

# Community and Property — For Those Who Have Neither

*Jeremy Waldron\**

*Both community and property are, each in its own way, exclusionary concepts. Property — certainly private property — is defined in large part by a right of exclusion. And although "community" sounds like a warm, inclusive word, real-world communities (be they nations, municipalities, neighborhoods, or clusters of condominiums) often define themselves by reference to an array of excluded "others" and erect fences and patrol borders to keep these others out. Enthusiasm for these exclusions is made to seem legitimate by the thought that those excluded from my property probably have somewhere else of their own to go to, and those excluded from our community probably also have a community of their own to live in.*

*In fact, neither proposition is entirely justified. We know that in most economically developed countries there are large numbers of people who live as transients and are not welcome or rooted in any community. Their only places of refuge are the substantial patches of public property (like parks and sidewalks) which society maintains for everyone's use. But public places are not themselves unregulated, and often they are regulated according to norms of community and in response to communitarian pressures. If these communities are themselves exclusive in character, they tend to reproduce at the public property level the exclusions that manifest themselves at the private property level. This Article attempts to chart and analyze the deadly*

---

\* University Professor, New York University (Law School). This Article was presented at the Cegla Center conference on Community and Property at the Tel Aviv and Bar-Ilan University Law Schools in January 2008. I am grateful to all who participated, particularly Gregory Alexander, Hanoch Dagan, Tamar Meisels, James Penner, and Neta Ziv for their comments and suggestions.

*combination of exclusive community and exclusive property that these modes of regulation represent.*

## I. PRIVATE PROPERTY

This Article is about the regulation of public places, by which I mean places like streets, squares, parks and sidewalks. But I would also like to take the opportunity to think more broadly about the way we approach issues of property and community in normative theory — indeed, to think generally about the way we approach the whole topic of the justification of regulatory schemes. I will begin with these general points and then focus specifically on the regulation of public places.

By "regulatory scheme," I mean a whole array of rules, rights, duties, etc. set up in regard to some subject matter. I use the phrase a little more broadly than its ordinary use in legal studies. Sometimes when we talk, for example, about the regulation of private property, we mean to refer to things like environmental regulations, or rules regarding public nuisance, or rules about historic preservation, etc. I mean to include these, but I also mean to include the array of more fundamental rules, rights, duties, etc., that actually define private property. The rule that — with regard to some resource (say a piece of land) — an individual nominated as the owner has the right to use the resource himself and exclude others from its use (or from using it in certain ways) is part of the regulatory scheme for that resource. The same is true of the rule that he must not use it in a way that affects the health of his neighbors or the rule that he must not deny beach access or whatever. These are all components of the regulatory scheme.

When we regulate anything, we often do so with some particular interests in mind. The justification of a regulatory scheme may well be a matter of how well it serves those interests. Of course on a utilitarian account, we ought to be paying attention ultimately to all interests, or at least all interests that might conceivably be affected by our scheme. We ought to pay attention to the general interest, conceived in some aggregative way. But often certain interests are more prominent than others, for a number of reasons:

(a) This may be because focusing on certain interests in particular or on a particular class of interests is a good strategy for promoting the general interest. This is what Jeremy Bentham thought, for example, about individual interests in security (secure expectations), in regard to the overall regulation of a scheme of property rights. Paying particular, even overriding attention

to the security interests of the person who has the right to use the land is, according to Bentham, the best way of promoting the general interest.<sup>1</sup>

(b) Alternatively, we may focus on certain interests in particular or on a particular class of interests because we reject any simple additive account of how the impacts of a given regulatory scheme on various interests are to be aggregated. We may want to use a different social welfare function; we may reject a simple additive function and adopt instead an approach that — even at the most fundamental level — gives priority to some interests over others. A maximin social welfare function, for example, might pay attention in the first instance to the interests of those (among the class of those affected by a regulatory scheme) who are worst-off. (Indeed, some theorists have argued that approaching the aggregation of interests on this basis is a requirement of justice.<sup>2</sup>)

(c) A third possibility is that we may understand the substantive point of the particular regulatory scheme that we are considering in terms of the promotion of a certain interest or a delimited class of interests. The promotion of a certain interest may be conceived as the *telos* of a given regulatory scheme. Or, if the *telos* is complex, there may be some order of priorities as to which interests we should look at first. Educational arrangements, for example, are regulated, in the first instance, for the sake of the interests of the children being educated; in the second instance, they are regulated perhaps in the interests of potential employers who need workers with certain skills; in the third instance, they are regulated in the interests of the parents; and so on.

