



Functional Property, Real Justice*

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Our days are a vast, intricate, evolving dance of mutual understandings. We stop at a traffic light, offer a plastic card as payment for a meal, leave our weapons at home, or enter a voting booth. We live and work in close proximity, at high speed, with few collisions: on our roads and in our neighborhoods, places of worship, and places of business. Somehow, having all those people around is more liberating than stifling. The secret is that we know roughly what to expect from each other. Knowing what to expect enables us to adapt to each other.

Not being obliged to conform to expectations—being free to test the previously untested— is likewise a great benefit. The two benefits seem mutually exclusive, yet property rights, combined with freedom of contract, enable us to reap both at once. We can rely on being able to go to market and find someone selling cauliflower at an affordable price. We can also rely on being able to go to market and find someone rendering obsolete what a few years ago had been cutting-edge technology. We make progress by testing what has not previously been tested. We experiment.

One problem with experiments is: many of them *don't work*.¹ Or, the ideas being tested turn out to be bad ideas. Thus a successful society encourages people not only to experiment, but also to shut down experiments whose inspiration proves unsound.

What kind of framework encourages experimentation without at the same time perpetuating *bad* ideas? Here is one hypothesis: in societies that sustain progress over long periods, people are free *to* experiment at their own expense and free *from* having to pay for other people's bad ideas. This is the true test of a system of property.

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¹ What does it mean for an experiment to fail? Consider the reputed fact that eighty percent of restaurants in the USA close their doors within two years of opening. Some go bankrupt, but eighty percent of the restaurants that close were not losing money at the time they closed. Mainly, owners were learning that they did not want to spend as much time as it takes to make a restaurant succeed, that they wanted to be in a different location, or that they wanted to try a different kind of restaurant. And so on.

It is natural to assume instead that the true test of a system of property is a question of whether the system is just. That is, philosophers should theorize about justice first, and only then begin to theorize about what can legitimately become a person's property. I have become skeptical about this. I now see justice as something that can and does evolve in a given society. Philosophizing from the armchair cannot tell us everything, and sometimes tells us little, about the historically contingent requirements of justice in a particular time and place. For example, imagine an airplane crossing over your land at high altitude, without permission. Has an injustice been done? To answer, we need to know what expectations have been legitimated in that particular time and place, and we need to know something about the function of property institutions.

Section I characterizes property rights, arguing that a property right first and foremost is a right to say no to proposed terms of exchange.² Section II discusses practical limits of the right to say no. Section III 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. Section IV considers what this has to do with justice, arguing that our philosophical theorizing about justice needs to answer to the question of what has a history of resolving conflict in a particular time and place, 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 in their everyday lives.

I. 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 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.³ A liberty in this technical sense is a nonexclusive right, whereas a proper right implies a right to exclude other would-be users: a right to say no.

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.⁴ However, 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. Property is a tree. If other sticks are

² See David Schmidtz, "Property," *Oxford Handbook of the History of Political Philosophy*, George Klosko, ed. (Oxford: Oxford University Press, 2010) for a reworking of some material from Section I.

³ Wesley Hohfeld, *Fundamental Legal Conceptions*. (New Haven: Yale University Press, 1964, 1st published in two parts in 1913 and 1917).

⁴ John Lewis, *Law of Eminent Domain* (Chicago: Callaghan & Co, 1888) generally is regarded as the first person to use the "bundle of sticks" metaphor.

branches, the right to exclude is the trunk.⁵

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 various sticks that make up property, the right to exclude is fundamental.

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. In normal cases, a piece of property P normally is protected by a *property rule*, meaning no one may use P without the owner’s permission. In other cases, 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 owner’s permission.⁶ This is how Calabresi and Melamed analyze the ways of giving property rights their due.

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.⁷

⁵ David Schmitz, “The Institution of Property,” *Social Philosophy and Policy* 11 (1994) 42-62, is my first attempt to articulate this point. I thank Oliviero Angelini for drawing my attention to an especially cogent argument for the point: Thomas W. Merrill, “Property and the Right to Exclude,” *Nebraska Law Review* 77 (1998) 730-55.

