https://doi.org/10.1017/S0265052509990045 Published online by Cambridge University Press

PROPERTY AND JUSTICE*

By David Schmidtz

I. Introduction

It is natural to assume that theorizing about property should be grounded in a foundation of theorizing about justice, and not vice versa. That is, philosophers should theorize about justice first, and only then think of themselves as in a position to theorize about what can legitimately become a person's property.

I have become skeptical about this. This essay explains why and sketches an alternative. I now see justice as something that can and does evolve in a given society. Moreover, as I see it, one driving factor of such evolution consists of facts about how judges, legislators, and cultures contingently respond to a particular history of litigation in particular and conflict in general.

Section II characterizes property rights, arguing that a property right first and foremost is a right to say no to proposed terms of exchange.[1] Section III discusses an inherent practical limit of the right to say no. Section IV argues that this limited right, and its correlative duty to respect prospective trading partners, is the key to getting real production, real cooperation, and real community off the ground. Later sections consider what this has to do with justice, arguing that our philosophical theorizing about justice needs to answer to our legal, economic, and historical theorizing about property, at least as much as the other way around, lest our philosophical theorizing have no reliable implications for what situated flesh-and-blood citizens owe each other (or what society's basic structure owes citizens) in their everyday lives.

II. The Concept of Property

According to Wesley Hohfeld, the crucial difference between a mere liberty and a full-blown right is this: I am at *liberty* to use P just in case I

* I thank Dean Donald Weidner and his colleagues at Florida State College of Law for honoring me with the opportunity to teach their first-year Property course in the fall of 2007. Their trust, encouragement, and unstinting collegial support inspired this essay. Thanks also to the Earhart Foundation for their support on this and various related projects. For comments, I thank Jason Brennan, Michael Bukoski, Chris Freiman, Keith Hankins, Kate Johnson, Ben Kearns, Mark LeBar, Dan Russell, Daniel Silvermint, John Thrasher, Jennifer Zamzow, and Matt Zwolinski.

[1] See David Schmidtz, "Property," *Oxford Handbook of the History of Political Philosophy*, ed. George Klosko (Oxford: Oxford University Press, 2010), for a reworking of some material from Section II.

doi:10.1017/S0265052509990045
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https://doi.org/10.1017/S0265052509990045 Published online by Cambridge University Press

have no duty to refrain from using P. I have a *right* to P just in case I am at liberty to use P, *plus* others have a duty to refrain from using P.[2] The difference between a mere liberty and a full-blooded property right is that a liberty, in this technical sense, is a nonexclusive right. A proper right implies a right to exclude other would-be users: a right to say no.

William Blackstone called property the "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[3] In practice, though, property rights in Anglo-American law have always been hedged with restrictions. The dominion to which Blackstone refers is real, but limited by easements, covenants, nuisance laws, zoning laws, regulatory statutes, and customary understandings of the public interest.

Today, the term 'property rights' generally is understood to refer to a bundle of rights that could include rights to sell, lend, bequeath, use as collateral, or even destroy. (John Lewis generally is regarded as the first person to use the "bundle of sticks" metaphor, in 1888.)[4] The fact remains, though, that at the heart of any property right is a right to say no: a right to exclude non-owners. In other words, a right to exclude is not just one stick in a bundle. Rather, property is a tree. Other sticks are branches; the right to exclude is the trunk.

Why must we see it this way? Because without a right to say no, other rights in the bundle are reduced to mere liberties rather than genuine rights. For example, I could own a bicycle in a meaningful sense even if, for some reason, I have no right to lend it to your friend. (That is, this particular tree is missing the "right to lend" branch.) By contrast, if I have no right to deny you permission to lend it to your friend, then I do not own the bicycle in any normal sense. Thus, there is a conceptual reason why, among the various sticks that make up property, the right to exclude is the core.

This does not settle what, if anything, can *justify* our claiming a right to exclude, but it does clarify the topic. When we ask about *owning* a bicycle as distinct from merely being at liberty to use it, we are asking about a right to exclude.

Exactly what protection is afforded by the right to say no is a separable issue. Property P normally is protected by a *property rule,* meaning no one may use P without the owner's permission. In some cases, we might instead say that P is protected by a *liability rule,* meaning no one may use P without compensating the owner. In a third kind of case, P might be protected by an *inalienability rule,* meaning no one may use P *even with* an

[2] Wesley Hohfeld, *Fundamental Legal Conceptions* (New Haven, CT: Yale University Press, 1964; first published in two parts in 1913 and 1917).

[3] William Blackstone, *Commentaries on the Laws of England* (Chicago: University of Chicago Press, 1979; first published 1765), book II, chapter 1.

[4] John Lewis, *Law of Eminent Domain* (Chicago: Callaghan and Co, 1888).

owner's permission. This is how Guido Calabresi and A. Douglas Melamed analyze the ways of giving property rights their due.[5]

The takings clause of the U.S. Constitution's Fifth Amendment specifies that private property may not be taken for public use unless just compensation is paid. In Calabresi and Melamed's terms, the takings clause affirms that even when a compelling public interest precludes respecting a private property right by treating it as protected by a property rule, the public must still respect the right to the extent of treating it as protected by a liability rule.[6]

The policy rationale for protecting property with property rules is that when a resource's only protection is liability rules, control of the resource is, for all practical purposes, concentrated in the hands of the bureaucrats who decide to treat one thing rather than another as a compelling public interest, and who make mistakes at other people's expense.

One rationale for liability rules is that sometimes it costs too much, or is impossible, to avoid impinging on someone's property. Or, in the case of torts, the impinging has already occurred, and the question is how to undo the wrong while acknowledging that the impinging was accidental rather than deliberate. (Where a property rule would require us to get advance permission from every owner on whom we impose a risk of accidental trespass, a liability rule requires instead that we compensate owners after the fact if we should accidentally damage their property.) One rationale for an inalienability rule is that there are forms of property so fundamental that we might cease to be persons in the fullest sense if we were to sell them. We may, for example, regard my kidney or my vote as my property, yet deny that this gives me any right to sell such things. In this respect, we would then be treating my right as inalienable.

[5] Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," *Harvard Law Review* 85 (1972): 1089–1128.