Elsewhere I have argued that in addition to the interests that might seem to us to represent the point or the *telos* of a regulatory scheme, an elementary requirement of political morality dictates that we must pay attention to the impact of the scheme on those who are most adversely affected by it. So, for example, I argued that when we think about a scheme of intellectual property such as copyright, we should focus not just on authors, for whose benefit the scheme is set up in the spirit of either (a) or (c), but also on the hardships imposed on potential copiers, i.e., those who might have an interest in doing something which will be forbidden if the scheme is sustained.<sup>3</sup> I argued

---

1 JEREMY BENTHAM, *Principles of the Civil Code*, in THE THEORY OF LEGISLATION (C.K. Ogden ed., 1931). There is an accessible excerpt in PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 39-58 (C.B. Macpherson ed., 1978).

2 See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 175-83 (1971).

3 See Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 841 (1993).

too that this should be true of our thinking about property generally.<sup>4</sup> Even if private property, for example, is justified in either a Lockean spirit (in a way that is oriented to the interests of the person who has mixed his labor with some resource)<sup>5</sup> or a Hayekian spirit (in a way that is oriented to the interests of the proprietor in having a sphere of individual freedom),<sup>6</sup> we should also pay particular attention to those who will be most adversely affected by our upholding the rights in question.

The point can be put in Hohfeldian terms.<sup>7</sup> To justify private property is to justify conferring, recognizing, and enforcing certain individual rights over material resources. An individual X's rights of ownership in relation to some land,  $L_x$ , usually are comprised of such elements as ( $R_1$ ) the right to use  $L_x$ , ( $R_2$ ) the right to exclude others from the use of  $L_x$ , and ( $R_3$ ) the power to transfer some or all of these rights to others by way of gift, sale, lease or bequest.<sup>8</sup>

Now it is perfectly appropriate to think about the justification of property in terms of the benefits that accrue to people like X from having rights such as these. But some of these rights have to be understood in terms of duties imposed on others. This is particularly true of  $R_2$ .  $R_2$  is the key to private property.<sup>9</sup>  $R_2$  is correlated with a duty  $D_2$ : "Others have a duty not to use  $L_x$  without X's permission." The duty is important, and we should consider it not just from the point of view of those for whose benefit it is imposed, but also from the point of view of those who will be burdened by it. Accordingly, one of the things we definitely ought to consider when we

---

4 Jeremy Waldron, *Property, Justification and Need*, 6 CAN. J.L. & JURISPRUDENCE 185 (1993). The argument of the following paragraphs is drawn from this essay.

5 JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 287-91 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). (The relevant passages are *Second Treatise*, §§ 27-34.)

6 F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 139-42 (1960).

7 W.N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (David Campbell ed., Ashgate 2001) (1920).

8 Of course, private property is really much more complicated than this; but this will do for the purposes of the present discussion. For fuller accounts, see A.M. Honoré, *Ownership*, in *OXFORD ESSAYS IN JURISPRUDENCE* 107 (A.G. Guest ed., 1961), and JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 26-61 (1988).

9 It is the addition of  $R_2$ , the right to exclude, that transforms a right to use into an essentially private right. In itself,  $R_1$  is roughly what we all have in relation to public parks and sidewalks. It is only when we conjoin it to  $R_2$  that we get something like a person's right to use her own land. For some further discussion of the right to exclude and its place in our understanding of private property, see also Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127 (2009).

are justifying private property is how much of a burden or a hardship it is to be under a duty of this kind.

The point is more than merely analytic. Since duties are hard things for people to have, we should expect the realm of duties to be the *testing ground* for claims of right. The realm of duties — the propositions about duty that a given claim of right entails — are where we should expect the problems (if any) with the regulatory scheme to rear their ugly heads. It is true that not all the problems of an institution are connected with the duties it imposes. But the duties are a good place to start, since they will take us to whatever hardships are most intimately involved in the immediate recognition and enforcement of the rights.

I think this point about duties is particularly important when we are considering property rights. The duties in this case operate to block people's uses of material resources. No doubt some of these blocked uses are greedy or frivolous, based, as John Locke put it, on "the Fancy or Covetousness of the Quarrelsome and Contentious."<sup>10</sup> But it would be a mistake to assume that all such uses fall into this category (particularly when Locke's background assumption of plenty no longer holds).<sup>11</sup> Material resources are crucial to our survival and elementary aspects of our wellbeing. In the circumstances of moderate scarcity that we must assume, it is perfectly possible that the uses that are blocked by the duties correlative to property rights are uses that relate to human need, not just covetous desire.<sup>12</sup>

In this regard, however, the Hohfeldian algebra can be misleading, if we focus only on the duties arising out of property rights in objects considered one by one. With regard to one piece of land, one individual owner, X, enjoys the benefits of private property rights and everyone else in the community (rich or poor) endures the hardships of private property duties. They all must stay off X's land unless they have his permission. Many of those who are affected in this way, however, have land of their own; and with their private property rights, they can exclude X from their land just as he can exclude them from his. In these cases the rights and duties are reciprocated: not only is Y's duty correlative to X's property right, but Y's duty is reciprocated by X's duty (which is correlative to Y's right).