⁶ Guido Calabresi and A. Douglas Melamed, “Property Rules, Liability Rules and Inalienability: One View of the Cathedral,” *Harvard Law Review*, 85 (1972): 1089-1128.

⁷ In *Del Webb v. Spur Industries* (1972), housing developer Del Webb sued neighboring feedlot operator Spur industries, saying that Spur’s operation was a noxious nuisance, damaging land 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 did Del Webb, then it has no complaint. Yet, the judge ruled that although Del Webb per se had no case, Del Webb’s customers were “the public” and the public has a right to be protected against noxious and potentially unhealthy nuisances. So, 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,

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 bureaucrats who decide what to treat 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 could 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. We would then be treating my right as inalienable.

II. TRAFFIC MANAGEMENT

Landowners use fences to notify the world that they reserve a right to say no. The point of fences is to *get in the way*. Why would we want to create such obstacles? To see why, consider a different metaphor: rights are like traffic lights.⁸ A mere liberty is a green light. A full-blooded *right* is a green light combined with a correlative red light.

Traffic lights facilitate traffic movement not so much by turning green as by turning red. Without 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 faces 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 don't 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

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.

⁸ See David Schmidtz and Jason Brennan, *A Brief History of Liberty* (Oxford: Blackwell Publishers) 2010.

well-placed property rights, liberate us, and help us stay out of each other's way.⁹

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 quicker, safer, and more predictably than we otherwise would, in virtue of having been able to coordinate on a system of mutual expectations that enable us to know what to expect from each other.

Commercial Traffic

Commercial traffic consists of people coordinating in a thick sense of doing elaborate projects together, and in a thin sense of staying out of everyone else's way as they pursue their respective projects. To coordinate in a thin sense, people need common understandings of torts and property. To coordinate in a thick sense, people need a common understanding of their right to say no and also of *new* obligations created by freely saying yes. So, people need common understandings of contract as well as of tort and property.

If people were hermits, then living well would involve being self-sustaining in a quite literal sense. As trade begins to emerge, though, which is another way of saying, as *community* emerges, 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. People we think of as more or less self-sufficient members of a community typically 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

⁹ 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 rules out places we cannot get to from here, but ruling out options on the grounds that we can't get there from here is hardly an arbitrary bias. 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 reason to *stay* there. Wherever we want to go, if we are serious, then we will care about whether we can get there from here, and if so, at what cost.

skillful at making their neighbors better off in particular ways. Division of labor thus vastly expands the opportunity to be served by and to in turn 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, yet still one manages to coordinate with them simply by ascertaining that the product is selling at a good price. Someone somewhere deems the product worth buying, and that is all that an ordinary producer needs to know. On such foundations is modern society and unprecedented (undreamt of as recently as a century ago even by science fiction writers) modern prosperity built.

III. LIMITS OF A FUNCTIONAL SYSTEM OF PROPERTY

The right to say no is stringent but by no means absolute. 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.”¹⁰ 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.

The right to say no is an institutional structure that facilitates community by facilitating commerce in the broadest sense. When people have a right to say no, and to withdraw, then they can afford *not to withdraw*. They can afford to trust each other. That is, they can afford live in close proximity and to produce, trade, and prosper, without fear. The right to say no enables people to come to market and celebrate the fruits of their productivity. People don’t 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 their exposure as targets for robbers) they begin to *openly advertise* the fruits of their productivity. They get to a point where, far from needing to conceal the fruits of their productivity from robbers, they come to need laws that prevent them from *exaggerating* the value of what they have produced. When that happens, there has been a minor miracle. Society has progressed to a point of being able to secure an expectation that what we produce will be transferred only by consent.

However, the right to say no is not a weapon of mass destruction. It is a device whose purpose is to facilitate commerce, not prevent commerce, so it must 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, not a right to forbid people in general to transact. For example, in

¹⁰ William Blackstone, *Commentaries on the Laws of England* (Chicago: University of Chicago Press, 1979, 1st published 1765) Book II, Chapter 1.

