

William & Mary Law Review

Volume 48 (2006-2007)
Issue 5 *Law and Morality Symposium*

Article 16

4-1-2007

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Carol M. Rose

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Carol M. Rose, *The Moral Subject of Property*, 48 Wm. & Mary L. Rev. 1897 (2007),
<https://scholarship.law.wm.edu/wmlr/vol48/iss5/16>

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THE MORAL SUBJECT OF PROPERTY

CAROL M. ROSE*

I ain't the woman in red, I ain't the girl next door
But if somewhere in the middle's what you're lookin' for
I'm that kind of girl

MATRACA BERG/RONNIE SAMOSET, *I'm That Kind of Girl*,
sung by Patty Loveless on
ON DOWN THE LINE (MCA Records 1990).

I. INTRODUCTION: THAT KIND OF GIRL

Utopians do not like private property. In one of the most notorious incidents of the Reformation era, militant Anabaptist preachers called for their followers to establish a Kingdom of the Saints in the town of Muenster in western Germany, gathering supporters in the early 1530s and finally taking over the town from the ruling Prince-Bishop in 1534.¹ The supposedly saintly Kingdom followed, in which a key element, though not an uncontroversial one, was the abolition of private property.² According to these Anabaptist leaders, their new converts were without sin. For these earthly saints, the self-regarding payoffs of "Mine" and the discipline of "Thine" were, as one leader said, "abominations."³ Love

* Ashby Lohse Professor of Water and Natural Resource Law, University of Arizona Rogers College of Law, and Gordon Bradford Tweedy Professor of Law and Organization, Emerita, Yale University. For very helpful comments on earlier drafts of this Essay I wish to thank Barak Orbach, Kenney Heglund, Marc Miller, Eduardo Penalver, Ted Schneyer, Henry Smith, and Ben Zipursky, as well as all the participants at the University of Arizona Rogers College of Law Works in Progress seminar. For very able research assistance I would also like to thank Nicole Beeskow Johnson.

1. NORMAN COHN, *THE PURSUIT OF THE MILLENNIUM: REVOLUTIONARY MILLENARIANS AND MYSTICAL ANARCHISTS OF THE MIDDLE AGES* 255-56, 260-63 (rev. ed. 1970).

2. *Id.* at 265-66.

3. *Id.*

and the spirit of community would induce the Saints to work and share selflessly, free from the grubby hoarding, hawking, and wage counting that accompany property rights.⁴ As a matter of fact, they were not supposed to need conventional marriage either, a doctrine that worked out quite conveniently for at least one of the Anabaptist leaders, Jan Bockelson, who ditched an old wife and acquired fifteen new ones.⁵ But the community of property—and the almost-community of spouses—was not to last. The Prince-Bishop returned with an army, assisted by a number of other alarmed German princes and the townspeople themselves, who had become dismayed at their increasingly tyrannical leaders.⁶ The besiegers turned out the Anabaptists in mid-1535, executing Bockelson and a number of other Saints with the exquisitely painful means and public drama reserved for sixteenth-century revolutionaries.⁷ Along with the bishop's restoration came the return of laws, marriage, and property—constraining institutions that were thought more compatible with the human state of fallenness—while the Anabaptists eventually retreated to more quietist versions of their faith.⁸ Their descendants now reside in Pennsylvania and other places as Mennonites and Hutterites.⁹

More modern Utopians have not always been quite so confident about their own salvation as Bockelson and his followers, but they too have tended to find private property distasteful and an impediment to perfectionist aspirations. Nineteenth century American utopian communities typically restrained private ownership in various ways, in the expectation that the community members would share at least with one another, although perhaps not with the world at large.¹⁰ Property, it seems, concedes too much to self-

4. *Id.* at 266.

5. *Id.* at 269-70.

6. *Id.* at 277-80.

7. *Id.*

8. *Id.* at 280.

9. *Id.*

10. See, e.g., IRA L. MANDELKER, *RELIGION, SOCIETY, AND UTOPIA IN NINETEENTH CENTURY AMERICA* 125-27 (1984) (describing renunciation of private property within utopian Oneida community, though the community retained property insofar as it sold goods to outsiders). Interestingly enough, the Oneida community, like the sixteenth-century followers of Bockelson, also practiced a kind of group marriage. See MAREN LOCKWOOD CARDEN, *ONEIDA: UTOPIAN COMMUNITY TO MODERN CORPORATION* xiii-xiv, 4 (1969) (concerning Oneida

interest, or perhaps just to old-fashioned sinfulness, to have a good reputation among perfectionists.

On the other hand, property also presents some problems to those who ascribe too thoroughly to the idea that human beings are merely self-interested—or sinful. William Blackstone famously noted how the imagination and affections of mankind are stirred by the right of property—that “dominion” over things that “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.”¹¹ But what is so remarkable about that? If one believes in the dominance of self-interest, what is to wonder that each person might claim to exclude all others from something he or she wants? Hoggishness is to be expected from sinners, is it not? No, what should truly strike the imagination is the fact that others—presumably equally hoggish others—pay the slightest attention to any such claims. A right of property would be no dominion at all unless those other persons backed off—playing the “chicken” role to the owner’s “hawk,” as the game theoretical language puts it.¹² This relieves the owner of the enervating requirement to guard her property all the time, so that she can actually improve and use it. That is to say, claims to property only make sense in a social context where there is some level of cooperative behavior: if any given subject is to have control over any given object, others must understand the signals of ownership and acquiesce in them.¹³

These signals of ownership are understood and respected much of the time. They do not always succeed, but often they do, thanks in large part to human forbearance from the impulse to take the money and run. For those convinced of human depravity—otherwise known, by some, as “rationality”—that fact should be the true wonder of Blackstonian claims of dominion. A property regime would be impossible, an unsolvable n-person “Prisoners’ Dilemma,”

characteristics and Noyes’ claim to perfection).

11. WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND *2 (Univ. of Chi. Press 1979) (1766).

12. Richard O. Zerbe, Jr. & C. Leigh Anderson, *Culture and Fairness in the Development of Institutions in the California Gold Fields*, 61 J. ECON. HIST. 114, 133-34 (2001) (analyzing property relations as a series of “chicken-hawk” games, with the owner taking hawk role).

13. Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 84-85 (1985).

if everyone behaved in the presumptive piggish manner all the time.¹⁴ Instead, we have property regimes that rest on an underlying thread of cooperative behavior that is quite out of line with a presumption of total moral fallenness.

One may understand the basic moral subject of property regimes as the practitioner of a kind of second-best morality. This morality does not presume saintliness, but it also is not made for total sinners; she is neither the girl next door nor the woman in red.¹⁵ The common law of property details the second-best morality expected of "that kind of girl," both as owner and as nonowner. As a nonowner, she is expected to ask permission of an owner and not just take things without consent, even when the owner's refusal seems unreasonable.¹⁶ Nor can she usually foist an improvement on the owner unless the owner consents.¹⁷ In her role as owner, on the other hand, although she has a wide latitude with her belongings, she cannot use them in ways that aggravate her neighbors in unusual ways.¹⁸ More particularly, she cannot use her property

14. Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 48-53 (1990).

15. In an earlier work I called her "Mom," to designate a person interested in the well-being of others but not a fool about her own interests, either. *Id.* at 43-48, 50.

16. See *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 156 (Wis. 1997) (upholding large punitive damage judgment against trucker who crossed property after owner's explicit refusal).