---

<sup>10</sup> LOCKE, *supra* note 5, at 291 (*Second Treatise*, § 34).

<sup>11</sup> *Id.* at 291-93 (*Second Treatise*, §§ 33, 36).

<sup>12</sup> I am grateful to Neta Ziv, who commented on my paper at the conference on Community and Property in Tel Aviv, where this Article was presented, for emphasizing this point about need: Neta Ziv, Comment on Jeremy Waldron, Community and Property (Jan. 2008) (unpublished manuscript, on file with author). See also *infra* text accompanying note 52.

But what if there is someone who does not enjoy this reciprocity — someone, Z, who is the owner of no land at all, and enjoys no rights of private property. Then Z is affected in a radical way: Z is the bearer of *all* of the duties correlated with private property rights in the society, yet he is the bearer of *none* of the rights. We do not become aware of the nature and extent of Z's predicament if we look at property rights individually one by one. In relation to X's right over  $L_x$ , Z is in exactly the same predicament as Y (he cannot use  $L_x$  without X's permission); and since this does not seem to be particularly irksome to Y, it is hard to see why Z should complain. And in relation to Y's right over  $L_y$ , Z is in exactly the same predicament as X (he cannot use  $L_y$  without Y's permission); since this does not seem to bother X, again it is hard to see what Z's problem is. Z's problem becomes apparent only when we consider together all of the private property rights over land — the private property rights over  $L_y$  *and* the private property rights over  $L_x$  *and* the private property rights over  $L_w$ , and so on. Z has to stay off all of this land; in effect there is no land he can use — or at least no privately-owned land — without having to obtain someone's permission.<sup>13</sup>

My view is that when someone is radically disadvantaged in this way,

---

13 Notice that the *reciprocity* of rights and duties is different from the idea of their *correlativity*. Correlativity is a matter of the entailment relation between propositions like  $R_2$  and  $D_2$ : one person's rights entail another person's duties. The idea of reciprocity, by contrast, is not a matter of entailment but a substantive insistence that everyone who has rights should have duties (owed to others) to fulfill as well, and that everyone who has duties should also have rights. Reciprocity requires that everyone who benefits from others' duties should owe similar duties to those others and everyone who is subject to a duty should be the beneficiary of a similar duty imposed on the others to whom *her* duty is owed. An example of reciprocity is the respect we owe to one another's bodies. Your right not to have your body invaded is *correlative* to my duty not to invade it, and my duty not to invade it is *reciprocated* by your duty not to invade my body. All right-holders have duties in this area, and all duty-bearers have rights. Even if the duty of non-invasion is irksome, no one bears that hardship without also benefiting from others' similar restraint.

Views have varied about what is required in order to establish the sort of reciprocity in a social system that would allow us to say that the poorest inhabitants have a duty to respect the property rights of the rich. John Locke seemed to think it was sufficient that the poor have access to the streets and the highways, *see* LOCKE, *supra* note 5, at 348 (*Second Treatise*, § 119) — or to the trickle-down benefits of the market, *id.* at 296-97 (*Second Treatise*, § 41). (I am grateful to Joshua Getzler for this point.) Others believe that what is necessary for reciprocity in this area is something like a "property-owning democracy." (For explanations of this phrase, *see* J.R. MEADE, *EFFICIENCY, EQUALITY AND THE OWNERSHIP OF PROPERTY* (1964); *see also* RAWLS, *supra* note 2, at 274, and JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 100 *passim* (Erin Kelly ed., 2001).)

any justificatory consideration of the regulatory scheme in question needs to pay special attention to his interest. We need to ask: in what way are his interests in particular taken care of in the case that we imagine being made for this set of arrangements?

I don't mean that we should ignore the marvelous Lockean and Hayekian benefits that accrue to X and Y and others as a result of the institution. That may still be crucial to the justification of property. But we need to have this further element as a sort of check, to ensure that the regulatory scheme that benefits potential owners does not do so at too great a cost. I emphasize this because I want to say that focusing on Z's predicament — and asking this question: in what way are his interests in particular taken care of? — need not be the upshot of a commitment to Rawlsian maximin. It may be that, but not necessarily. In the first instance, it is simply a determination to look seriously at the predicament of those who are burdened by the rights that the scheme sets up; it is under that description that they are a focus of concern.