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 high altitude count as trespassing? In the case of *Hinman vs. Pacific Air Transport*, a landowner, Hinman, sued an airline (Pacific Air) for trespass. Hinman wanted Circuit Judge Haney’s court to affirm his right to stop airlines from flying over his property.

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, whereas a ruling that landowners can veto the emerging airborne commercial traffic would be 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 court’s verdict for the defendant led to an interpretation of 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. Whatever else is true, though, the right to exclude was not the thing to give up, and in fact the parts of that right that had a history of mattering to people on the ground were left undisturbed.

It would be a manner of speech at best to say that the *Hinman* court, 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 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 veto on the ground would be prohibitive.¹¹

The plaintiff’s unsuccessful suit had relied heavily on the concept of *ad coelem*, an ancient Roman dictum that “he who owns the soil owns it to the heavens.” Was *ad coelem* relevant to questions about airplanes crossing over someone’s land at high altitude? Before the advent of air travel, there was no fact of the matter. No legal dispute had ever brought the issue

¹¹ Schmidtz, “Property and Justice,” *Social Philosophy & Policy* 27 (2010) in press, discusses the *Hinman* case as an example of a decision driven by transaction costs—namely, the costs (transportation, packaging, advertizing, and so on) of getting a product to market and then into the hands of customers—to manageable levels.

to a head. There had not yet been philosophical debate needing to be resolved in one way rather than another. Once air travel emerges, though, and landowners file suit against airplanes for trespass, someone has to decide what *ad coelem* entails. In different words, someone has to discover what *ad coelem*, and the right to say no more generally, *needs* 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 is working well, no discussion is needed. Judges are forced 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.

One further thought on property's practical limits: It is 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.¹² And 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. JUSTICE: THE WRONG WAY

There 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 simply 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.

Multitudes, but not necessarily everyone, and in fact not everyone to the same degree or at the same time. So, what about pedestrians, one might reasonably ask? Where is the benefit for them? The answer is that not every would-be motorist gets a car on the same day, but

¹² The so-called Lockean Proviso holds that original appropriation is legitimate if it leaves "as much and as good" for those who come later. My discussion of the Lockean Proviso in Schmidtz (1994) argues that, for the sake of latecomers, original appropriation is *required*, so as to turn negative sum commons tragedies into positive sum games of cooperation where the right to exclude enables owners to conserve resources for future generations.

commercial traffic's point is to produce and disperse the means of participating in the market.¹³

Commercial traffic—the trucking and bartering of multitudes— is a community's lifeblood, enabling children to grow up to become *drivers*. Ensuring that everyone gets a car on the same day, or at the same age, is not the point. If we instead were to insist on a distributive principle like “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 an 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 co-exist with people having reason to live in that community.

One familiar way of theorizing about justice and ownerships starts with ideal theory, meaning we assume a world of perfect compliance, then decide what the principles of justice should be in that world. Some, 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 bounds. Then our job as moral philosophers is done, as we turn the resulting compliance problem over to experts at implementing policy. Let them find out 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 starts by assuming that justice is something we have reason to take seriously, and then tries to specify what that reason is. (The reason is not that English speakers arbitrarily make the sound ‘justice’ when referring to it. A real reason is something that matters to us. Justice makes a difference to our lives such that living in a just society is better, in a non-question-begging way, than living in an unjust society. If we trade some of what we call utility for the sake of what we call justice, it will be because we have good reason for expecting the tradeoff to make the world a better place—better in a way that does not beg the question, which is to say, better in a way that does not presuppose contested conceptions of justice.) We go on to talk about people as they actually are. Even if we have reason for imagining our discussion occurring behind a veil of ignorance, we talk about principles for people as they actually are. We do not imagine agents whose compliance can be taken for granted (no matter what principles we imagine them choosing!). The first virtue of social institutions for actual human beings is that they help actual human beings live together, and meet their actual needs, including their need to deal with the fact that compliance is a variable that is *highly* sensitive to the details of the institutions they live within, and the details of what principles they are being asked to live by. We realize that rational agents *would not* choose principles with which real agents—especially the most advantaged agents, on whose