17. For example, the doctrine of "ameliorative waste" may make a tenant liable for altering an owner's property even if the alteration adds to the property's value. See 8 RICHARD R. POWELL, *POWELL ON REAL PROPERTY*, § 56.05[1][c] (Michael Allan Wolf ed., 2005) (discussing leading case of *Melms v. Pabst Brewing Co.*, 79 N.W. 738 (Wis. 1899), and noting that modern historic preservation makes doctrine more sympathetic). Similarly, the doctrine of "accessions," permitting an improver to keep an improved object, is sharply limited by the requirement that the improver make a "blameless" mistake and pay compensation. See *DeAngelo v. Brazauskas*, 655 N.E.2d 165, 165-66 (N.Y. 1995) (permitting equitable relief to contractor who mistakenly built house on wrong lot, by enabling him to remove house upon compensation and remediation, contrary to usual accession doctrine remedy which would give house to owner of mistakenly improved lot). In a contemporary example, "squeegee guys," persons who wash windshields while cars are stopped at traffic lights and then demand payment, serve as a metaphor for extortion and urban disorder. See, e.g., Michael Cooper, *Mayor Urges Plan for Drastic Cuts and Tax Increases*, N.Y. TIMES, Nov. 15, 2002, at A1 (describing New York mayor Michael Bloomberg's reassurance that tight budget would not mean return of squeegee guys).

18. See, e.g., *Middlesex Co. v. McCue*, 21 N.E. 230, 231 (Mass. 1889) (describing nuisance as a deviation below ordinary usage); see also Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 729-33 (1973) (proposing land use regulatory standards that build on normal behavior standards

maliciously simply to spite another.¹⁹ Spite only escalates wasteful retaliation, in which each side expends resources just to ruin the other party's things, resulting in a double loss for the society at large. Moreover, property regimes require that on some occasions, especially in emergency situations, the owner must yield to the nonowner who encroaches on her property.²⁰

Like the common law itself, the theoretical names for property practices reflect the second-best character of the morality expected in property regimes, encapsulated in phrases like "self-interest rightly understood,"²¹ "tit for tat,"²² or "everyday Kantianism."²³ Aside from the fact that some people do not abide even by this second-best morality, however, the trouble with this moral middle ground is that it is a large and sometimes ambiguous space. Take the issue of spite or malice, for example: was the owner really acting maliciously toward the neighbor when she built a fence that totally blocked the view from his basement window and then poured water onto the plants there? Or was she merely putting up a kind of trellis on which to grow her vines?²⁴ Or take the case of emergency: is a potentially dangerous detour enough of a necessity to permit a trucker to drive across a lot in spite of the landowners's

implicit in nuisance law).

19. See, e.g., *Bar Due v. Cox*, 190 P. 1056, 1057-58 (Cal. Dist. Ct. App. 1920) (ruling that a ten-foot board fence blocking neighbor's window had to be removed or modified because its construction was motivated by malice).

20. *Ploof v. Putnam*, 71 A. 188, 188-89 (Vt. 1908) (classic torts case permitting boat operator to tie up at pier of another in case of storm, so long as user paid damage); see also *Campbell v. Race*, 61 Mass. (6 Cush.) 408, 412-13 (1851) (stating that road user could make detour onto private property around impassible spot so long as deviation caused as little damage as possible, describing doctrine as an "incidental burden" that a property owner should expect in a "civilized community").

21. See 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 121-24 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Kropf 1945) (commenting on centrality of "self interest rightly understood" in American commerce and politics).

22. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 13-14 (1984) (analyzing the development of cooperation among "tit-for-tat" players of a Prisoners' Dilemma game, who begin with a cooperative move and thereafter reciprocate the move of the opposite player, including refusal to cooperate further with noncooperators).

23. JON ELSTER, *THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER* 192-93 (1989) (describing "everyday Kantian" as one who determines her behavior with the consequentialist question, "What if everyone did that?").

24. See *Bar Due*, 190 P. at 1057 (answering that evidence showed malice).

objection?²⁵ Then too, just how wide is the owner's latitude to carry out her preferences? Can she join with her neighbors, for example, in a set of agreements to exclude minorities or disabled persons from the neighborhood?²⁶

Some cases like these are decided in favor of the owners and some against. Perhaps because of their ambiguities, and perhaps also because we deal with property virtually constantly, property as an institution raises an unusually large number of moral complaints.²⁷ Why *should* anyone recognize and acquiesce to other people's claims of exclusive dominion over anything? This question need not derive from hoggish self-interest, or simply from the intruder or the thief who wants to take the goodies and run; rather, this question originates from the opposite direction, namely that of the perfectionist. The perfectionist might ask, is the institution of property morally worthy enough to command the respect and forbearance upon which it depends?

The remainder of this Essay explores that question, pursuing it in several areas in which moral objections to property frequently arise, and exploring as well the explanations that property proponents give. The argument of this Essay is that the moral objections

25. *Jacque v. Steenberg Homes*, 563 N.W.2d 154, 156 (Wis. 1997) (answering no). Thomas Merrill and Henry Smith use the *Jacque* case as a central example of the moral intuition in favor of property's exclusivity. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1871-74 (2007). My own view is that enough cases have relaxed exclusivity claims that the moral dominance of exclusivity, although important, is somewhat less monolithic in the common law of property than these authors suggest. See, e.g., *supra* note 20 and accompanying text.

26. See *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that racially restrictive covenants are not legally enforceable, but not illegal if purely voluntary); *Crane Neck Ass'n v. N.Y. City/Long Island Servs. Group*, 460 N.E.2d 1336 (N.Y. 1984) (refusing on grounds of public policy to enforce covenant against group home for the mentally disabled).

27. It should be noted that tort law presumes much the same moral character that property law does: one who is "reasonable" but not saintly; someone who meets but does not necessarily exceed a community average in courage, prudence, and judgment. See FOWLER V. HARPER ET AL., *THE LAW OF TORTS* § 16.2 (2d ed. 1986). Moreover, one character who makes an appearance in tort law is the person who stops to help at an accident; though under no legal requirement, she is present often enough that others should look out for her. See, e.g., *Solomon v. Schuell*, 457 N.W.2d 669, 682-83 (Mich. 1990) (describing rescue doctrine). Nevertheless, simply because torts occur in accidental situations, the characters in them are not as constantly subject to observation and critique as those in property transactions. Thanks to Ben Zipursky for bringing to my attention the similarities between the moral characters assumed in torts and property law.

to the institution of property generally are drawn from the sense that property concedes too much to human self-interest. The responses, on the other hand, generally take a form that common lawyers would have called confession and avoidance: property law does so for some larger good. Indeed, even when conventional understandings of property require the property owner to give ground, as in the spite cases, they do so from the perspective of the larger public utility at least as much as from the perspective of private morality. And that is the point: these arguments and responses in certain ways do not meet each other. Instead, they pit concerns for individual morality against justifications based on public welfare, which is a very different matter.²⁸ Whatever the inadequacies of the utilitarian response to first-best or perfectionist moral complaints, however, I will argue that there is a humaneness in the second-best position that in some ways allows it to call the first-best position into question.

II. MORAL OBJECTIONS TO PROPERTY

Where, then, does property come under moral attack? This occurs in many places, but this Essay will concentrate on three somewhat overlapping *loci*: acquisition (where it is argued that property is based on wrongful acts of acquisition), distribution (where it is argued that property is unequally and unfairly distributed), and commodification (where it is argued that treating things as property undermines their true meaning). Other issues might have been raised, such as externality (where it is argued that property rights cause uncompensated harm to others), or even exclusivity itself (where it is argued that exclusive rights throw up barriers between people). I leave these to one side, however, for slightly different reasons: externality, because this issue is already so widely discussed in other literature; and exclusivity, because many of the

28. Cf. JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 106 (2000) (noting divide between rights-based and efficiency-based discussions of property, criticizing both for ignoring role that property law plays in structuring social relations); JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 12-14 (1988) (describing disjunct between rights-based and utilitarian arguments for property).

moral questions about exclusivity come up in the three issues under discussion here.