You might ask: does this determination involve anything more than an insistence on scrupulous cost-benefit analysis? Am I saying anything more than that when we propose a regulatory scheme we must not only consider the interests of those who stand to benefit, but also look unflinchingly at the interests of those who stand to lose? In the first place the answer is, of course, yes, everyone's interests should be considered. And of course cost-benefit analysis is appropriate — provided we pay appropriate attention to the problem of structuring a fair social welfare function to address the array of costs and benefits that are likely to be associated with any regulatory scheme.<sup>14</sup>

But when we do nothing more than recommend a cost-benefit analysis, there is an unpleasant tendency for the interests of those most heavily impacted to be sold short — not out of any defect in cost-benefit analysis as such, but simply on account of the opportunities it offers for bad faith on the part of its practitioners.

This is clearest in the case of law-and-economics analysis, for example, where a ruthlessly additive social welfare function is adopted so that "consideration" of the interests of those who are worse off as a result of a given regulatory scheme involves little more than using their losses as the measure of the gains of the better-off: we look at their losses to ensure that the winners' gains are sufficiently large that in the unlikely event that the winners should be interested in compensating the losers there would

---

<sup>14</sup> See Jeremy Waldron, *Locating Distribution*, 32 J. LEGAL STUD. 277 (2003), for the importance of selecting the right social welfare function.

be more than enough gains to enable them to do so. Nothing beyond this *measurement* of the losses of some against the gains of others is deemed necessary for this sort of "justification."<sup>15</sup>

I believe that makes a travesty of the justificatory enterprise. When we are considering a property scheme that confers rights and imposes duties on X and Y but does nothing but impose duties on Z, it may conceivably be appropriate to ask of X and Y whether the gains they derive from their reciprocal property relationship outweigh the costs that they must shoulder. But that approach will not do for Z. Under this regulatory scheme Z bears only duties and the costs of fulfilling them. I am assuming that it is not enough to say of Z's predicament that it is compensated for by the net benefits that the scheme confers on X and Y. Justifying a regulatory scheme involves preparing ourselves to respond to complaints or objections that might come from real people. And merely pointing to the benefits that other people receive is not usually a proper way of responding to a particular individual's complaint on his own behalf.

In a famous passage attacking utilitarian and other similar measures of social welfare, Robert Nozick imagined someone defending the position that I have been attacking in the following words:

Individually we each sometimes choose to undergo some pain or sacrifice for a greater benefit or to avoid a greater harm: we go to the dentist to avoid worse suffering later . . . some persons diet to improve their health or looks. In each case, some cost is borne for the sake of the greater overall good. Why not, similarly, hold that some persons have to bear some costs that benefit other persons more, for the sake of the overall social good?<sup>16</sup>

In my view, Nozick's reply was devastating:

But there is no social entity with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more.<sup>17</sup>

Notice how general Nozick's point is. It does not matter whether the loss to Z is actively imposed on him by X and Y (or by the state), or whether it is just something Z will suffer if the regulatory scheme in question is

---

15 Jeremy Waldron, *The Primacy of Justice*, 9 LEGAL THEORY 269, 287-94 (2003).

16 ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 32 (1974).

17 *Id.* at 32-33.



implemented. Imposing the loss on Z — actively harming him — might serve as an additional layer of objection in certain cases. But at the moment, we are just thinking about how to regard the relation between costs and benefits (whatever the causal story as to how they came about). Whether it is a matter of implementing or sustaining a given scheme of property rights, we must take seriously the burdens that people like Z have to endure under the scheme, and not cover them up using fancy phrases like "wealth-maximization" to convey the point that those who benefit from the scheme gain more than is lost by those who suffer under it.<sup>18</sup> The losses suffered by X and Y may be made good or effaced by their gains; but the losses suffered by Z are not made good by X's and Y's gains. They gain and Z loses; nothing more.

It is for reasons like this that I think it is necessary to focus steadfastly on particular interests that might be affected by a given regulatory scheme, in particular the interests of those most adversely affected, and not move too quickly (if at all) to a calculus that allows the magnitude of those individual effects to disappear from view. My emphasis is intended to make the aggregation of costs and benefits a little less abstract, to put a human face on some of the costs, to make their presentation a little more riveting. In ordinary humane politics, the plight of those who suffer most is given its due in the sober consideration of social and legal justification. But law-and-economics seeks to make political consideration less humane in this regard, to make it easier for us to brush past the individual costs that are imposed or tolerated in the quest for the maximization of wealth.