¹³ 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.

productivity we will be most dependent— predictably would not comply. (What principles should you live by in a world where people decide for themselves what principles to live by, and where you can take for granted that others will see the decision differently?) After we have such a picture in front of us, then we go on to say alleged principles of justice, if we are to have any reason whatever to take them seriously (any moral reason, any economic reason, etc.), must find their place within—must facilitate rather than thwart— the growing of beneficial institutions, including property institutions. Before formulating 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. So, 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, when 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.

Generalizing the point, whatever we call justice has to be compatible with people prospering, which means it has to be compatible with a system of property that enables people to prosper. If what we choose to call justice is not compatible, then we have no reason—indeed no *right*—to take so-called justice seriously.

V. JUSTICE: THE RIGHT WAY

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. Presiding Judge Haney 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 way, made the system a better solution to the particular problem confronting his court.

To be a good judge is to be good at resolving conflict. For a judge, part of what it means to be good at resolving conflict is to be good at issuing verdicts that settle disputes and that leave people with a better sense of what to expect from each other so people can avoid similar disputes in the future. When courts are working well, they are fast, fair, flexible, and final. Their verdicts serve as food for thought for future courts and potential future litigants.

Litigants, and people in general, operate with comprehensive conceptions of the good that can, after all, reasonably be rejected by others. We should not have to apologize for, and should not even be troubled by, the fact that our conceptions of the good can reasonably be rejected. We have something to apologize for only when our conceptions are such that the people around us would be better off without us. A successful liberal society, and a successful judge, puts people in such a position that the differences between their comprehensive

conceptions of the good don't make them worse off—that they do not end up pursuing their comprehensive conceptions at the expense of the people around them.

If principles of justice are to be compatible with people getting what they need, then they need to be compatible with people resolving conflicts as they occur, then getting on with their lives feeling like they've been respected as the separate persons they are, not needing to be heavily policed. 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 need to do to meet their dietary needs, then people would have to keep looking for principles of justice they could live with.

Politicians As Plumbers

Stephen Holmes and Cass Sunstein suppose 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.”¹⁴

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. So, suppose we call a plumber to fix a faucet, but decline to turn over to the plumber the jobs of providing us with food, shelter, and health care. Would we thereby be failing to take “crying needs for public assistance” seriously? No. We simply recognize that a plumber's job description—that small facet of the overall job of making us better off that falls under the heading of plumbing—does not encompass everything. Nor should it. Why not? Because if plumbers had to take over the job of providing us with food, the quality and quantity of food would fall. So, if we the public decline to turn over a given job to a plumber, or a politician, it *may* be because we fail to see how important the job is. More likely, though, is that we decline precisely because we *do* see how important the job is.

Guarantees

¹⁴ Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes*, New York: W. W. Norton and Company (1999) 120. Emphasis added.

My second response is that, as Holmes and Sunstein say, people need food, shelter, and occasionally medicine. However, they leap to the false conclusion that if food is required, then guaranteed government provision of food is similarly required.¹⁵ Justice does not require people to wait in line for government-provided food. Neither does justice require government to intervene in the process by which people figure out ever-better ways to feed themselves and their communities. Nor does justice involve guaranteeing that citizens will have to pay the price of meeting other people's needs but not their own.¹⁶

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.

Instead of looking at official guarantees, we must look at patterns of actual 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 47 years for white males, and 33 years for black males. By the year 2000, life expectancy was 75 years for white males and 68 years for black males.¹⁷ This is an incredible achievement. Whether the U.S. government ever guaranteed that people would live that long is beside the point. What it did guarantee, more or less, is that society would remain a scene of experimentation. The bravest and best would take risks. Often they would fail. Their assets would be liquidated. But they would survive, dust themselves off, lick their wounds, then try again. Many eventually would succeed, carrying their country and their planet to the next level of aspiration and progress.