A. Acquisition

People who read Blackstone's famous sentence about property's marvelous claims of exclusive dominion²⁹ seldom go on to read the rest of the paragraph. If they did, they would find that in the next few sentences Blackstone sharply qualifies his own marveling, and instead expresses great uneasiness about whether people really do have good reasons to respect ownership claims.³⁰ Blackstone's unease springs from the uncertainty involved in acquisition: where did those ownership claims come? As Blackstone observed, people do not like to think about this question too much, because it could cast doubt on the justice of their own claims.³¹

Blackstone had several answers for worries of this kind. First, he basically admonished everyone to forget about these fears and let sleeping dogs lie.³² Proudhon, who described property as theft, would soon reject this advice as would Marx, who said much the same in his acid comments on original acquisition.³³ Second, Blackstone told a little narrative illustrating the much more convincing argument that property rights do a lot of good, whatever their original source, and however they may be passed down.³⁴ Then, and third, he launched into an exquisitely detailed description of property rights as they then existed, perhaps in an effort to effectuate the first admonition and to help people forget to ask these troubling questions.³⁵

The second of Blackstone's answers, the little story to show property's larger benefits, is the relevant one here. The tale begins

29. See BLACKSTONE, *supra* note 11, at *2.

30. See *id.*

31. *Id.*

32. *Id.*

33. See 1 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 713-15 (Frederick Engels ed., Int'l Publishers 1967) (1887) (describing original acquisition as based on force and fraud); PIERRE JOSEPH PROUDHON, WHAT IS PROPERTY? AN ENQUIRY INTO THE PRINCIPLE OF RIGHT AND OF GOVERNMENT 11-15 (Benjamin R. Tucker trans., Howard Fertig 1966) (1840) (asserting that property is theft).

34. BLACKSTONE, *supra* note 11, at **2-12.

35. *Id.*

in the mists of time past, when supposedly all things were held in common. Property then emerged as the world grew more populous and resources grew scarcer, and as people wanted to do things now for the sake of rewards in the future.³⁶ As Blackstone rhetorically asked, who would till today if he could not reap later?³⁷ And so, as he put it, “[n]ecessity begat property”: property emerged, apparently because people needed it.³⁸

This story is less than persuasive as an historical explanation for property’s origins and development. It has some problems on the analytic front as well, because it assumes *both* that people are self-interested *and* that they are cooperative enough to exercise forbearance about other people’s claimed rights.³⁹ But the greater significance of the story is its moral justification for property. Indeed, it recounts one of the most important and prevalent of all moral justifications for property: property is the foundation stone of economic well-being.⁴⁰

Blackstone’s story effectively describes the basic moral subject so common in property: the person who is self-interested enough to need property as an inducement to labor, but who is also cooperative enough to eschew grabbing other peoples’ claimed rights. Once we are given such a subject, with all her internal logical contradictions, property as an institution makes a lot of sense. In theological terms, property provides the link between sinful human beings and the Biblical injunction to labor.⁴¹ The essential gist of a property regime is to let people take the payoffs from their work and investment, and at the same time to identify owners so that everyone can trade instead of fighting. Trade encourages specialization and even greater gains from investment and exchange. This virtuous spiral of work, investment, and trade makes everyone better off in the standard property rationale.

The moral question is whether this expected social good outweighs whatever injustices may have accompanied the original

36. *Id.* at *7.

37. *Id.*

38. *Id.* at *8.

39. *Id.* at **7-8.

40. *Id.* at *8.

41. *See* at **2-3.

acquisition of property rights. Seventeenth- and eighteenth-century property theorists were much fixed on the issue of whether all humankind had to agree to any one person's removal of private property from the great commons that God had provided. Hugo Grotius said yes, John Locke said no, and Blackstone called this "[a] dispute that savours too much of nice and scholastic refinement!"⁴²

Even though the terms of the debate have changed, the acquisition question is still relevant, though in somewhat different arenas. Property, as an institution, requires stability in people's expectations about their own and other people's claims. This is why property law has several claims-clearing devices that substitute Owner #2 for Owner #1 when the claims of Owner #1 have not been sufficiently publicized, and when most people think that Owner #2 is the true owner even though she is not. Adverse possession is a classic example of this sort of claims-clearing device. Unfortunately, Owner #2's claims may have arisen in dubious circumstances or even through force or fraud, and that fact can undermine confidence in the entire institution.⁴³ Contemporary Russia is a case in point, where major capitalist figures are widely regarded as the beneficiaries of insider favoritism and horrifically shady practices.⁴⁴ Should their great wealth be recognized, simply for the sake of getting on with things and letting a modern economy unroll? Or would some kind of redistribution actually lead to greater stability?

Historic injustices create another source of unease: Palestinians vis-à-vis Israelis, former East European landowners vis-à-vis the

42. *Id.* at *8 (describing views of Hugo Grotius and John Locke, among others, and adding his own comment); see also WALDRON, *supra* note 28, at 147-53 (describing seventeenth- and eighteenth-century debate over the emergence of property from supposed original common ownership).

43. See, for example, *Ewing v. Burnett*, 36 U.S. (11 Pet.) 41, 42-44 (1837), a leading adverse possession case in which a wealthy neighbor succeeded in taking property claimed by a poorer man. See also LINDA S. PARKER, *NATIVE AMERICAN ESTATE: THE STRUGGLE OVER INDIAN AND HAWAIIAN LANDS* 115-19 (1989) (detailing use of adverse possession by large landowners to dispossess traditional small Native Hawaiian holdings, often with questionable notice and Native Hawaiians' distrust of courts).

44. See, e.g., Bernard S. Black & Anna Tarassova, *Institutional Reform in Transition: A Case Study of Russia*, 10 SUP. CT. ECON. REV. 211, 218-20 (2003) (describing post-Soviet Russian "oligarchs" takeover of major parts of resources and economy, leading to popular doubts about political and economic reforms); see also DAVID E. HOFFMAN, *THE OLIGARCHS: WEALTH AND POWER IN THE NEW RUSSIA* (2002) (providing biographical information and a description of the rise of a newly wealthy group).

newcomers under Soviet rule, numerous indigenous groups vis-à-vis the settler societies that displaced them, descendants of slaves vis-à-vis the descendants of slave-owners. Settling all those scores could be hugely disruptive, and the passage of time itself makes proposed settlements morally ambiguous, because the original victims and perpetrators often are no longer on the scene. Why charge *A* in favor of *B*, when neither *A* nor *B* were personally involved in the past injustice? Moreover, settlements could leave open the origins of the displaced persons' *own* prior claims, as in the case of former aristocrats' plantations in East Germany.⁴⁵ Just whom did *their* ancestors displace, far back in the Middle Ages?⁴⁶ And so on back in time.

The age-old acquisition problem is not very salient to most property regimes, however, even though it bubbles hotly at the center in some locales. Issues of this kind usually become peripheral because we basically follow Blackstone's advice: we forget about the questionable origins of title. The common law of property encourages this forgetting process, for example, by creating the legal fiction of the "lost grant" for some moderately aggressive but uncontested resource use, or by treating the period of roughly twenty years as a time period for which "the memory of man runneth not to the contrary."⁴⁷ By forgetting about origins we can keep on acquiring, investing, trading, and generally making

45. For a discussion of post-Soviet property issues, see Peter E. Quint, *The Constitutional Law of German Unification*, 50 MD. L. REV. 475, 541-49 (1991) (describing the potentially "explosive" controversies and the decision not to restore East German property confiscated between 1945-49 from the aristocratic "Junkers" and other landowners); *id.* at 549-62 (describing further controversy over decisions to restore property confiscated by East German government after 1949); see also Michael Heller & Christopher Serkin, *Revaluing Restitution: From the Talmud to Postsocialism*, 97 MICH. L. REV. 1385, 1397-412 (1999) (describing nationalistic and ethnic motivations and other perverse incentives in postsocialist restitutions in Czechoslovakia and Hungary).

46. See Hans Rosenberg, *The Rise of the Junkers in Brandenburg-Prussia 1410-1653*, 49 AM. HIST. REV. 1, 4-15 (1943) (describing the emergence of the East German aristocratic class in late medieval and early modern era).