It is sometimes said that liberals are committed to finding a set of political, social and economic arrangements that can be justified to everyone, a set of arrangements whose viability does not have to depend on anyone's being mystified or dragooned into compliance by sheer coercion. The hope is that there will be an explanation available to everyone, and one that will not require any person to abandon or distort a concern for his or her own interests in order to live under those institutions. That hope may seem far-fetched. But there is something to the idea that if we undertake the business of justification, that is what we are promising to do.<sup>19</sup>

The social-contract heuristic used by Kant and Rawls captures this quite

---

18 Cf. NOZICK, *supra* note 16, at 33 ("Talk of an overall social good covers this up. (Intentionally?)").

19 Elsewhere I have argued that this approach is consonant with the whole liberal spirit of the Enlightenment. See Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127 (1987).

well.<sup>20</sup> The great merit of the contractarian approach is its insistence that justifications are owed *to every last person* who has to make a life within the framework we are considering. The contract image conveys this by the idea of unanimity that it involves: one cannot be voted into a contract. If the last person cannot be convinced to sign, or if nothing can be said to allay *his* concerns, then *he* is not bound to uphold the scheme, no matter how many others have appended their signatures.

One reason for concentrating on the person most radically disadvantaged by the scheme we are purporting to justify is that it approaches this justificatory burden in an honest spirit — at the right end of things, so to speak. I like to think it has something in common with the Popperian approach to justification in science. According to Karl Popper, the way to evaluate any scientific hypothesis that has the form of a law-like generalization is to be on the lookout for possible falsifications, indeed to be prepared to specify what one would count as a falsification as one articulates the hypothesis itself. One says: "Here is what would require me to give up this hypothesis." Confirmations are easy to come by. It is falsification that is specifically excluded, and just one is enough to call the truth of the entire hypothesis into question.<sup>21</sup> In the same way, if there is just one person to whom nothing can be said about why she should put up with a given set of institutional arrangements, then the arrangements have not been justified. What is promised is a justification that connects with the interests of everyone. The fulfillment of that promise is refuted by a single showing of a person to whose interests nothing can be said in the institution's defense. As far as she is concerned, compliance with the institutional rules will be the result of force, fraud, mystification or despair, not of understanding and consent. And as far as we are concerned, that means the institution is exposed as inherently coercive.

The approach I have taken differs somewhat from what is usually said about the justification of private property. Justificatory discussions of property commonly approach the matter, in the first instance, from the perspective of the rights and interests of the (potential) proprietor and, secondly, from the perspective of society as a whole. I mean that, to the extent that individualist assertions on behalf of (potential) proprietors are

---

20 See IMMANUEL KANT, *On the Common Saying: 'This May Be True in Theory, but It Does Not Apply in Practice,'* in KANT'S POLITICAL WRITINGS 61, 79 (Hans Reiss ed., H.B. Nisbet trans., 1970), and RAWLS, *supra* note 2, at 17-22.

21 See KARL R. POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* (Routledge 1992) (1959). The relevance of Popper's methodology in moral argument is discussed in R.M. HARE, *FREEDOM AND REASON* 87-93 (1963).

ever opposed or evaluated critically, the claims that are cited against them are usually those of "society." Property, it is said, is not an absolute individual right, but one that must serve a social function. The question is usually this: are we perhaps paying too much attention to the individual — the would-be owner — and not enough to society? So we develop arguments — against private property, or in favor of a particular limitation on owners' rights — from the perspective of the general welfare. The hard cases for private property are almost always phrased in these *social* terms: pollution, social irresponsibility, inequality as a pattern, poverty as a generalized social problem, and so on.<sup>22</sup>

The trouble with locating all the objections at the social level is the trouble with any aggregative approach to the general good: the particularity of individual predicaments disappears from view. Some policy may do wonders for "us" in general or for society as a whole, but still leave a few particular persons gravely prejudiced in their freedom and wellbeing. Now this individualist worry about social values is, of course, most often cited by the individual owners whose interests are the subject of the Lockean justifications. They are the ones who complain vociferously about the threat to individual freedom from our preoccupation with the social good. Theirs, however, are not the only individual interests at stake. When we evaluate private property, we should surely consider, in the first instance, those individuals whose interests and activities are most directly constrained by its rules. Now, as I have said there is a sense in which we are all constrained by property rules: you must not encroach on my property and I must not encroach on yours. But the individuals whose position is most deeply prejudiced are those who have no property at all, or none to speak of — the poverty-stricken and the homeless. These are people who bear all of the restraints, but enjoy none of the benefits, that accrue from the rights distributed in a property regime. And although of course their interests are to be counted, along with everyone else's, in any decent calculus of social advantage, we know enough about politics to be able to say that theirs are the ones most likely to be neglected in the real world. Modern