[6] *Spur Industries v. Del Webb,* 494 P.2d 700 (Ariz. 1972) is a notorious case in which housing developer Del Webb sued neighboring feedlot operator Spur industries, alleging that Spur's operation was a noxious nuisance that was damaging property values and making neighborhood life unpleasant. Spur Industries had been operating long before Del Webb showed up, though, which is part of the reason why Del Webb was able to buy the land so cheaply in the first place. The basic principle of common law is that if a party moves to the nuisance, as Del Webb did, then it has no complaint. Yet the judge ruled that although Del Webb per se did not have a case, Del Webb's customers were "the public" and the public has a right to be protected against noxious and potentially unhealthy nuisances. Thus, the judge ruled for Del Webb, granting an injunction against feedlot operator Spur Industries. Remarkably, the court held that winning plaintiff *Del Webb* had to compensate *Spur,* not the other way around. The court judged that Spur's property claim was valid but that (because the feedlot was a public nuisance) Spur could be forced to move, with compensation, because Spur's property right was, in effect, protected by a liability rule rather than a property rule. Interestingly, the case was settled within a month of the publication of Calabresi and Melamed's article; the judge had not read it. For further information, see almost any casebook on property. I have used Thomas Merrill and Henry Smith, *Property* (New York: Foundation Press, 2007).

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III. Property's Practical Limits

The right to say no is stringent but by no means absolute. The right to say no is an institutional structure that facilitates commerce, that is, commerce in the broadest sense. When people have a right to say no, and to withdraw, they can afford to live in close proximity and to produce and prosper, without fear. The right to say no enables people to come to market and celebrate the fruits of their productivity, spreading the goods across a store window for all to see, without fear that the goods will simply be taken.

However, the right to say no is not a weapon of mass destruction. It does not put people in a position to gridlock the system. The right to say no is meant to be a right to decline to be involved in a transaction. It is not a right to forbid people in general to transact. For example, in many cases, judges have to affirm, as utterly basic to the concept of property, that owners have a right to exclude—to post a "No trespassing" sign. But does flying over someone's land at ten thousand feet count as trespassing? In the case of *Hinman v. Pacific Air Transport* (1936), a landowner, Hinman, sued an airline (Pacific Air) for trespass.[7] Hinman wanted the court to affirm his right to stop airlines from flying over his property. Hinman cited the ancient doctrine of *ad coelum,* which says that he who owns the soil owns it from the heavens to the depths of the earth.

The court was in a predicament, for the right to say no is the backbone of the system of property that, in turn, is the backbone of cooperation in a society of self-owners. Yet much of property's ultimate point is to facilitate commercial traffic, and ruling that landowners could veto the emerging airborne commercial traffic would have been a kind of red light that would gridlock traffic, not facilitate it. So the judge had to find a way to rule in favor of the airline without destabilizing the whole system of property. There were truths the judge was trying to track: about what institutional framework enables people to live well together, about what enables people to mind their own business, and about what would empower people to hold each other for ransom without conferring any compensating power or incentive to make a positive contribution.

The plaintiff relied heavily on *ad coelum,* but the court ruled that *ad coelum* isn't true, and never was. Subsequent readings were silent on this nuance, so far as I can tell, finessing the need to pronounce on *ad coelum* by interpreting air traffic as having a *navigation easement,* held by the public in theory and administered by the federal government in practice, which wasn't a radical departure from traditional law regarding easements.[8] Whatever else is true, though, the right to exclude was not the thing to give up, and in fact the practical instances of the right to exclude

[7] *Hinman v. Pacific Air Transport,* 84 F.2d 755 (9th Cir. 1936).
[8] See, e.g., *United States v. Causby,* 328 U.S. 256 (1946).

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that had a history of mattering to people were left pretty much undisturbed by the *Hinman* decision.

It would be a manner of speaking, at best, to say that the court in *Hinman,* in coming to a verdict, was discovering a natural law. The court was trying to discover *something,* though, and what it was trying to discover was closer to laws of nature than to legislation. That is, the court was trying to discern the laws and economics of human coordination—realizing that the point of the rule of law is to enable people to prosper, and that the basic prerequisite of people prospering is that people be able to produce and then to trade. Moreover, the air traffic industry was a potentially revolutionary experiment in pushing the frontier of people's ability to produce and trade. The judge also realized that giving every landowner a right to treat air traffic as a trespass would throttle air traffic, because the cost of an airline transacting with every potential rent-seeking property owner on the ground would be prohibitive.[9]

None of these facts are artifacts of legislation. There may have been no fact of the matter about what *ad coelum* really meant—no fact of the matter about whether landowners had a right to forbid people to pass over their land at ten thousand feet. Before the advent of air travel, no legal dispute had ever brought the issue to a head. There had not yet been philosophical debate that needed to be resolved in one way rather than another. Once air travel emerged, though, and once landowners filed suit against airplanes for trespass, that was when someone had to decide what *ad coelum* entailed (or discover what it *ought* to entail, by discovering what it *needed* to entail to be part of a system that helps people live together).

To be clear, it should be a rare event when judges step back to ask what property is for. Property is supposed to settle what is within one's jurisdiction and what is not. If it is settled that X is your property, then you are the one who gets to decide what X is for. When we get to the parking lot at the end of the day, you drive home *that* car and I drive home *this* one, period. When the institution of property is working well, no discussion is needed. Judges need to step back to ask what property is for when and only when the institution is not working well—when litigants run into a question that the institution has not yet evolved to answer.[10]

Another thing to note is that, even given that justice has to answer to principles of traffic management, so as to enable people to move forward, the fact remains that to move forward, people need to look backward, to a degree, in order to secure conditions for reliable trade. For example, one has to do a routine title search when transferring title to real estate. One

[9] Schmidtz, "Property," discusses the Hinman case as an example of a decision driven by the imperative to limit transaction costs—namely, the various costs (transportation, packaging, advertising, and so on) of getting a product to market and then into the hands of customers—to manageable levels.

[10] I thank Matt Zwolinski for pressing for clarification here.

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need not go back to the Middle Ages in search of histories of nonconsensual transfer. A routine title search is more modest, going back to a point where title appears to have been uncontested. A title insurance company then takes on the risk of warranting that it has done due diligence and that the title being transferred is good.[11]

One further important clarification: It is (or, in any case, should be) no part of classical liberal theory that the right to property implies a correlative duty to roll over and die rather than trespass on someone's land. For the system to be stable enough to last, respecting the property system has to be a good option for just about everyone, including those who arrive too late to be part of the wave of first appropriators. And in order for respecting the system to be a good option for just about everyone, it has to be true that just about everyone has good options regarding how to make a living within the system.

IV. Property Rights as a System of Traffic Management

The main theses of Stephen Holmes and Cass Sunstein's *The Cost of Rights* (1999) are that rights depend on government and rights cost money.[12] They do not argue, but I would argue, that it is because rights are so costly that people who seriously believe in rights as a framework for revering persons as ends in themselves do not believe in *lots* of rights.

