D 591 (1963).

makes clear that the authors had that intention. I think I am with the Anglicans here in preferring the *de dicto* version. The *de re* version offers too many ways an ill-instructed or unorthodox minister can produce invalid sacraments.

12. This case requires a more complicated analysis than the others. The rabbis condemned in the Gospel passage evidently found themselves logically compelled by the following argument:

> Everything the owner says is dedicated to the Temple is in fact so dedicated.
> Nothing dedicated to the Temple is available for parental support.
> Joe says that everything he owns that is available for parental support (and nothing else that he owns) is dedicated to the Temple.
> Therefore, nothing that he owns is either dedicated to the Temple or available for parental support.

The argument is fallacious because the first premise is true only if interpreted *de re*, whereas the third is true only if interpreted *de dicto*. That is, it may be true that for every x if the owner of x says that x is dedicated to the Temple, then x is so dedicated, but that does not mean that to utter a proposition about dedication is to make it true, especially where it refers to an empty class. But uttering such a proposition is all that the third premise of the argument claims that Joe has done. It is not the case that there is an x such that x is available to support Joe's parents and Joe has said that x is dedicated to the Temple. So the first premise, rightly understood, does not refer to anything that the third premise refers to, the premises between them do not support the conclusion, and Joe had better get busy supporting his parents.

Having gone through this collection of examples, we are ready to consider the major question before us: what is the use of analysis of this kind? I believe the examples show that it is useful in several ways. First, as in the rape case and the case of the undutiful son, there are people who find themselves logically compelled to intuitively bad results, or, as in the case of the empty pocket, intuitively compelled to what seem illogical results. By showing that the *de re* and *de dicto* alternatives have equal claim to logical support, the analysis makes it possible to embrace the intuitively right result with no logical qualms. Second, in cases such as the one involving the transportation of corrosives, where the intuitive judgment is less than clear, the analysis stands in the way of using an appeal to logic to avoid the necessity of making a hard decision and taking responsibility for it. Finally, some cases actually do turn on the meanings of words and sentences or the logical form in which rules are couched or questions put. In such

cases, it often turns out that one side is relying on a *de re* interpretation, the other on a *de dicto* one, so that it becomes impossible to reduce the matter at issue to a clear question that a decisionmaker can answer one way or the other. In 1310, in a complicated case involving responsibility for feudal dues, Chief Justice Bereford of the Court of Common Pleas reproached the lawyers, saying, "Get to your business. You plead about one point, they about another, so that neither of you strikes the other."[15] I think there are cases in which this analysis will enable a few lawyers to get to their business.

15 Abbot of Hartland v. Beaupel, Y.B. 3 Edw. 2, Trin. (1310), *reprinted in* 20 SELDEN SOCIETY 164, 169 (1905).