---

22 LAWRENCE C. BECKER, *PROPERTY RIGHTS: PHILOSOPHICAL FOUNDATIONS* (1981) is a good example. The one chapter Becker devotes to "Anti-Property Arguments" (Chapter 8; *id.* at 88-98) divides the objections to private property into four general types: "arguments to the effect that property rights have an overall social disutility; arguments to the effect that the institution of property rights is self-defeating; arguments to the effect that private ownership produces vicious character traits . . . ; and arguments to the effect that systems of property rights produce and perpetuate socio-economic inequality." *Id.* at 88.

social policy is addressed in the first instance to the articulated needs and interests of middle-class families, and to those of the poor and the homeless only to the extent that they constitute a problem or a discomfort — dangerous neighborhoods, unsanitary parks where our children play, aggressive panhandling, and so on — for middle-class families. So if social values are taken to be the only basis for critical evaluation of property claims, we may be in danger of leaving out of the picture the interests of those most directly, grievously and immediately affected by the enforcement of property rules — that is, the interests of those to whom, *above all*, a justification of property is owed.<sup>23</sup>

The point becomes even more acute when we turn from social policy critiques to social policy defenses of private property rights. Suppose it can be shown that the institution benefits society as a whole, by making markets possible and thereby promoting progress and prosperity. Then the minority of individuals — the poor and the homeless — who are prejudiced by the institution run the risk of being overlooked altogether, their interests and objections having traditionally been assembled under the heading of "social concerns." Now that it has been established as a general principle that social functionality is the issue, and that individual economic interests may not be asserted against social values, where are these few impoverished persons to turn to vindicate their "antisocial" claims?

In general, there are grave dangers for the poor in having their poverty categorized as a *social* problem, and their complaints about property rules treated as just another aspect of the alleged *social* dysfunctionality of private ownership. We need to change our perspective on their predicament. Poverty is not just a problem to be fixed, like an oil slick or the decaying infrastructure. Each poor man, woman and child has a human status as an individual, an agent, a proper subject of freedom, and a potential bearer of

---

23 Another way of putting the point is to say that when property rights are viewed critically, they are most commonly viewed as obstacles to the carrying out of public policy: property development by a landowner may obstruct the conservation of a coastline or the construction of an airport or some security interest. If the claims of the poor are cited at all, they come in derivatively, as the distant beneficiaries of public schemes that are being frustrated by property rights: the selfishness of the wealthy prevents us from raising the taxes or building the shelters that we need to address social problems like poverty and homelessness. In fact, however, property rights impact non-derivatively on the poor, unmediated by our public policy schemes. They bear the *direct* brunt of the institution, for they are *immediately* excluded by property rules from taking and using the resources they need to live. It is a mistake, then, to relegate their interests to a secondary position, behind the claims that "we" make aggregatively in the name of public policy.

obligations. It is in virtue of that status — and their position as citizens from whom our institutions claim allegiance — that objections should be raised.

## II. PUBLIC PLACES

So far I have discussed the general issue of justification, the interests to which it is (and ought to be) oriented, and the application of those ideas to debates about private property. What about public property? I believe the same general points apply, and I want to consider their application to the way we regulate public places.

I begin with a story.<sup>24</sup> Many years ago, when I lived in California, I was invited by a former student, who was acting for a large number of homeless people, to participate in litigation against a program that the mayor of San Francisco, Frank Jordan, had implemented.<sup>25</sup> Called the "Matrix" program, it was intended as a coordinated set of initiatives by police and social services to control (and, the mayor hoped, to eliminate) encampments of homeless people from the center of San Francisco (particularly the public places around the Civic Center).<sup>26</sup> My former student recalled an article on homelessness that I had written in 1991,<sup>27</sup> and he asked me to use it to draft an amicus brief responding to a position adopted in an amicus brief by a communitarian organization, the American Alliance for Rights and Responsibilities (AARR).<sup>28</sup> The lawsuit was not successful; actually it

---

24 Much of what follows is adapted from Jeremy Waldron, *Homelessness and Community*, 50 U. TORONTO L.J. 371 (2000).

25 *Joyce v. City of San Francisco*, 846 F. Supp. 843 (N.D. Cal., 1994).

26 There is an excellent account of the San Francisco Matrix Program and the public response to it in Nancy Wright, *Not in Anyone's Backyard: Ending the 'Contest of Nonresponsibility' and Implementing Long-term Solutions to Homelessness*, 2 GEO. J. ON FIGHTING POVERTY 163, 180-81 (1995).

27 Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295 (1991).