Consider that the whole point of fences, and of rights, is to *get in the way.* Or to use a different metaphor: rights are like traffic lights.[13] A mere liberty is a green light. A full-blooded *right* is a green light combined with a correlative red light. Some rules are better than others at unobtrusively enabling people to get on with their business. Traffic lights facilitate traffic movement not so much by turning green as by turning red. Without

[11] Michael Walzer has asked me where I stand on issues of rectificatory justice. What are we to do about the histories of unjust expropriation that we find everywhere we look? There comes a time when it is too late and such histories cannot be undone. When it is too late to make victims whole, rectificatory justice has to be about something else. It has to be about enabling people to repair broken relationships, reconcile, forgive, understand exactly where their culture has been and where they resolve never to be again, so that they can get on with their lives together. So my answer to Walzer is that he was correctly interpreting my view: our need to be able to coordinate and cooperate, going forward, shapes the interpretation of all principles of justice, including principles of rectificatory justice. See Linda Radzik, *Making Amends* (New York: Oxford University Press, 2009); and Charles Griswold, *Forgiveness* (New York: Cambridge University Press, 2007).

[12] Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: Norton, 1999), 15. To elaborate, "Property rights have costs because, to protect them, the government must hire police officers" (ibid., 146). The government takes responsibility, at considerable expense, in three ways: first, when it pays the officers; second, when it trains the officers to respect the rights of suspects; third, when the government monitors police (and other public officials, presumably) so as to deter rogue officials and generally minimize corruption (ibid.).

[13] Jason Brennan and I elaborate on the traffic light and traffic management metaphors in David Schmidtz and Jason Brennan, *A Brief History of Liberty* (Oxford: Blackwell Publishers, 2010).

https://doi.org/10.1017/S0265052509990045 Published online by Cambridge University Press

traffic lights, we all in effect have a green light, and at some point traffic increases to a point where the result is gridlock. By contrast, a system in which we take turns facing red and green lights is a system that keeps us out of each other's way. Of course, the system itself gets in the way when it presents us with a red light, but almost all of us gain in terms of our overall ability to get where we want to go, because we develop mutual expectations that enable us to get where we want to go more peacefully and more expeditiously.

We can see from this that we do not want *lots* of rights, for the same reason we wouldn't want to face red lights every fifty feet. We want the most compact set of lights that enables motorists to know what to expect from each other, and thereby get from point A to point B with minimal interference. By getting in our way to some degree, well-placed traffic lights, like well-placed property rights, liberate us, and help us stay out of each other's way.[14]

Holmes and Sunstein's basic point is, as they say, obvious. Rights are indeed costly. (More generally, they could have said, government is costly—since what they mean by rights is essentially tied to government.) Their point is important, too, for a reason they leave unmentioned: namely, the cost of various alleged rights is one key way for theorists to sort out which rights ought to be taken seriously, for many alleged rights are *prohibitively* costly. The implication is that we cannot afford to teach people to think they have the hugely expensive ones.

Property rights are, among other things, red lights that tell you when the right to use the intersection belongs to someone else. Red lights can be frustrating, especially as a community becomes more crowded, but the game they create is not zero-sum. When the system works, nearly all of us get where we are going more quickly, safely, and predictably than we otherwise would, in virtue of having been able to coordinate on a system that enables us to know what to expect from each other.

Commercial traffic consists of people coordinating in a thick sense of undertaking elaborate projects together, and in a thin sense of staying out of everyone else's way as they pursue their respective projects. To secure coordination in a thin sense, people need some common understanding of torts and property. To secure coordination in a thick sense, people need a common understanding of their right to say no and also of new obli-

[14] When I speak of putting people in a position where they know what to expect from each other, this may seem to privilege the status quo. I am of two minds about this. First, I think the often-expressed concern about privileging the status quo often is misplaced. Acknowledging that we start where we actually start is a bias in a sense, because it rules out places we cannot get to from here, but it is not an arbitrary bias. If we rule out options on the grounds that we cannot get there from here, we are ruling them out for good reason. Second, if there is anything conservative about this approach, it is the thinnest kind of conservatism. The point is that we start from where we are, not that we have any reason to stay where we are. Wherever we want to go, if we are serious, then we will take seriously questions of whether we can get there from here, and if so, how.

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gations created by freely saying yes. Thus, they need common understandings of contract as well as of tort and property.

V. Justice

What about the pedestrians, one might ask?[15] That is a crucial respect in which the traffic-light metaphor radically understates the benefit of a successful property regime. Literal traffic lights are working well when people manage to stay out of each other's way, but commercial traffic management must pass a far more stringent test. Commercial traffic's aim is not merely to be accident-free but to bring people together. Rising commercial traffic is a boon, not a drag. The ultimate secret of progress and prosperity is the cooperation of multitudes. Commercial traffic—the trucking and bartering of multitudes—is a community's lifeblood, enabling children to grow up to become *drivers.*

Not every would-be motorist gets a car at the same time, but commercial traffic's point is to produce and disperse the means of participating in the market.[16] Ensuring that everyone gets a car on the same day, or at the same age, is not the point. If, instead, we were to insist on a distributive principle such as "no one gets cars or computers or kidney transplants until there is enough for everyone to be guaranteed one at the same time," that would be the sort of red light that gridlocks a system, bringing progress to a crashing halt. That red light has no place in a community's system of traffic management, no place in its system of property, and therefore no place among its principles of justice, because that sort of red light cannot coexist with people having reason to live in that community.[17]

The traffic management function of property conditions what can count as justice, given that whatever we call justice has to be compatible with people prospering, which means it has to be compatible with the system of property that enables people to prosper. If whatever we choose to call justice is not compatible with property, then we have no reason—indeed, no right—to take so-called justice seriously.

We have reason not to treat justice the way philosophers have treated it in recent decades, as a matter of distributing shares. Some philosophers even ask us to imagine rational contractors coming to a table to divide the

[15] I thank Daniel Bell for the question.

[16] I suppose age would be one of the best demographic predictors of car ownership, as it is of income in general, and for the same reasons. It takes years to accumulate capital, including the most valuable job skills.

[17] Egalitarian theorists such as Richard Arneson (in a series of articles on the various currencies of egalitarianism, and on alternatives that simply prioritize the claims of the destitute), and Thomas Christiano, in *The Constitution of Equality* (Oxford: Oxford University Press, 2008), and *The Rule of the Many* (Boulder, CO: Westview Press, 1996), are helping to take political philosophy to places it has never been before. Each in his own way seems to be developing principles of egalitarian justice that are not recipes for gridlock—that could be implemented in ways that would unleash producers without leaving young pedestrians permanently on the outside looking in.