47. See JESSE DUKEMINIER ET AL., PROPERTY 696-97 (6th ed. 2006) (describing development of the doctrine of prescription); see also Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 15-16 (1992) (arguing that the law recognizes that an original owner's sense of entitlement "fade[s]" while later possessor's attachment grows over time). But see Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723, 740-43 (1997) (disputing Waldron's arguments in case of indigenous cultural goods).

ourselves wealthier. The larger public good of stable claims normally outweighs the private lapses that were entailed in some of those claims.

But not surprisingly, on occasion the situation is reversed: unjust acquisitions may seem so gross as to eat away even the middle ground morality that makes property regimes possible. If you think that all those who succeed are thieves, why not be a thief yourself? That rhetorical question turns tit-for-tat practitioners into larcenists. Under such circumstances, public morality—even in quest of stability for property—could require some kind of restitutionary gesture, or at least some acknowledgment of past injustice.⁴⁸

The perception of unjust initial acquisition may also help to explain the unusual willingness of many ordinary people to flout intellectual property claims. Intellectual property (IP) is supposed to serve most of the same utilitarian functions as other kinds of property, incentivizing rights-holders to develop creative projects and identifying owners so that trade is possible, and with trade, the dissemination of artistic and inventive achievements. But That Kind of Girl sometimes violates IP claims with an insouciance that is quite out of character with her usual respect for property, at least insofar as her uses are personal and not commercial. Why? Because she does not think that IP really applies to noncommercial uses.⁴⁹ After all, as Jessica Litman points out with respect to copyright, she senses that most of the relevant law is cooked up by and for commercial interests, without respect to the impact on the rest of us.⁵⁰ If some copyright monitor tries, say, to stop her friends from

48. For discussion of a current controversy, reparations for enslavement, see Hanoch Dagan et al., *Symposium: The Jurisprudence of Slavery Reparations*, 84 B.U. L. REV. 1135, 1135-36 (2004) (describing the variety of views in the symposium). For an example of one small recognition of past injustice, see LESLIE T. HATAMIYA, *RIGHTING A WRONG: JAPANESE AMERICANS AND THE PASSAGE OF THE CIVIL LIBERTIES ACT OF 1988*, at 51, 58 (1993) (describing passage of the 1987 statute to redress personal harms, but not property harms, done to Japanese Americans during World War II); see also SINGER, *supra* note 28, at 190-95 (describing "Dilemmas of Reparation"); Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657, 1686-99 (1999) (describing reparations for long-past injustice as expressions of "regret," rather than inducement to seek useful changes in the law).

49. Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 23-24 (1996).

50. *Id.* Litman develops this depiction of copyright law further in her book, *DIGITAL COPYRIGHT: PROTECTING INTELLECTUAL PROPERTY ON THE INTERNET* (2001).

singing "Over the Rainbow" at the corner bar, she is very much annoyed. She regards this kind of rights-claiming as overreaching, a grab for something outside the range of what might have been justly acquired, namely commercial protection.⁵¹

Indeed until relatively recently, her view was not actually so far off from the way IP rights were actually enforced, perhaps because personal uses did not seem to threaten IP incentives very much.⁵² The advent of the duplicating machine, the video recorder, and especially digital copying have put great pressure on this tacit understanding of the just reach of IP rights, however, because massively enhanced opportunities for personal copying can have enormous commercial ramifications. That Kind of Girl is smart and cooperative enough to appreciate this, as is evidenced by her willingness to buy iTunes when they became available, even though some of her counterparts continue to look for ways to circumvent IP rules.⁵³

Scholarship about IP has intensified exponentially over the last decade, and a central reason is that in this area of property, technology has destabilized the always slightly vague boundary between justly acquired, socially useful IP rights on the one side, and overreaching on the other. Blackstone wanted everyone just to forget about the justice of original acquisition for the sake of current social utility, but modern controversies suggest that those sleeping dogs can wake up unexpectedly.

B. Distribution

Justice, as Aristotle said, is commonly thought to be a kind of equality,⁵⁴ but a property regime almost guarantees that the dis-

51. For a somewhat similar imbroglio, see Elisabeth Bumiller, *Battle Hymns Around Campfires: ASCAP Asks Royalties from Girl Scouts, and Regrets It*, N.Y. TIMES, Dec. 17, 1996, at B1 (describing public relations disaster for royalty collection organization over request for royalties from Girl Scouts for singing "Happy Birthday to You").

52. Litman, *supra* note 49, at 40-41.

53. See, e.g., Constance S. Hawke, *Piracy and Protocols: Handling Internet Piracy on University Networks*, 209 EDUC. L. REP., 17, 26 (2006) (noting great success of online music sales, including Apple's iTunes, but also continuing piracy issues in universities).

54. ARISTOTLE, *THE POLITICS OF ARISTOTLE* 129 (Ernest Barker ed. & trans., Oxford Univ. Press 1962) (noting that ordinary, as well as philosophical, usage describes justice as a kind of equality, though leaving the question of equality with respect to *what*).

tribution of wealth will not be equal: some people will get richer than others. To be sure, there are wealth inequalities in *dirigiste* regimes as well, as in the old Soviet Union, but at least in theory they are likely to be considered flaws rather than systematic institutional features. Not so in property regimes: ownership's economic advantage is that it "internalizes externalities," focusing the rewards and penalties of planning and investment on the owners themselves.⁵⁵ Some owners will do better than others, and the resulting inequality acts as a disciplinary school for capitalist improvement.⁵⁶ One who wants to succeed can identify others' successes and emulate their behavior. Riches are the goal and poverty the goad, and the differences between them form the engine that drives people to work, invest, plan, trade, and in general to take the efforts that increase the probabilities of personal wealth.

But is it *morally right* that wealth be unequally allocated? One answer is, of course it is: as John Locke put it, God intended that the world be put to use by "the Industrious and Rational" and not frittered away by the "Fancy or Covetousness of the Quarrelsome [sic] and Contentious."⁵⁷ That is to say, inequalities in wealth reflect differences in talents and effort, and hence rewards to merit entail inequality of wealth. There is a problem with this answer, though, even supposing that rewards to merit are an appropriate measure of morality, and even putting to one side the inexactness of the merit/reward equation—particularly when the rewards go to heirs rather than original earners. The problem is that this merit/reward answer only kicks the question upstairs, as John Rawls famously argued: inequalities in abilities and energy are themselves a matter of luck, and on a reward-to-merit argument, luck gives no moral claim even to the original earners, much less to their even luckier

55. See generally Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967) (detailing the role of property in internalizing externalities).

56. See THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) (observing that it is contrary to "the first object of government" to remove the "diversity in the faculties of men, from which the rights of property originate" and from which unequal kinds and quantities of property also emerge, even though these differences contribute to political factions).

57. JOHN LOCKE, *Second Treatise, in TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).

heirs.⁵⁸ Hence for the sake of justice in the allocation of resources, those with greater talents and more energy might well be thought obligated to share the results with the less-well-endowed.⁵⁹

There are several responses to this critique. One is the libertarian claim that things that are justly acquired and justly transferred belong to the owner as a matter of right, and as such they are not subject to redistribution without the owner's consent.⁶⁰ This assertion has considerable appeal, though it is subject to the issue that Blackstone identified about acquisition: how can one show the justice of the original acquisition?⁶¹

Perhaps even better-known, however, is the standard utilitarian riposte that redistribution will kill the goose that lays the golden eggs. Once again, property's moral subject is That Kind of Girl, and not a saint. She minds the store and improves the things that are hers so that she can enjoy the rewards, including the enjoyment that she gets from giving things away to persons and causes of her own choosing, rather than the choosing of others. Her efforts, taken together with those of others like her, make the proverbial Pie bigger for all,⁶² and they feed into the Rising Tide that Lifts All Boats, as another proverbial phrase puts it.⁶³ And wherever her talents and energy may have come from, she is at least somewhat less likely to exercise them if no rewards are forthcoming. Even Rawls conceded something to the incentive structure implicit in property: in his blindfolded "Original Position," in which participants do not know where they personally will come out in the

58. JOHN RAWLS, A THEORY OF JUSTICE 72-74, 100-04 (1971).

59. *Id.* at 100-04.

60. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 151 (1974).

61. *See supra* notes 30-35 and accompanying text.

62. For a summary of the "pie" argument, see Carol M. Rose, "Enough, and as Good" of What?, 81 NW. U. L. REV. 417, 417-22 (1987) (describing motivations of fictional character, Rational Utility-Maximizer, or RUM); *see also* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 3-6 (1985) (using the "pie" metaphor to set up a theory of takings).

63. *See, e.g.,* John C. Weicher, *Private Production: Has the Rising Tide Lifted All Boats?*, in HOUSING AMERICA'S POOR 45 (Peter D. Salins ed., 1987) (arguing that general housing improvement also improves housing for the poor); *cf.* Richard L. Kaplan, *Economic Inequality and the Role of Law*, 101 MICH. L. REV. 1987, 1989 (2003) (reviewing KEVIN PHILLIPS, WEALTH AND DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN RICH (2002)) (attributing to John F. Kennedy the saying "a rising tide lifts all boats," but disputing accuracy of the idea).

regime they are choosing, he thought people would choose to allow the rich to get richer as long as their efforts made the poor somewhat richer too.⁶⁴ To put it in more of a vernacular style, the Goose of property may live, so long as its owners give an occasional Golden Egg to nonowners.

Some in the Original Position might opt for an even riskier strategy than Rawls suggested, preferring no giveaways of Golden Eggs or pieces of the Pie at all, in the hopes that the no-give-away strategy will result in an even bigger Pie. Those intrepid souls might think that the probabilities for a slice of that bigger Pie outweigh the chance of coming up short.⁶⁵

But whatever their wishes, one can imagine another practical reason for redistribution within a property regime. This reason revolves around envy and resentment. Great disparities may arouse jealousies among those at the bottom of the heap. Because by definition the have-nots do not have much to lose, they can make a credible threat to disrupt the institutions that protect the wealth of the haves. That reasoning yields what Frank Michelman has called the "big-bribe" theory of redistribution: give away something in order to alleviate the threat.⁶⁶ Bruce Johnsen's investigations of Indian fishing communities in the Pacific Northwest suggest a big-bribe motivation behind the potlatch,⁶⁷ and Mark Roe's observations on economic and political "backlash" suggest that a similar motivation might be at work in more complex economies as well.⁶⁸

64. See RAWLS, *supra* note 58, at 157 (noting that wealth disparities may be acceptable if the least well-off are made at least slightly better off).

65. Rose, *supra* note 62, at 418-20.

66. Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 154 (1977) (describing rational economic motivation to pay for welfare as "big-bribe" to induce stability). Note that if property theorists are right, even have-nots have more than they would have in state of nature, because their labor is a more valuable asset in a property regime. See Geoffrey P. Miller, Comment, *Economic Efficiency and the Lockean Proviso*, 10 HARV. J.L. & PUB. POL'Y 401, 407-08 (1987) (arguing that enclosure leaves even non-enclosers better off because of greater productivity and higher labor value).

67. See D. Bruce Johnsen, *The Formation and Protection of Property Rights Among the Southern Kwakiutl Indians*, 15 J. LEGAL STUD. 41, 62-63 (1986) (attributing potlatch to efforts to allay aggressiveness by neighboring groups whose fishing activities were less successful).

68. Mark J. Roe, *Backlash*, 98 COLUM. L. REV. 217 (1998) (suggesting that redistribution of wealth may promote social stability, increasing overall economic welfare).

Envy and resentment may not be the only practical redistributional motivations at work in a property regime, however. Thomas Haskell argues that modern philanthropy began with the vast expansion of commercial activity in the late eighteenth century.⁶⁹ According to this account, through trade, entrepreneurs came to know and care something about people very different from themselves, and they become convinced as well that they themselves had the power to intervene to improve the lot of others.⁷⁰ That is to say, trade excited the moral sentiments, along with action based on those sentiments.⁷¹

Philanthropy is not so far removed from involuntary redistribution, either, at least for That Kind of Girl, who is an Everyday Kantian and a practitioner of a Middling Morality. She would like to give away something to alleviate the troubles of the less fortunate, but she does not want to be a sucker about it and be the only one. If others feel the same way, a requirement of mandated redistribution reassures the participants and becomes an entirely plausible outcome in a regime that protects private property.

Perhaps in keeping with the middle-ground morality expected in property regimes, property law takes a middling approach to redistribution. Involuntary individual redistributions—such as theft, robbery, and fraud—are everywhere sharply discouraged, at least with respect to members of the in-group.⁷² Voluntary individual redistributions in the form of gifts are more or less unproblematic. The common law contains certain presumptions against gifts—perhaps because gift-giving is not normally expected in a second-best morality, or perhaps because what seems a voluntary gift might be a larceny in disguise—but gifts are allow-

69. Thomas L. Haskell, *Capitalism and the Origins of the Humanitarian Sensibility*, Part 2, 90 AM. HIST. REV. 547, 547, 554-59 (1985).

70. *Id.* at 555-58.

71. For Adam Smith's and other Enlightenment thinkers' location of "moral sentiments" in interactions with others, see EMMA ROTHCHILD, *ECONOMIC SENTIMENTS: ADAM SMITH, CONDORCET, AND THE ENLIGHTENMENT* 230 (2001).

72. JOHN PHILLIP REID, *LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL* 350-55 (1997) (describing extreme level of respect for property among westward emigrants, even under dire circumstances); cf. Richard O. Zerbe, Jr. & C. Leigh Anderson, *Culture and Fairness in the Development of Institutions in the California Gold Fields*, 61 J. ECON. HIST. 114, 123, 135-37 (2001) (discussing strong concept of private property but harassment of outsider ethnic groups among American gold rush miners).

able if they jump through the requisite hoops to prove their genuineness.⁷³ Publicly mandated redistribution has a long history—as in the potlatch—and no doubt serves in some measure as mutual insurance,⁷⁴ though in modern economies the mutual insurance idea may be less convincing (does Donald Trump really need welfare as insurance?). Modern economies generally put one constraint on publicly mandated redistribution: it usually takes the form of taxation—that is to say, payment falls on a large group. “Takings” law and similar doctrines constrain the degree to which particular individuals can be forced to disgorge wealth for transfer to the less fortunate, even though these doctrines differ from country to country, and even though there may be some gentle inclination toward redistribution implicit in takings law itself.⁷⁵ This would comport with the second-best moral approach to mandated redistribution: it is all right and perhaps even desirable so long as a lot of people are involved, and no one person is the sucker.

In sum, then, property law is not entirely hostile to redistribution, even mandatory redistribution, despite moral critiques to the contrary. Spreading the burden is an important consideration, but so is the potential cost to productivity entailed in reducing incentives. But if a property regime really succeeds in harnessing self-interest to labor, and if labor and effort really do contribute to greater social wealth, then greater generosity may follow too. Aristotle commented that even the liberal person pays attention to his property so as to have enough to give to others, a view that may

73. Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295, 302-08 (1992) (noting that promises to make gifts are enforced only with a special showing of the donor's intent).

74. Elizabeth I of England attempted to deal with poverty by requiring the impoverished person's original parish to provide for him or her. For the original Elizabethan Poor Law, see An Act for the Reliefe of the Poore, 43 Eliz. c. 2 (1601) (Eng.). Other contemporary societies provided poor relief as well, though poverty was not necessarily made pleasant. See, e.g., SIMON SCHAMA, *THE EMBARRASSMENT OF RICHES: AN INTERPRETATION OF DUTCH CULTURE IN THE GOLDEN AGE* 19-21, 174-75, 575-83 (1987) (describing seventeenth-century Dutch charity for local poor persons along with much more draconian treatment of “idlers, spongers, beggars and assorted ne'er-do-wells” considered able-bodied).