28 The AARR was a nonprofit public-interest group founded in 1988 as an activist arm of "The Communitarian Network." It used to litigate to defend local and municipal initiatives which promoted what it regarded as increased safety, civility and community responsibility. See David B. Kopel & Christopher C. Little, *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 MD. L. REV. 438, 443 (1997). It was described by one of its leading litigators as aiming to "restore the spirit of community in the United States . . . . [Its] approach is to identify, promote and defend new approaches which make citizens part of the solution, and strike a balance between extreme rights claims and those who would sacrifice civil liberties as means to an end." See Robin S. Golden,

was eventually declared moot when the San Francisco abandoned the Matrix program after the election of Mayor Willie Brown in 1995. But the issues raised in the exchange with the AARR remained with me, and I would like to address some of them in this Article.

The line taken by the AARR was familiar, for they had pursued it in a number of cities in the United States.<sup>29</sup> Mayor Jordan's Matrix program was an attempt, they said, to recover the public spaces of the city for the community. So long as homeless people remained encamped in the city's streets, parks and public squares, those places would be cluttered with tents, dirty sleeping bags, cardboard shelters, and stolen shopping carts, and contaminated with urine, feces, and drug paraphernalia. Such conditions, argued the AARR, made it very difficult for ordinary citizens, either individually or in families, to use those spaces in the way that they were intended. Panhandling, drinking and various forms of disturbed behavior exacerbated the problem, making the public urban environment not only unpleasant but hostile and potentially dangerous. The result, they said, was that public places which used to be available to the whole community were now "becoming the preserve of those on the margins of society."<sup>30</sup>

The AARR argued that a community has a right to control behavior in its public spaces, and to outlaw activities such as drinking, panhandling, sleeping on benches, washing in fountains, urinating and defecating in public, etc. The point of such restrictions, they said, was not to oppress the homeless or diminish their liberty, but to reduce annoyance and above all to provide a fair basis on which all citizens could make use of the public spaces of their city, and to allow parks and squares to become once again a healthy focus for the community's public life. The AARR argued that communities benefit from public spaces being kept sufficiently attractive to act as public meeting

---

*Toward a Model of Community Representation for Legal Assistance Lawyering: Examining the Role of Legal Assistance Agencies in Drug-Related Evictions from Public Housing*, 17 YALE L. & POL'Y REV. 527, 552 n.167 (1988) (quoting an affidavit of Roger Conner in support of a motion to modify and intervene in *Escalera v. NYCHA*, 924 F. Supp. 1323 (S.D.N.Y. 1996)). For a good account of the organization's mission, see Robert Teir, *Restoring Order in Urban Public Spaces*, 2 TEX. REV. L. & POL. 255 (1998).

29 See especially *Roulette v. City of Seattle*, 78 F.3d 1425 (9th Cir. 1996) (supporting city laws against obstruction of sidewalk), and *Johnson v. City of Dallas*, 61 F.3d 442 (5th Cir. 1995) (supporting city laws against sleeping in public).

30 Brief for the American Alliance for Rights and Responsibilities as Amicus Curiae at 2, *Joyce v. City of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994) [hereinafter AARR Brief in *Joyce*].

places and as places where people voluntarily spend their time.<sup>31</sup> Their brief spoke wistfully of a time when citizens from all walks of life could spend their leisure hours in public places, a time when parks and boulevards were places of "interaction, integration, relaxation, and reflection."<sup>32</sup> Recalling this vision, the AARR urged the court to allow the Mayor of San Francisco to persevere in his efforts to restore this communitarian mode of the use of its public spaces.

What should we make of this, as a proposal about the regulation of public places? What should we think about the AARR approach as a theory of such regulation?

The premise of the AARR position was that "governments have the right to regulate certain types of conduct in public places, to ensure that parks and sidewalks remain accessible and welcome to all."<sup>33</sup> That seems like the right sort of premise. But still, it is important to ask exactly how the regulation was to be set up, on the AARR approach, and towards whose interests in particular the regulatory scheme was to be oriented.

If there were no homeless persons in our community — i.e., if everyone living in our cities had access to private accommodation or guaranteed shelter space for sleeping and for care of self — then public spaces could be regulated on the following basis. Since everyone would have access to a private home, activities deemed particularly appropriate to the private realm — activities like sleeping, lovemaking, washing, urinating, etc. — could be confined to that realm. Public places could be put off-limits to such activities, and dedicated instead to activities which *complement* those that citizens ought to perform in their own homes. (I shall call this the Complementarity Thesis.)

On the basis of the Complementarity Thesis, public places could be dedicated to things like strolling, picnics, meeting people, walking dogs, children's play, and so on. It would be reasonable for those who wanted to enjoy the public spaces in these ways to expect not to find people sleeping, cooking or storing their possessions there, and not to find evidence of human urination or defecation. They might reasonably assume that everyone had a home to go to for activities of that kind. Laws and regulations prohibiting sleeping and storing possessions on sidewalks and public parks could be enforced in light of that expectation without fear of disparate impact.