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economic pie. Bruce Ackerman is candid enough to refer to what contractors come together to distribute as manna from heaven.[18] In the real world, though, the stuff that would-be distributors want to distribute tends to be a product of lifetimes of work. Intuitively, it is not just—and, to say the least, is not the *essence* of justice—to ignore the fact that what distributors want to distribute is not manna but is in fact produced by other people. Holmes and Sunstein get at this fact, albeit inadvertently, when they stress that rights cost money.[19] More precisely, pie costs money; it sits on a table awaiting division only if someone paid the cost of creating it and then getting it to the table.

I see real justice as a response to whole persons, especially persons as producers of pie, and most definitely not just as a response to persons as stomachs—that is, as mere consumers of slices of pie. To respect producers, we have to respect what they have produced, and what they have plowed into production.[20] (We have to give up on theories that ask us to pretend not to be able to tell the difference between people who contributed to a given production process and people who didn't.) So we have to talk about what we have reason to regard as theirs, rather than as someone else's.

Holmes and Sunstein repeatedly present their thesis that rights cost money as refuting libertarians and conservatives. They scoff at "the *libertarian fiction* that individuals who exercise their rights, in the classic or eighteenth-century sense, are just going about their own business, immaculately independent of the government and the taxpaying community."[21] Conservatives are supposed to be similarly oblivious to the cost of rights. In Holmes and Sunstein's words, "Conservatives, for their part, may prefer to keep quiet about—or as their rhetoric suggests, may be oblivious to—the way that the taxes of the whole community are used to protect the property rights of wealthy individuals."[22]

Not once in Holmes and Sunstein's book is the most important corollary of the truism that rights cost money even mentioned. Namely, there is a world of variation in what particular rights cost, and some of the rights-claims that government has granted cost *a lot*.[23]

[18] Bruce A. Ackerman, *Social Justice in the Liberal State* (New Haven, CT: Yale University Press, 1980), 31.

[19] Holmes and Sunstein, *The Cost of Rights,* 15.

[20] John Rawls was ahead of his time in insisting that we must not think of the pie as fixed and must construct our redistributive principles with a view to the fact that what people produce will depend on the extent to which we treat their product as their property. Rawls also, unfortunately, insisted that people's productive capacities were among the morally arbitrary properties of persons that did not figure directly into the question of what they rightfully could claim as their due (from society's basic structure). See John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 74–75.

[21] Holmes and Sunstein, *The Cost of Rights,* 29; emphasis added.

[22] Ibid., 25.

[23] It seems the "libertarian fiction" is a fiction written *about* libertarians, not *by* them, which may account for why (aside from two sentence fragments on page 1 of *The Cost of*

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When we are trying to articulate principles of justice that we have reason to take seriously in a world like ours, one way to start is with an understanding of what our world is like, and of which institutional frameworks promote our thriving in communities and which do not. If we start this way, we can sort out alleged principles of justice by asking which ones license mutual expectations that promote our thriving and which ones do otherwise.

A priori reasons for endorsing principles of justice generally are not good enough. A good enough reason would be something like this: to endorse *this* way of applying *this* principle in *this* kind of circumstance is to support institutional frameworks that position us to play positive-sum games that make no one worse off, or that at worst limit negative externalities (noise pollution, say) to levels and kinds widely accepted as a reasonable price of living in communities.

A. Creation myths

Holmes and Sunstein refer to "the obvious truth that rights depend on government."[24] But Holmes and Sunstein are smart enough to know that this is not obvious, and readers should not let themselves be intimidated. Let me quote the paragraph from the beginning: "The Declaration of Independence states that 'to secure these rights, Governments are established among men.' To the obvious truth that rights depend on government must be added a logical corollary, one rich with implications: rights cost money."[25] Notice that the Declaration *denies*, rather than states as obvious, that rights depend on government. The Declaration says that part of what can justify establishing a government is its efficacy in securing rights: the explicit point is to *secure* rights, not to create them.

Legal rights admittedly are creations in some sense, but there remain truths about which legal rights ought to be created and which ought not. Holmes and Sunstein say:

Rights, ascribed to contemporary policy experts Charles Murray and David Boaz) no libertarians are ever cited. Nowhere do Holmes and Sunstein acknowledge that the classical liberals to whom they allude (without ever naming them, and frankly I doubt they have anyone specific in mind) are the most cost-conscious rights theorists who ever lived. (It would make sense to at least mention Friedrich Hayek, James Buchanan, Richard Epstein, Thomas Sowell, Daniel Shapiro, Scott Arnold, Jan Narveson, Robert Sugden, or even left-libertarian Hillel Steiner, just to name a few.) Holmes and Sunstein write: "Some of those who wince at the very mention of the cost of rights may distrust close inquiry into the tradeoffs that rights enforcement inevitably entails" (ibid., 177). Holmes and Sunstein insinuate that classical liberals and conservatives are the ones who wince, but nothing could be further from the truth. Classical liberals have always done more than anyone to warn us that few alleged rights are worth the cost. Holmes and Sunstein themselves do not actually do anything in this regard. Their only reason for belaboring this theme is that it is the closest thing they have to an argument that rights are created by government, and that it is the government's prerogative to decide what we owe government in virtue of such protection.

[24] Holmes and Sunstein, *The Cost of Rights*, 15.

[25] Ibid.

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> A liberal government must refrain from violating rights. It must "respect" rights. But this way of speaking is misleading because it reduces the government's role to that of nonparticipant observer. A liberal system does not merely protect and defend property. It defines and thus *creates* property. Without legislation and adjudication there can be no property rights in the way Americans understand the term.[26]

Since they mention misleading ways of speaking, it seems fair to note that Holmes and Sunstein are speaking of how *they* understand the term, which has little or nothing to do with how "Americans" understand the term. Holmes and Sunstein acknowledge that a liberal government must refrain from violating rights, yet their view entails that the all-too-easy way for a government to ensure that it does not violate rights would be to eschew creating inconvenient rights in the first place. I observe that there have been Americans—including judges, legal theorists, and founding fathers—who understood the term differently.

I would not deny Holmes and Sunstein's premise that property would, on balance, be more insecure if governments were not in the business of protecting it. That property would be *nonexistent* in the state of nature, though, is either false or an empty tautology, depending on whether we treat property as legal rules that only governments can create, or as forms of possession that neighbors respect by spontaneous village custom. Property in the latter sense is an institution that governments sometimes recognize, ratify, and clarify. On this reading, there is nothing trivial about what governments can bring (and what governments at their best do bring) to systems of property, but there is nothing primordially fundamental about it either.[27]

More generally, if rights and correlative duties are true claims about how moral agents ought to be treated, then the idea that such truths do not exist until governments say they exist just isn't credible.[28] The idea that rights would not be *enforced* without government is closer to being

[26] Ibid., 60; emphasis added.