75. Hanoeh Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 743-44, 747 (1999) (arguing that takings doctrine has redistributive element, particularly in subdoctrines of reciprocal benefit and diminution of value).

bear some relationship to the more modern idea of the diminishing marginal utility of income or wealth.⁷⁶ Economists find that environmental degradation in developing areas follows a U-shaped “Kuznets curve,” worsening at the outset of economic development but then improving again as people’s environmental interest presumably rises along with their growing disposable incomes.⁷⁷ Even crows are generous with their neighbors when they have a lot of food and numerous nesting spaces around.⁷⁸ The very poor can certainly show great generosity, and for the needy as well as others, sharing can act as insurance in a very risky setting.⁷⁹ But more wealth may also foster more generosity, and if property regimes succeed in producing wealthier societies, they may well add to the sum total of generosity and motivation to redistribute.

C. Commodification

Still another common moral complaint about property is that the “propertytization” and trade of some good things fatally misjudges their character and undermines the good things themselves. “Love for sale,” for example, might be thought an expression that misjudges the character of love, and worse yet, one that undermines people’s ability to understand what love really is.⁸⁰

76. ARISTOTLE, 4 *Nichomachean Ethics*, in 2 THE COMPLETE WORKS OF ARISTOTLE 1768 (Jonathan Barnes ed., Princeton Univ. Press 1984). For an explanation of the declining marginal utility of wealth, describing the idea but also some of its difficulties, see WALTER J. BLUM & HARRY KALVEN, JR., THE UNEASY CASE FOR PROGRESSIVE TAXATION 40-41, 45-46, 51-54, 56-63 (1953). Greater generosity, however, may reflect a shift in spending tastes with greater wealth, rather than a declining marginal utility. *Id.* at 57 n.146.

77. Daniel C. Esty, *Bridging the Trade-Environment Divide*, 15 J. ECON. PERSP. 113, 115, 119 (2001) (describing Kuznets curve in development-environment relationship and arguing that even this pattern may be influenced to favor environment).

78. Jane E. Brody, *The Too-Common Crow: Too Close for Comfort*, N.Y. TIMES, May 27, 1997, at C1.

79. Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1341-44 (1993) (analyzing communal ownership as insurance-like response to high risk).

80. For a leading critique of the corrupting character of some commerce, see Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets*, in RETHINKING COMMERCIALIZATION: CASES AND READINGS IN LAW AND CULTURE 122, 122-23 (Martha M. Ertman & Joan C. Williams eds., 2005) (attacking commodification of some things as corrupting).

The commodification issue is basically an objection not to property in general, but rather to a particular feature of property rights, that is, alienability, and especially alienability through sale.⁸¹ Some things, it is said, should not be treated as marketable property, available for purchase by the highest bidder.⁸²

As an aside, however, a considerable amount of property in the world in fact is *not* alienable, not because of moral objections but because the distribution of property rights make alienation impracticable. The reason is complexity: large numbers of overlapping rights in any given thing generally mean that this thing is unlikely ever to be traded. In such cases, the costs of finding all the owners and getting their consent precludes trade. Overlapping rights can be a curse, as in the "tragedy of the anticommons," in which the number and complexity of rights precludes commercial development even of assets that are plainly adapted to commercial uses, such as the storefronts in post-Soviet Moscow.⁸³ Modern intellectual property aims at utilitarian incentivizing, but IP too can sprout overly complex property rights that impede socially beneficial free availability, as in the patenting of upstream scientific research⁸⁴ or the "propertization" of artistic productions.⁸⁵ On the other hand, complex rights can also have some uses. They are prevalent in many small-scale subsistence or community-resource-based economies, such as precolonial New Zealand agriculture⁸⁶ and the medieval European open-field regimes.⁸⁷ In those

81. Margaret Jane Radin, a leading scholar in the area, describes the issue of commodification as "market alienability." See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1853 (1987).

82. *Id.* at 1855.

83. Michael A. Heller, *The Tragedy of the Anticommons: Property in Transition from Marx to Markets*, 111 HARV. L. REV. 621, 622-24 (1998) (describing inability of Moscow storefront claimants to agree, freezing use).

84. See, e.g., Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998) (arguing that upstream patents complicate research efforts).

85. *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 901-02 (9th Cir. 2002) (limiting trademark in Barbie doll to permit song with critical social commentary).

86. Stuart Banner, *Two Properties, One Land: Law and Space in Nineteenth-Century New Zealand*, 24 LAW & SOC. INQUIRY 807, 811-12 (1999).

87. Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131, 132 (2000).

close-knit groups, complexity may be favored by the participants,⁸⁸ not only can complex rights stabilize the community by inhibiting insiders' overreaching,⁸⁹ but complexity also makes it hard for outsiders to buy in and for insiders to sell out without the consent of the whole community.⁹⁰

Unlike past societies, modern economies—and their laws—tend to treat alienability as one of the principal features of property, and alienability necessarily much reduces complexity.⁹¹ Trade is a matter of immense importance in modern economies, because trade tends to move resources to those who value them most highly, and because it encourages specialization on an ever-wider scale, which vastly increases the total quantity of goods and services available. Hence when something comes to be treated as property, tradeability is presumed, at least in modern economies. But in order to be tradeable over wide circles of potential buyers, property must be fairly simple as a legal matter, so that complete strangers have some idea what they are getting. Thus there are many legal doctrines that simplify property rights, even overriding the wishes of the current owners for more delicate arrangements, so that property will indeed be available for alienation—including alienation to total strangers.⁹² In a wide and commercialized property market, property law acts as an ax that purposely chops out nuances and niceties in the things traded. Too many complications spoil the market.

The formulaic, simplified legal patterns of alienable commercial property are quite distinct from the exchange relations that occur in more close-knit societies. In the latter, everyone knows in detail whatever there is to know about who owns what in the community. Exchanges may indeed be frequent, but they generally take the form of reciprocal gifts. The relative values of these gifts

88. *Id.* at 153-54 (noting evidence that medieval and early modern farmers created scattered fields and common property regimes by contract, evidently preferring this mode to individual property rights).

89. *Id.* at 146-47.

90. *Id.* at 136-37; Banner, *supra* note 86, at 813-15, 817-20.

91. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 3-5 (2000) (noting that land and other property can be conveyed only in one of a limited number of standard forms).

92. *Id.* at 24.

go unstated, but they are implicitly understood by all the participants.⁹³ Gift exchange cements community bonds—from a community of two on up to many more—keeping all the participants in a vague but nevertheless socially and emotionally charged condition of mutual give and take.⁹⁴

The contrast between the two patterns of exchange, if taken at face value, does not speak very well for modern property regimes. We observe delicate and subtle gift exchanges between intimates on the one hand; but clunky, matter-of fact, rude, and explicit deals between strangers on the other. The commodification objection is that at least with respect to some subjects, we should limit exchange relations to the former type of relationship and curtail the latter.

Accordingly, the anticommodification subjects are often those in which we commonly find a high level of personal or emotional content. For example, according to some common anticommodification claims, you might *give* your mother's wedding ring to your daughter, to whom it could have special meaning, but it is a horrible loss to have to *sell* it to a pawnbroker, who might resell it to anyone at all.⁹⁵ You might *give* your kidney to your brother, but you would *sell* a kidney to a stranger only under the direst threat of poverty; moreover, your doing so might devalue and discourage the altruistic donation of a kidney by a third party.⁹⁶ You freely exchange sexual favors with your lover, but selling sexual services is a violation of human dignity, and doing so cheapens sexuality

93. MARCEL MAUSS, *THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* 1, 3, 40-41 (W.D. Halls trans., W.W. Norton 1990) (describing market-like character of gift-exchange). For a more modern example, see Robert C. Ellickson, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 55-56 (1991) (describing "[m]ental [a]ccounting of [i]nterneighbor [d]ebts" in close-knit community).