Prosperity's foundation is productivity, and productive societies are always the ones

¹⁵ Echoing Holmes and Sunstein, Liam Murphy and Thomas Nagel say "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*, New York: Oxford, 2002, 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.

¹⁶ If there were one thing people need 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.

¹⁷ See <http://www.elderweb.com/home/node/2838>, citing U.S. Census Bureau's Current Population Reports.

that do not overdo the guarantees.¹⁸

VI. WE DON'T NEED A COMMON DESTINATION

I have spoken about evaluating property institutions, and about sorting out alleged principles of justice, by asking whether they help us to live well together. Needless to say, a philosopher would want to know exactly what I mean when I speak of living well together. I have tackled that issue elsewhere and will resist the temptation to discuss it at length here.¹⁹ Let me simply observe that if we were asked whether plumbers help us live well together, we might say, “of course, so far as plumbing goes.” The philosophical 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, signaling a context in which philosophical rigor is neither expected nor useful. 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. We know what they contribute, and we know that the contributions of honest plumbers are straightforwardly positive, even if limited. If we ask whether traffic lights help us live well, that too has a straightforward answer. Lights that are well-placed and function reliably do indeed help motorists live well. We could say much the same of property rights.

What it means to prosper—to reach one’s destination—is 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 holds the right 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).

To theorize productively about justice, we must consider what it takes for people to prosper in communities. However, a judge need not know every facet of that genuine ideal 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

¹⁸ 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.

¹⁹ David Schmidtz, *Rational Choice and Moral Agency* (Princeton: Princeton University Press, 1995), Chapter 7.

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 their 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 these circumstances 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 safely where they want to go. We do not need to know or to evaluate the details of where they want to go, and we are better off living in societies where bureaucrats do not presume to micro-manage our choice of destination.

To summarize, in more concrete terms, when a system of property is working, it enables people to live good lives together by helping people to solve a cluster of key problems:

1. It puts people in a position to produce.
2. It puts producers in a position to trade.
3. It fosters creative destruction by encouraging people to experiment, and to shut down experiments that are not working, and to acquire and transmit information about which experiments work and which do not.
4. It limits externalities. That is, it results in people having to pay the costs of their own experiments, and also in people being able to enjoy the benefits of their own experiments, thereby helping 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.²⁰
5. It limits transaction cost. A system must enable producers to take steps to minimize the cost of getting their product into the hands of their customers. The roads must be good. Tariffs must not prevent them from dealing with foreign suppliers, and so on.
6. It enables producers to grow their business, setting up production processes that exploit opportunities for productivity-increasing division of labor and economies of scale.

Property rights don't do everything for us, any more than do traffic lights, or plumbers. Traffic lights don't cure cancer (although they do put us in position to do cancer research).

²⁰ 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. Elinor Ostrom, *Governing the Commons: the Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990).

They 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.

VII. CONCLUSION

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 the 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 in a given time and place will exhibit a certain degree of path dependence. It will be partly a product of contingent pressures of actual dispute resolution. We could see this as an epistemological issue—saying there are eternal truths that we learn by going to court. Or we can 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 where there previously had been no such need. 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. Abstract reasoning does not tell us whether to drive on the left. Observing how people do things in a particular time and place does.) The only determinate truth is that someone needs to decide, one way or another, so that people can get on with their lives with a better idea of what to expect from each other.

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 the 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.

Property rights don't do everything, but this much they can do: they can structure people's opportunities and incentives such that the most profitable thing people can do is to be as useful as possible to the people around them. The key to explosive economic growth is simple: put people in a situation where the way to make themselves better off is to figure out ever more effective ways of making the people around them better off.

Nonideal theory in moral and social philosophy is a project that involves theorizing about how rules and principles evolve in response to evolving and newly emerging problems, and about how to formulate such rules and principles and implement them through institutions in such a way that they *can* evolve. 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. They may be 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.