[27] Holmes and Sunstein write: "No sharp line can be drawn between markets and government: the two entities have no existence detached from each other" (ibid., 69). Likewise, Liam Murphy and Thomas Nagel write that because "[t]here is no market without government and no government without taxes . . . [i]t is therefore logically impossible that people should have any kind of entitlement to all their pretax income." Murphy and Nagel, *The Myth of Ownership* (New York: Oxford University Press, 2002), 32. My best guess from the context is that this is a maximally provocative way of saying that governments do not function well in the absence of a price mechanism and markets do not function well except in the context of enforceable contracts.

[28] Even the idea that laws are exclusive creatures of government is hard to believe unless it is stipulated to be so by definition. Mutual understanding and coordination, based on mutual acknowledgment of one another's possessions, has always been mostly a spontaneous matter, just like language, not generally or primordially a creation of government. And such coordination does, in fact, give rise to expectations that community members treat

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plausible. Still, even that weaker claim is dubious. Our ancestors were marking and defending territory long before there were governments. Even today, most protection and enforcement is not governmental but is instead in private hands. Normally, we call government police not to prevent crimes but to fill out forms and otherwise deal with the aftermath.

As the infrastructure of coordination and cooperation emerges, one of the services in scarce supply will be basic physical security. People do not come to the market unless they are confident that they will survive the trip (or at least that making the trip is safer than staying home). Eventually, ordinary producers not only make the trip, they begin to feel *so* secure that far from *concealing* the value of what they possess (to limit the extent to which they are targets for robbers), they begin to *openly advertise* the fruits of their productivity. When that happens, there has been a minor miracle. Society has progressed to a point of being able to secure an expectation that such fruits will be transferred only by consent.

B. What plumbers do well

Having (for better or worse) defined rights as basic interests that government can protect,[29] Holmes and Sunstein suppose that

> [i]t is perfectly obvious that people cannot lead decent lives without certain minimal levels of food, shelter, and health care. But calling the crying need for public assistance "basic" may not get us very far. A just society would ensure that its citizens have food and shelter; it would try to *guarantee* adequate medical care; it would strive to offer good education, good jobs, and a clean environment.[30]

Here are two responses. First, suppose we grant that the proper way to evaluate societies is by asking whether they empower and enable people to lead decent lives together. How then would we evaluate plumbers? We might ask the same sort of question: namely, do plumbers make us better off? But we would not use that question as a template for a plumber's *job description.* A job description would be narrower and would have something to do with plumbing. Suppose, then, that we call a plumber to fix a faucet, but decline to turn over to the plumber the jobs of feeding and clothing us and providing us with health care. Would we thereby be failing to take "crying needs for plumbing assistance" seriously? No. We simply recognize that a plumber's job description—a plumber's particu-

as legitimate, with at least as much status within communities as the sorts of expectations that later in human history come to be created by governments as well.

[29] Costs "will be understood to mean budgetary costs and 'rights' will be defined as important interests that can be reliably protected by individuals or groups using the instrumentalities of government" (Holmes and Sunstein, *The Cost of Rights,* 16).

[30] Ibid., 120; emphasis added.

https://doi.org/10.1017/S0265052509990045 Published online by Cambridge University Press

lar way of making us better off—does not encompass everything. Nor should it. Why not? Because if plumbers had a license to do everything (without customers' consent! without needing to say in advance what the service will cost!), we would live worse lives, not better ones. The point is, if we decline to turn over a given job to the plumber, it *may* be because we fail to see how important the job is. A more likely explanation, though, is that we decline precisely because we *do* see how important the job is.

C. Guarantees

My second response is to recast Holmes and Sunstein's basic point: *guarantees* cost money. As they say, people need food, shelter, and occasionally medicine. It is neither obvious nor even true that people in any analogous way need guarantees.[31] Nor is it comparably obvious that justice has much to do with guaranteeing that citizens will, like it or not, have to pay the price of meeting other people's needs but not their own.[32]

Thus, people who clamor for guarantees should stop and ask whether the guarantees they envision, in the hands of ordinary government administrators, will actually make people better off. Are such guarantees guaranteed to make people better off? Why don't we need *that* to be guaranteed as a prerequisite of having any right to start issuing guarantees?

Better yet, why don't we need at least to be guaranteed that issuing such guarantees won't make poor people *worse* off? If guarantees are so important, we should clamor for *that* guarantee first, and clamor for additional guarantees only after getting that one.

Holmes and Sunstein say that "a theory of rights that never descends from the heights of morality into the world of scarce resources will be sorely incomplete, even from a moral perspective."[33] I could not agree more. We must look at patterns of results, and once we see the pattern, we should take the hint. For a start, we can measure how much a society has achieved, along one uncontroversially important dimension, by looking at life expectancies. In 1900, life expectancy in the U.S. was forty-seven years for white males, and thirty-three years for black males. By the year

[31] Echoing Holmes and Sunstein, Murphy and Nagel write: "Few would deny that certain positive public goods, such as universal literacy and a protected environment, that cannot be *guaranteed* by private action, require government intervention" (*The Myth of Ownership,* 6; emphasis added). What a curiously old-fashioned approach this seems to be, as if there were no gap between finding a theoretical imperfection in private provision and clinching the case for public provision. Perhaps Murphy and Nagel assume that public provision has a record of perfection in these areas. More likely, they assume that public providers need not achieve perfection, because public providers (and only public providers) have their hearts in the right place, which suffices to make public provision just.

[32] If there were one thing people needed from a government, it would be to give some teeth to the right to say no. And the right to say no won't have teeth except under a government that treats possessions as presumptively legitimate—defeasible, of course, but not in fact defeated in normal cases.

[33] Holmes and Sunstein, *The Cost of Rights,* 18.

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2000, life expectancy was seventy-five years for white males and sixty-eight years for black males.[34] This represents an incredible achievement. Whether the U.S. government ever *guaranteed* that people would live that long is beside the point.