94. See Lee Anne Fennell, *Unpacking the Gift: Illiquid Goods and Empathetic Dialogue*, in *THE QUESTION OF THE GIFT: ESSAYS ACROSS DISCIPLINES* 85, 93-94 (Mark Osteen ed., 2002) (arguing that gift giving differs from market exchange because through gifts, each party engages in "imaginative participation in the life of the other," helping to cement relationships).

95. See Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 959-60 (1982) (noting difference in emotional attachment to ring as between "loving wearer" and jeweler).

96. See Sandel, *supra* note 80, at 122-23 ("[C]ertain moral and civic goods are diminished or corrupted if bought and sold for money.").

more generally.⁹⁷ At least, so goes the argument: commodification coarsens subjects when intimacy and generosity are important, and it reduces our ability even to understand their value. In that sense, property—at least alienable property—corrupts the moral subject.

The philosopher Michael Sandel has been particularly adamant about the dangers of commodification, and especially about the way that commodification can corrupt the moral subject, who comes to misjudge and devalue things that should at most be exchanged as gifts.⁹⁸ Sandel has also raised a related corruption issue about the burgeoning use of property-like institutions in public regulation, arguing that these undermine civic consciousness. For example, he has opposed emission trades in connection with air pollution control. These trades allow high-cost polluters to meet their cleanup obligations by paying someone else—presumably someone with lower prevention costs—to do the cleanup instead.⁹⁹ The intuition behind emission trading is that trading encourages substitute performance, and substitute performance may reduce overall pollution at the lowest cost, without respect to exactly where the pollution reduction occurs and who actually does the reduction. But in Sandel's view, this market arrangement corrupts the purchaser, because it permits her to do something that is wrong simply because she buys the right.¹⁰⁰ This corruption spreads to other people as well: the purchase of a "right to pollute" sends the wrong message about the wrongfulness of pollution, and undermines those who would try to do the right thing by reducing pollution as much as possible.¹⁰¹

There are several responses to these anticommodification arguments, however. To begin with the more intimate subjects, there is a certain prissiness about the claim, say, that sexuality is best experienced in a situation of love and caring. Perhaps that is true for some people (even most people), but some folks out there like their sex a whole lot edgier, and the desired edginess might

97. *Id.* at 123.

98. *Id.* at 122-23.

99. Michael J. Sandel, *It's Immoral To Buy the Right To Pollute*, N.Y. TIMES, Dec. 15, 1997, at A23.

100. *Id.*

101. *Id.* ("[T]urning pollution into a commodity to be bought and sold removes the moral stigma ... associated with it.").

well include domination, humiliation, and yes, buying and selling.¹⁰² Even putting to one side kinky preferences of this sort, there are others who strongly resent public interference in their choices about intimate matters, such as acquiring reproductive materials. Gays and lesbians, long shut out by the disapproving regulations of adoption and surrogacy, may well find the market a refreshing and liberating alternative.¹⁰³

But for the second-best morality of property, none of these grander liberationist claims for the market are really necessary. Take the issue of prostitution. Let us concede, for the sake of argument, the perhaps unadventurous view that first-best sexuality and reproduction take place among loving partners in intimate relationships. There still may be serious costs if sexuality is limited to these circumstances. Whether we like it or not, sexuality is likely to get marketed because some people do not have better options.¹⁰⁴

A property-based, second-best solution would be to take these frailties into account and try to make the best of them. What would that mean? It would mean taking seriously the prostitute's property in her body and her contractual interests in dealing with it.¹⁰⁵ That is to say, it would make sure that her contracts are enforceable and, most importantly, that she gets paid.¹⁰⁶ Otherwise she may have to use a pimp for enforcement and/or pay off corrupt cops, and she may find getting out of "the trade" a whole lot more difficult and time-consuming, supposing that she wishes to do so.¹⁰⁷ Illegalizing the sale of sexual services makes her much more vulnerable to these kinds of individuals, encouraging their overreaching and her dependency, hardly a scenario for moral uplift.¹⁰⁸ Illegality has of

102. Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 206-07 (2001) (noting that sexuality may take edgy forms, including objectification).

103. See Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 35-37 (2003) (arguing for a more open market in reproductive materials).

104. See Sandel, *supra* note 80, at 123.

105. See MARTHA C. NUSSBAUM, *SEX & SOCIAL JUSTICE* 276-85, 291-93 (1999) (describing and refuting arguments against prostitutes' contracting for sexual services).

106. *Id.* at 278.

107. *Id.*

108. *Id.* at 294 (noting that pimps' control of prostitutes' earnings may be exacerbated by illegality).

course been the choice of many jurisdictions, though one might well doubt its humaneness, and one might certainly doubt whether such choices lead to enhanced welfare for any of the concerned parties. Even St. Augustine thought legality the better route, largely for second-best reasons.¹⁰⁹

At this juncture, the usual second-best considerations—doing well in the long run, even at the cost of some concession to human frailty—begin to raise a moral claim of their own vis-à-vis the first-besters. Where does the superior moral position really lie? Pushing even further and really insisting on the first-best solution, that no sex should occur outside a loving relationship, could mean that the prostitute starves to death. The same may be said of those who sell kidneys and other body parts. How moral is this? That question, by the way, is no doubt one reason why one of the more sober anticommodificationists, Margaret Radin, thinks that with respect to dire circumstances of this sort, there can be no complete anti-commodification position without a commitment to welfare.¹¹⁰

In a second-best moral universe the welfare solution could have considerable appeal, because it at least recognizes the prostitute or the kidney-seller as a property-holding agent, who has to be paid to do something different with her property from what she might have otherwise preferred. Of course, those who pay the welfare tab might be concerned about the impact on incentives; transfer payments that are too large might even encourage some to threaten to sell kidneys or sex just for the sake of the expected payoff. Donors could well give generously to these laudable ends, but they do not want to be suckers. As usual, the second-best moral subjects presumed by property are capable of thoughtful and cooperative activity, but they respond to incentives; what is more, they know that others do as well, and they think it is asking for trouble to forget it.¹¹¹ Sale of intimate goods thus takes on a rather different hue when seen through the lens of property as a second-best morality: considerably

109. St. Augustine, *De Ordine* 2.12, in 5 THE FATHERS OF THE CHURCH 227, 287-88 (Ludwig Schopp ed., Robert P. Russell trans., Catholic Univ. of Am. Press 1948) (saying that prostitution is an evil, but that it cannot be eradicated without great unsettlement, due to human lust).

110. Radin, *supra* note 81, at 1910-11.

111. See *supra* notes 12-23 and accompanying text.

more sympathy for those who trade in these goods, considerably less sympathy for the effort to suppress them, and some interest in the welfare-buy-out option along with some scepticism about its efficacy.

Although the context is very different, the anticommodification position raises similar second-best considerations when the issue comes to the use of finite resources, as in clean air. No doubt the moral stricture against polluting would be a good thing if there were no cost to halting pollution. But as with the curtailment of prostitution or kidney sales, there *are* costs, even though they may not be so searingly personal. When the no-pollution option has real costs, such as in making electricity prohibitively expensive, it is questionable whether a strictly "moral" antipollution position is very sensible. Pollution does indeed damage important aspects of social welfare, but without polluting activities it would be impossible to have some good things—electricity for refrigeration for foods and medicines, lights for libraries and theaters, and many, many other benefits. Considered only from the perspective of pollution *vel non*, the first-best moral ideal would presumably be no pollution at all; but from a wider perspective, no pollution would cost a great deal. Left to herself, That Kind of Girl just isn't that good.

