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Introductory Remarks: Property Law

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PROPERTY LAW

INTRODUCTORY REMARKS

JAMES G. DWYER*

The three essays on property law focus primarily on its relationship to the moral beliefs, attitudes, and experience of the average person in society, rather than to moral theory. First, Merrill and Smith argue for the proposition that a society's property laws "must be regarded" as resting upon widely accepted moral principles that are simple and that include recognition of moral rights with respect to things.¹ They see this proposition as at odds with the view "that property is a pure creature of law" and with the modern utilitarian approach to analyzing property, which is "largely indifferent to questions of individual rights and distributive justice."² And they view the proposition, once established, as a basis for critiquing the "bundle of sticks" conception of property rights and the Coasean postulate of reciprocal causation, because those ideas are too complex and/or counter intuitive for the average person.³

A basic ambiguity in Merrill and Smith's thesis makes it difficult to assess the success of their arguments. It is unclear whether they claim (1) that the best theoretical justification for a property law regime must consist of simple moral precepts, or (2) that property law must coincide with and be understood by the average person in terms of some simple moral beliefs. The first would be a claim about the relationship between moral theory and property law, whereas

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1. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (2007).

2. *Id.* at 1849.

3. *Id.* at 1860-66.

the second would be a sociological claim about the relationship between popular moral beliefs and popular support for and adherence to property laws. Language in their essay suggests the authors are making both claims.⁴ Their argument at best supports only claim #2, however, because it rests entirely on empirical assumptions about the average person's views about property rights and the average person's willingness to obey the law. Merrill and Smith offer no basis for unifying the two—that is, for concluding that the best theoretical justification for property laws is whatever set of moral propositions the average person will accept and act upon. Yet until they provide a compelling argument for claim #1, they will not have provided a basis for criticizing theorists who use the bundle-of-sticks metaphor or Coasean theory in presenting theoretical normative arguments for or against particular property rules.

In addition, their case for claim #2 is not entirely convincing. They are quick to assume that the bundle-of-sticks and reciprocal causation concepts are entirely foreign to the average person, but certainly many counter examples could be cited. Further, though they devote much space to establishing that property laws must embody or rest upon simple norms—for example, that theft is wrong and that ownership entails the right to exclude, they make little effort to establish that those norms must be moral rather than (only) legal. In fact, the examples just cited are legal norms: stealing is a legal wrong and legal ownership entails a legal right to exclude. It might well be that widespread belief in moral property rights generates greater compliance with legal property rules than would the legal rules standing alone, but the authors would need to do more to demonstrate that such widespread moral beliefs are indispensable, that without them chaos would prevail. Moreover, even if one could demonstrate that, it might nevertheless be the case that property is, as an historical matter, a legal invention, a “creature of law,” around which popular moral beliefs have over time coalesced, in the way that David Hume described.⁵

Carol Rose offers a “best of all possible worlds” apologia for property law as we know it. She engagingly illustrates how several aspects of property law—rules regarding initial acquisition,

4. *See, e.g., id.* at 1877, 1889.

5. *Cf. id.* at 1849, 1857 n.19.

distribution, and commodification—reflect what some might see as a second-best morality, one that accommodates human fallenness while still assuming or demanding some moral behavior on the part of a society's members, striking a balance between self-interest and cooperativeness.⁶

Like Merrill and Smith, Professor Rose perceives a need for certain moral attitudes to prevail in a society in order to ensure sufficient compliance with property laws, but she also contends that we could not do better by trying to move the law substantially in the direction of assuming more moralistic and less self-interested behavior on the part of the average person—that is, toward utopian or communistic ideals.⁷ This sort of realist resignation is routinely force-fed to first-year law students, and it is difficult to contest; indeed one wonders whether it is practically nonfalsifiable. Are references to particular past, supposedly failed utopian experiments sufficient to demonstrate that the law could not or should not be changed to demand or assume greater community spiritedness? Or are such past experiments too few and too complex to support definite conclusions? One wonders as well whether Rose's equilibrium theory has any basis for critiquing particular existing laws; or does a law's very existence manifest that it reflects an optimal balance between allowing pursuit of self-interest and demanding cooperation?

Emily Sherwin is less sanguine about existing property law regimes, contending that they inevitably generate substantial moral unease, though she does not suggest that this unease can be eliminated.⁸ Professor Sherwin points out that not only the public moral justifications of property laws, but also the laws themselves, must be relatively simple, and that this gives rise to moral disquiet, because some particular cases decided under a rule will not fit its underlying moral assumptions.⁹ Moral unease also arises from conflict between the desire to correct past wrongs and the need for stability in arrangements once established, as well as from disso-

6. See Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897 (2007).

7. See *id.* at 1925-26.

8. See Emily Sherwin, *Three Reasons Why Even Good Property Rights Cause Moral Anxiety*, 48 WM. & MARY L. REV. 1927 *passim* (2007).

9. See *id.* at 1950-51.

nance among the dictates of retributive, corrective, and distributive justice. Sherwin claims that these sources of moral anxiety, although not unique to property rights, are more pronounced in this area.¹⁰ She does not discuss other types of rights, however; in particular, she does not consider whether similar problems arise in connection with rights to freedom or political participation. Thus, more work would be needed to show that her points in fact say something distinctive about property law, but they are interesting points nonetheless.

10. *See id.* at 1951.