Prosperity's foundation is productivity, and productive societies are always the ones that do not overdo the guarantees.[35]

D. The meaning of life well lived

To theorize about justice and do it well, we need to start by considering what it takes for people to prosper in communities. However, a judge need not know every facet of that genuine ideal of justice to say something about justice in a given case. All a judge needs to know is that commercial traffic management is a prerequisite of achieving that ideal on any non-question-begging interpretation, and that some kinds of property rights are a prerequisite of effective commercial traffic management. A judge has to see that litigants come before the court with their own visions of the good life. Usually the visions are compatible, but the litigants have incompatible views about their right to pursue their vision in a given way. A judge's job is to resolve the conflict. A judge never needs to know the details of people's visions of the good life, but in hard cases a judge does need to keep in mind that the job of the court is to clarify the rights-of-way at issue in such a way that people such as these litigants in circumstances like theirs will be able to get on with pursuing their own visions, and will be able to do so in peace, assisted by a verdict that clarifies what people like these litigants reasonably can expect from one another. In metaphorical terms, we need to know that our system of traffic management is helping people get where they want to go, accident-free. We do not need to know or to evaluate the details of where they want to go.

What it means to prosper is somewhat (although only somewhat) underdetermined by theory, but communities work out the details. For one thing, people will not prosper together unless they come up with a system that does not require consensus on the details. To prosper, people need to agree on who has jurisdiction, that is, who gets to make the call. The point of property rights is to settle who gets to make the call. That is part of the explanation of why liberal societies are places of rising prosperity (and also of why measures of prosperity tend to be controversial).

Which kinds of property rights enable people to prosper together? In a nutshell, the kind that can evolve to internalize evolving externality prob-

[34] See http://www.elderweb.com/home/node/2838, citing data from the U.S. Census Bureau's Current Population Reports.

[35] Aiming at near-universal literacy is one thing. Aiming to eradicate polio is one thing. I am open to arguments that such aims are altogether legitimate, even at significant cost. Even so, the aim itself is the thing. Guarantees are neither necessary nor sufficient.

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lems while securing the opportunity and incentive to produce, invent, and otherwise help a society make progress. In most times and places, this will mean a mixed regime in which important bits of property are held by the public but in which the primary means of production are in private hands. That kind of mixed regime has been tested repeatedly in practice. Evidently, and for well-known reasons, it just works better.[36]

Worldly principles of justice are principles of conflict resolution and conflict avoidance. They define and codify legitimate mutual expectations and articulate ideals about what is involved in being a good neighbor in a particular community. A principle can and does work better if it responds to the realities of where people happen to be, and points the way to something better *starting from where they are.* And making progress from where they are is most imperative when where they are is not already fair and just.

If asked whether plumbers help us live well together, we might say, "Of course, so far as plumbing goes." The indeterminacy of what is to count as living well would not trouble us in that circumstance. Why not? Partly because such a question sounds ordinary rather than technical, and we know what the words mean well enough to have no trouble with them in ordinary conversation. Another part of the explanation is that what plumbers contribute to society is concrete and specific enough that no warning bells go off. We know what they contribute, and we know that the contributions of the ones who do an honest job are straightforwardly positive, even if limited. So, if we asked whether traffic lights help us live well, that too would have a straightforward answer. Lights that are well-placed and function reliably do indeed help motorists live well. I suppose we could say much the same of property rights. Some rights (but not others) internalize externalities, effectively enshrine a right to say no, help people stay out of each other's way, help people feel secure enough to take the risk of investing in cooperative ventures, and so on.

Property rights don't do everything for us, any more than traffic lights or plumbers do. Traffic lights don't cure cancer. (Perhaps property rights do in a sense cure cancer if and when they help us find whatever we are hoping to find when we come to the market, including opportunities to do research, and to buy and sell what we discover in the process. Perhaps there is nothing that property rights cannot ultimately help us do. On any given day, though, property rights will not be a panacea.) They will help secure our possessions well enough to make it safe for us to be a part of the community. That is a lot, but it isn't everything.

[36] See, e.g., Robert C. Ellickson, "Property in Land," *Yale Law Journal* 102 (1993): 1315–1400; Carol Rose, "Possession as the Origin of Property," *University of Chicago Law Review* 52 (1985): 73–88; Carol Rose, "The Comedy of the Commons: Custom, Commerce, and Inherently Public Property," *University of Chicago Law Review* 53 (1986): 711–87; and Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990).

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If we could conceive of people more or less in isolation, then living well for them would consist of being self-sustaining in a quite literal sense. As trade begins to emerge, though (which is another way of saying, as *communities* emerge), there emerges with it the opportunity to be self-sufficient not by producing enough directly to meet one's own needs so much as by producing enough to meet *other people's* needs. As a rule, the people we think of as more or less self-sufficient members of a community come nowhere near to producing enough to meet their own needs (in the way a hermit would need to do). They do not even try. Instead, they go to the market to offer their plumbing or cancer-curing services to other people, and after a series of trades they go home with plenty of food for their families, typically without producing a grain of food.

Yet people cooperate only if they establish adequately understood and mutually acceptable *terms* of cooperation. The possibilities multiply when people become able to give their word, create mutual expectations, and count on agreements being kept. Being able to count on one another makes possible the rule of law, which enables people to trust each other even more, giving up on the idea of being self-sufficient and instead becoming especially skillful at making their neighbors better off in particular ways. The division of labor thus vastly expands the opportunity to be served by, and in turn to be of service to, vast multitudes. In an advanced commercial society, one can produce for customers whom one will never meet. One may be only dimly aware of their purposes, and indeed of their very existence; one knows only that sales are good. Someone somewhere must deem the product worth paying for, and that is all that an ordinary producer needs to know. On such foundations are modern society and our unprecedented modern prosperity built (a prosperity undreamt of as recently as a century ago, even by science fiction writers).

VI. What Property Is For

When I taught the first-year Property course at Florida State College of Law, I was fascinated to imagine what it must have been like to have been in the judges' shoes in the cases we studied. Judges found themselves having to resolve competing claims, and in the more interesting cases, each side brought to bear relevant and weighty moral and legal desiderata. Typically, it would have been superficial to interpret the conflict as between, say, justice and utility. The claims were competing claims of justice, and the judge was in a position of having to interpret the rival claims so as to render them "compossible."[37] A judge might face a case

[37] The term 'compossible' is most often associated with Hillel Steiner. I think the idea comes originally from Leibniz, but Steiner fruitfully applied it to theories of rights. The idea of rights being compossible is that it cannot be true that a person both does and does not have a claim to X. When rival claims are not compossible, then at least one of the rival claims has to be incorrect, or in any case must be reinterpreted or repudiated so that the rival claims

https://doi.org/10.1017/S0265052509990045 Published online by Cambridge University Press

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where the plaintiff claims a right to run a school unmolested, complaining that the defendant has no right to interfere. The judge looks at how the defendant is alleged to have interfered and says yes or no. If the interference took the form of running a superior school that "steals" the plaintiff's customers, the judge throws out the suit. Why? Because the plaintiff's customers are not the plaintiff's property, so "stealing" them is not really stealing. If the interference instead took the form of firing guns into the air and frightening parents into removing children from the school, then the judge rules for the plaintiff, because that sort of disturbance is an intentional trespass, aimed at making the plaintiff's parcel a less desirable location for a school. It deliberately sabotages the operation of the school with no constructive purpose in view.