To be fair to Michael Sandel, he apparently does not presume that she is. He just thinks that she should avoid "excessive" pollution, and that if others are buying and selling pollution entitlements, she is likely to become discouraged,¹¹² and thus less likely to make the effort to reduce excesses. In his view, this kind of buying and selling sends the wrong message, namely that something morally wrong is not an evil but simply an expense.¹¹³

What is really under discussion here, then, is the kind of entitlement that will most efficaciously keep a necessary evil within some kind of boundaries. Some property regimes certainly insist that actors behave in the ways that Sandel suggests. In nuisance law or riparian law, everyone is supposed to behave "reasonably," which generally means that each person can act in a way that is compatible with like activities of everyone else, a sort of practical

112. Sandel, *supra* note 99.

113. *Id.*

Golden Rule.¹¹⁴ But regimes of this sort often emerge where there are relatively high transactions costs among the participants. Here courts require “reasonable” behavior because the parties cannot easily bargain for their more precise preferences.¹¹⁵ When transactions become less costly, or when the parties’ preferences become more important to them, they often start to cut deals.¹¹⁶ Why? Because there are often gains from trade: the low-value water user, for example, can trade his “reasonable” diversion rights to the higher-value user, and both are better off. Tradeable emission allowances lower the cost of trades by defining property rights, and once that is done, there certainly appear to be gains from trade here too, with lower-cost pollution preventers selling permits to higher-cost preventers, while the rest of us come out with less pollution and at a lower total social cost.¹¹⁷

Pollution trading may reduce more pollution for less money, but is that good enough to justify the moral degradation of the participants? An important question here, however, is whether there really *is* much of a moral loss. Undoubtedly there is *some* loss, under some circumstances—or at least the claim is arguable. In a much-cited study of an Israeli daycare center, parents apparently were failing to pick up their children on time, much to the distress of the staff, who wanted to get home themselves.¹¹⁸ When the staff instituted a fine for laggards, however, the parents began to regard the arrangement as a fee for service, and they left the kids late even more often.¹¹⁹

That Kind of Girl, however, might see a different opportunity here: why not take the money from fines (or fees), hire a babysitter

114. See, e.g., *Middlesex Co. v. McCue*, 21 N.E. 230, 231 (Mass. 1889) (finding that ordinary use of land was not a nuisance). For riparian rights, see Carol M. Rose, *Energy and Efficiency in the Realignment of Common-Law Water Rights*, 19 J. LEGAL STUD. 261, 284-85 (1990) (associating riparian law with reasonable correlative rights).

115. Rose, *supra* note 114, at 285.

116. See *id.* at 281 (noting riparian owners’ complex transactions concerning water power for industrial purposes).

117. For a well-known statement of the trading gains from emission rights systems, see Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1341-42 (1985).

118. See Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1, 1 (2000).

119. Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 339-40 (2001) (citing Gneezy & Rustichini, *supra* note 118, at 15) (arguing that fine increased parent tardiness rather than discouraged it).

to stay late with the kids, and make everybody happy while creating a new job for someone? Would it be better if all the parents did the right thing? Well, maybe. But if they do not, enlightened self-interest might be able to come up with satisfactory solutions. First-best actors could enjoy their halos, but they would miss out on some opportunities, such as providing a job for somebody else.

A more important point is that it is not altogether clear that people do in fact respond worse to fees-for-service than they do to expectations of what might be thought to be "good" behavior. Industries have long griped and moaned under the requirements of command-and-control environmental rules, which are themselves a variant on the stricture that everyone should do the right thing, or at least the very best they can.¹²⁰ Even putting to one side the expense and misdirection of some command-and-control regulations,¹²¹ industrialists' evasions and prevarications about these controls are not a thing of moral beauty. Using an example from the express "diamond" lanes of a California highway, Lior Strahilevitz has interestingly described the normative response that motorists made to a change from command-and-control to market mechanisms.¹²² When the rules permitted only multiple-passenger vehicles to use the express lanes, single-passenger motorists responded with rampant cheating and resentment. But cheating dropped precipitously when the system changed, and when drivers were simply charged extra to use the fast lane.¹²³ Apparently both those who paid and those who did not thought that the allocation was fair: you pay your money and you get your lane. And by the way, the money could be used for transportation improvement, or even environmental protection. Is this immoral? Perhaps for the Utopian, but not necessarily for That Kind of Girl.

120. See, e.g., Andrew C. Revkin & Neela Bannerjee, *Some Energy Executives Urge U.S. Shift on Global Warming*, N.Y. TIMES, Aug. 1, 2001, at C1 (describing energy industry opposition to proposed mandate for all power plants to employ modern emissions-reductions technology, and describing industry preference for tradeable pollution credits).

121. See, e.g., J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757, 817 (2003) (calling for global view in environmental regulation, discussing overregulation of one source of air pollution and underregulation of another).

122. See Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. 1231 (2000).

123. *Id.* at 1250-52, 1256-60.

CONCLUSION

The California highway experience suggests a more general point about anticommodification and antiproperty claims: even though for the sake of getting on with things, property regimes may overlook some lacunae in the justification of entitlements, nevertheless, in many or perhaps most instances people think property arrangements and markets are fair. Indeed, the medieval philosophic tradition of the "just price" used the market price as a normal gauge.¹²⁴ Most people do not behave with their property or in markets in the cold, calculating, and utterly self-serving ways that anticommodificationists and more general antiproperty theorists suggest.¹²⁵ If they did, markets would not last very long, and property probably would not either. People have to accept property for it to work in any meaningful way. And, very often, they do, relieving owners of the onerous necessity to guard their things all the time.¹²⁶ Whatever the lapses, property regimes generally mediate issues of resource use and discourage feuds while encouraging trades instead. As to trade, people meet others in market relationships; they learn to trust one another and to behave in trustworthy ways, and out of those relationships of trust they can develop general habits of civility and more specific friendships, sometimes quite remarkable ones.¹²⁷ Property accepts people as they generally are—self-interested, to be sure, but capable of cooperation—and of course it leverages both traits into productive activity.

By contrast, it is the Utopian, first-best demand—the demand that insists on sharing and that concomitantly severely limits property—that puts inordinate strains on That Kind of Girl. As a result, although there are some utopian successes such as monasteries, the history of utopian experiments is littered with moral

124. James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587, 1604 (1981).

125. See *supra* notes 80-82 and accompanying text.

126. See *supra* notes 11-14 and accompanying text.

127. See Peter Kollock, *The Emergence of Exchange Structures: An Experimental Study of Uncertainty, Commitment, and Trust*, 100 AM. J. SOC. 313, 337-38 (1994) (describing experimental study of relationship-building through trade).

failure and sometimes great cruelty.¹²⁸ Shops in socialist regimes are renowned for the rudeness and indifference of their clerks. Why should they care? They get nothing from good behavior. The Anabaptists at Muenster fell into mutual recriminations, and they ultimately betrayed and killed one another.¹²⁹ Perhaps the greatest of all utopian experiments was the old Soviet Union, and according to one eminent Soviet historian, Richard Pipes, the experiment led to unprecedented listlessness, arbitrariness, corruption, and moral slackness.¹³⁰

This is not to say that private property regimes are all sweetness and light. They are not. They have more than their share of trouble makers, hucksters and advantage-takers. But those kinds of people are not the normal subjects of property, and they are certainly not the ideal type supposed by property law. When they can be caught, they are treated with disapprobation. The normal subject instead is the kind of person who is self-seeking enough to get herself into plenty of Prisoners' Dilemmas, but generous enough to get herself out of them when dealing with a similarly generous counterpart.¹³¹

Economic thinkers have come to realize that this kind of person is a great source of wealth-production—much more so than the purely saintly type. Economic success often serves as the rationale for ignoring the unsolvable issues of entitlement and distribution that dog property regimes. But moral thinkers might well consider that this kind of person, the normal subject of property, is also worthy of some respect. This is not because she is perfect, which she is not, and not simply because her characteristics are so productive, which they are, but because she has her own streak of divinity. It is a streak that, although wary, is still trustful, trustworthy, and good-willed—all traits that can be enhanced by institutions that recognize that, in this vale of tears, second-best may be the best that we can do.

128. See *supra* notes 4-6 and accompanying text.

129. See *supra* text accompanying notes 1-7.

130. See generally Richard Pipes, *Human Nature and the Fall of Communism*, AM. ACAD. ARTS & SCI. BULL., Jan. 1996, at 38.

131. See *supra* note 22 and accompanying text.