A. Before justice

All this suggests that, at least in hard cases where judges aim not merely to apply principles of justice but to articulate them (sometimes for the first time), judges have to make decisions about where to locate property's edges, and in the process settle whether justice sides with this litigant rather than that one.

The details of justice in a given time and place are not specifiable by armchair philosophy. The substance of justice is partly a product of contingent pressures of actual dispute resolution. No one needs to know whether flying over someone's land at ten thousand feet counts as trespassing until actual disputes come before a court. We could see this as an epistemological issue—saying there are eternal truths that we learn by going to court. I am not sure that much of practical significance rides on this, but I find it more realistic to interpret the issue as metaphysical: there is *no truth of the matter* about what the law is until litigants force the issue, creating a need for a ruling and a common understanding. Indeed, sometimes there is no uniquely determinate truth about what the law ought to be. (Sometimes rulings are like deciding whether distances will be measured in miles or kilometers, or whether people will drive on the left or the right.) The only determinate truth is that a decision has to be made one way or another, so people can get on with their lives with a better idea of what to expect from each other.

Even natural law theorists would acknowledge that the edges of the concept of property are underdetermined by theory. Edges must be defined

no longer contradict each other. Where I disagree with Steiner is in thinking that this truth is more fruitfully regarded as a contingent truth than as a necessary one. I think judges and legislators affirm rights claims all the time that turn out not to be compossible, and, as I see it, compossibility in a system of rights is an achievement, not a given. Judges, legislators, and other agents have to work to make sure that rights claims are compossible *enough* to enable agents to avoid conflict while still taking seriously their rights as affirmed by judges and legislators.

and refined by practice and custom, and sometimes by judges confronting newly evolving edges of the traffic management problems that property rights are supposed to solve. Often, there are right and wrong answers to how edges need to be defined so as to settle current disputes, enable people to get on with their lives, and avoid disputes in the future. To return to the flyover case, a landowner's right to say no, essential though it may be to land ownership, would have been a recipe for gridlock had it been taken to entail that airlines generally need permits from individual landowners to have a right to fly.

In *Hinman,* the nature and value of commercial traffic settled the question of where to locate the boundaries of rights and justice, not the other way around. The judge was trying to take rights seriously. He succeeded. His verdict left us with a system of rights that we could *afford* to take seriously. He took a system that had come to be inadequately specified relative to newly emerging forms of commercial traffic, and, in a predictable, targeted, not overly clever way, made the system a better solution to the particular problem confronting his court.[38]

Property's normative roots are to be found less in philosophical theorizing about justice and more in whatever the truth of the matter happens to be in a given time and place about what it takes for people to be able to prosper together. The latter discussion turns on facts about what it takes to induce and inspire people to be productive, that is, to identify and meet needs, not only their own needs but also the needs of the people around them.

The point here is not that justice is unneeded or unimportant. In particular cases, we want it to be true that justice is the most important thing, or perhaps the only important thing. But reaching a point where justice holds sway in that manner is an *achievement.* Judges in hard cases don't have such principles to appeal to; by hypothesis, they begin with principles that are silent on the issue at hand. They need to articulate, discover, extend, or in any case decide what justice says in the kind of case they are facing, and (in a precedent-driven system, at least) if they rule well, they will make similar cases easier to resolve in the future.

If the principles of justice are to be compatible with people getting what they need, then they must be compatible with people getting what they

[38] Avner de-Shalit has asked me about the status of principles of justice that in particular cases fail to fit nicely into a system of traffic management. There are no guarantees. Quite the contrary. Judges face such cases from time to time and have to make decisions nonetheless. What often seems to guide them, and I would say rightly so, is a desire to avoid doing anything that appears too creative. They want their rulings to be what people would or should have expected under the circumstances. The law does a better job of managing traffic, other things equal, to the extent that it is predictable. Sometimes the justice of a ruling is controversial. Sometimes it would have been controversial regardless of which way the judge ruled. Sometimes the ruling is a net loss for society in a particular case, and sometimes, nonetheless, the ruling is correct—insofar as it is fair, it is what people should have expected, and it is in keeping with the kind of overall rule of law that keeps the traffic moving as smoothly as can be reasonably expected.

https://doi.org/10.1017/S0265052509990045 Published online by Cambridge University Press

need from a property system, because people do after all need a property framework, and they need it to function in a particular way. (They likewise need a traffic management system, and need it to function in a particular way.) If an alleged principle of justice rules out what people need to do to coordinate expectations, internalize externalities, and secure their possessions well enough to make it safe for them to look for ways to make their customers better off, then people need to keep looking for principles of justice that they can afford to respect. By analogy, if an alleged principle of justice ruled out doing what people needed to do to meet their dietary needs, then people would have to keep looking for principles of justice they could live with.

B. Property as theory-laden

Scholars such as Gerald Gaus sometimes claim that it is basic to any liberal philosophy that there is a presumption against coercion, and thus that coercion has to be justified.[39] Critics reply (at least in conversation) that the presumption against coercion is theory-laden, and in particular presupposes a controversial conception of property and especially of self-ownership.[40]

Alternatively, one might argue that society sets prices, thereby determining the remuneration of particular skills sets, and therefore ought to use redistribution to make amends for setting so high a price on, say, the services of the most talented entertainers. On the one hand, if it were customers who were responsible for deciding whether to pay that high a price, out of their own pockets, then it would not be society's business. In that case, society did not calculate prices at all, so it did not miscalculate either. There is nothing to feel guilty about. On the other hand, if society is the true owner of the money, and for that matter the talents, then (and only then) the question of how to distribute becomes very much society's business. Some of the things Gaus would call coercion—some of the

[39] Gerald Gaus, "Coercion, Ownership, and the Redistributive State: Justificatory Liberalism's Classical Tilt," elsewhere in this volume.

[40] Here is a common view that in a subtle way denies the liberal premise of self-ownership. Holmes and Sunstein say that the ACLU (American Civil Liberties Union) is tax exempt, "which means its activities are partly financed by the public." Holmes and Sunstein later say that "a tax deduction is a form of public subsidy" (*The Cost of Rights,* 21, 66). If this is meant as a substantive claim, though, it is indefensible. The truth is that if a dollar belongs to George Washington, and George uses that dollar to finance project X, then George is subsidizing project X. But if the dollar that Patrick Henry is investing in the ACLU belongs to Patrick, then it is Patrick's dollar, not George's, that is subsidizing the ACLU, and we do not change that fact by noting that George is powerful enough to take it from Patrick but decided not to. To say that the tax deduction is a public subsidy is to presume, rather than to argue, that the public owns the dollars that it sometimes declines to take from Patrick. Perhaps there is an argument for this, but to assert without argument that deductions are subsidies is to try to bully readers into not asking for the argument. Thus, there is a basic choice, and a defining choice for liberalism: Does George need to justify taking Patrick's possessions, or does George need to justify *not* taking them?

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things that call for justification—would not be coercion at all. They would simply be a matter of an agent (the state) deciding how to allocate resources that the agent has every right to allocate.

Perhaps the critics are wrong. But if the critics are right, what follows? In particular, if I cannot justify my possession, does that entail that someone else has a better claim to my possession than I do? Or is it the case that the king (or the state) does not *need* a better claim, so long as he can convince himself that there is some problem with *my* claim? Perhaps no one has a better claim than anyone else. Would that leave the king (or the state) at liberty to settle the question with raw power?[41]

Philosophers Liam Murphy and Thomas Nagel write: "The state does not own its citizens, nor do they own each other collectively. But individual citizens don't own anything except through laws that are enacted and enforced by the state."[42] I wonder, which is it? Who owns a citizen's body, if not the state, not the "people," and not individual citizens either? Perhaps there is a fourth alternative: *no one* owns the citizen's body. *No one* holds a right to say no. But if no one has an exclusive right to a citizen's body, and therefore no one has a correlative duty not to seize that body, that is not liberalism. It is not even civilization.

Property is in some ways conventional, but that is not to call it arbitrary. We may decide arbitrarily to drive on the right rather than on the left, but once a decision is made, the further decision to respect a convention of driving on the right is not arbitrary. And property conventions are less arbitrary than that. There are compelling (even if not universally decisive) reasons to treat a given crop's grower as the crop's owner rather than, say, tying ownership to being the next person to introduce crop disease, or being the next to seize the throne.

Gaus is right; there really is something basic about his premise that coercion is the paradigm of what requires justification, as a straightforward claim and also as a characterization of what is involved in being a liberal. If coercion did not need justifying, not much would. I would add (realizing this is somewhat alien to Gaus's own approach) that *if* Gaus's premise required defense, a defense would be ready to hand. (It is not part of my view that Gaus's premise requires a defense, only that a non-question-begging defense is in fact available.) Namely, people have a record of prospering together when they treat each other as self-owners,

[41] Murphy and Nagel say that "we cannot be said to deserve outcomes for which we are in no way responsible. Thus, to the extent that market outcomes are determined by genetic or medical or social luck (including inheritance), they are not, on anyone's account, morally deserved. Since nobody denies that these kinds of luck at least partly determine how well a person fares in a capitalist economy . . ." (*The Myth of Ownership,* 32). But to be lucky is not to be "in no way responsible." What cuts against being deserving is not being lucky, but rather being *merely* lucky. See my "How to Deserve" (1982), updated in Schmidtz, *The Elements of Justice* (Cambridge: Cambridge University Press, 2006), and in Schmidtz, *Person, Polis, Planet: Essays in Applied Philosophy* (New York: Oxford University Press, 2008).

[42] Murphy and Nagel, *The Myth of Ownership,* 176.

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and thus treat the coercing of other selves—disposing of their possessions without their consent—as the paradigm of what needs justifying.

VII. Conclusion

One familiar way of theorizing about justice and ownership starts with ideal theory, meaning that we assume a world of perfect compliance, then decide what the principles of justice should be in that world. Some theorists, for example, start with intuitions about how much inequality justice permits, formulate a theory that underwrites those intuitions, then infer what sort of redistribution is needed to keep our evolving wealth distribution in compliance with justice by the lights of that theory. Then our job as moral philosophers is done, as we turn the resulting compliance problem over to experts at implementing policy. Let them learn from experience how many police it takes, with what legal powers, to implement justice so conceived. In short, do the philosophy first; save the social science for later. That is one way.

A second way to talk about justice in ownership starts by picturing a world of human beings as they actually are, and then says that the first virtue of social institutions is that they help such beings live together, realizing the best of the potential benefits while avoiding the worst of the potential costs of community life. After we have such a picture in front of us, we go on to say that alleged principles of justice, if they are to have any place in society, must find their place within—must facilitate rather than thwart—the growing of such beneficial institutions, including property institutions. Before we formulate principles of justice, we first draw conclusions about which principles are compatible with growing institutions, norms, and expectations that people need to live by if they are to live well together. Thus, if an alleged principle of justice (such as "People should not have to pay for basic human needs") rules out our using a price mechanism to distribute bread, and if a price mechanism is the only way to distribute bread without starvation and without turning the central distributor's subjects into a groveling underclass, then we know we have no duty, indeed no right, to try to impose that alleged principle of justice on our fellow citizens. If justice is not the only (or even the first) virtue of institutions, or of persons, then not everything that matters is a matter of justice.[43] My claim in this essay is that *figuring out* what else matters can be an essential step in determining what justice itself is about.

Think of the choice between these two ways of theorizing about justice in terms of direction of fit. The first approach says that our world ought to fit our theory of justice, and "you can't make an omelet without breaking a few eggs." The second says that our theory of justice ought to fit our

[43] See John Tomasi, *Liberalism Beyond Justice* (Princeton, NJ: Princeton University Press, 2001).

https://doi.org/10.1017/S0265052509990045 Published online by Cambridge University Press

world, and "you can break a lot of eggs and still not have an omelet." This second approach treats functioning property institutions as morally fundamental and justice as derivative. Philosophy has tended to choose the first path, which empowers us to begin (and end) with philosophy, without all the hard slogging through law, economics, history, and other disciplines before we can even start philosophizing. In a way, this is understandable, but still, it is time for a change.

This has been an essay in the how and why of nonideal theory: in particular, how and why principles of property come first and principles of justice second. Ownership conventions, and property law as it develops under the pressures of case-by-case dispute resolution, tend to become touchstones for conflict mediation down through generations. These conventions (and property law itself) remain imperfect, retaining vestiges of adaptations to ancient problems that no longer exist; yet still they work, coordinating expectations so as to make it easier for people to live together.

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