That, in my view, captures the spirit of the AARR brief, which evoked a time when citizens from all walks of life — "[t]hose with Armani suits,

---

31 See Teir, *supra* note 28, at 256.

32 AARR brief in Joyce, *supra* note 30, at 2.

33 *Id.* at 1.

and those with nose rings; elderly people and gay couples; residents and visitors; rich, middle, and struggling classes"<sup>34</sup> — spent their leisure hours in public places.<sup>35</sup> It is an attractive idea, of public places facilitating interaction among strangers not just among friends.<sup>36</sup> As AARR counsel Rob Teir put it,

City parks and sidewalks were built to be community meeting places, where people of different races, religions, ethnic groups, socio-economic levels, and political views, could come together and share in the benefits of public spaces. These venues are places of integration, assimilation, mixture of social classes, and a counterweight to the increasing fragmentation of society.<sup>37</sup>

We are to imagine diverse citizens coming out into the parks and boulevards where they can enjoy their leisure, "interact with their fellow citizens and leave behind their isolation and segregation,"<sup>38</sup> before returning once again to the private realm.

I said in Part I that we must address any issue of justification for a given regulatory scheme, not only by considering the advantages that are supposed to accrue to those for whose benefit the scheme is set up, but also by considering the predicament of those most radically disadvantaged by the scheme. When we adopt this perspective, the bottom falls out of the AARR argument. For the attractive image that the AARR argument appeals to, and the basis of regulation that it invokes, are not appropriate for the regulation of public places in a society *where there are large numbers of homeless people*.

In such a society, public spaces have to be regulated on a somewhat different basis. They have to be regulated in light of the recognition that some people have no private space — not even the temporary privacy that public shelters or public toilets would afford — to come out of or return to. Fairness demands that public spaces must be regulated in light of the recognition that large numbers of people have no alternative but to be and remain and live all their lives (all aspects of their lives) in public. For such persons there is an unavoidable failure of the complementarity between the use of private space and the use of public space, and unless we are prepared

---

<sup>34</sup> Teir, *supra* note 28, at 290.

<sup>35</sup> AARR brief in *Joyce*, *supra* note 30, at 2.

<sup>36</sup> See also the discussion in MICHAEL IGNATIEFF, *THE NEEDS OF STRANGERS* 139 (1984).

<sup>37</sup> Robert Teir, *Maintaining Safety and Civility in Public Spaces: A Constitutional Approach to Aggressive Begging*, 54 *LA. L. REV.* 285, 289 (1993).

<sup>38</sup> *Id.* at 337.



to embrace the most egregious unfairness in the way our community polices itself in public, we are simply not in a position to use that complementarity as a basis for regulation.<sup>39</sup>

It is worth dwelling on the question of fairness. In response to accusations that his position was unfair to the poor, AARR counsel Robert Teir protested that

[t]here is nothing unfair or mean-spirited about wanting to be free from harassment and intimidation, wanting urban parks where children can play and adults can enjoy the green, and the quiet, or wanting urban parks that are not filled with litter, human waste, needles, bedrolls, drug users, and used condoms. . . . These rules . . . are set so that all people feel welcome in the public spaces.<sup>40</sup>

He was right. In itself, the aspiration he mentions is just and admirable. Unfairness comes into the picture only when we consider the implementation of this goal against the background of homelessness.

But again Teir protested. He said that those who suffer from the deterioration of public places are often the poorest of those who have a home to go to, rather than the most prosperous. This is not a case of discrimination against the poor in favor of the rich; at worst it is discrimination against one class of poor people in favor of another.<sup>41</sup> Anyway, said Teir, the measures embodied in Frank Jordan's Matrix Program were not *aimed* at the homeless. They were aimed at and address conduct, and only those who choose to engage in the prohibited conduct fall within their reach.<sup>42</sup>

Once again, he may be right. But we should also consider evident and predictable disparities that different classes of people will experience in

---

39 For recent developments of similar arguments, see Justin Stec, *Why the Homeless are Denied Personhood Under the Law*, 3 RUTGERS J.L. & URB. POL'Y 321 (2006); Jane B. Baron, *Homelessness as a Property Problem*, 36 URB. LAW. 273 (2004); and Philip Lynch, *Begging for Change: Homelessness and the Law*, 26 MELB. U. L. REV. 690 (2002).

40 Teir, *supra* note 28, at 290.

41 Thus Teir writes: "Nor are these measure unfair to the poor. . . . [I]t is not the affluent who reap the benefits of these measures. The rich, after all, can take care of themselves. They are not, speaking generally, dependent upon public parks for recreation. They usually live in secured communities, and shop in safe and comfortable places. The well-off can also leave an area when it gets intolerable. Rather, it is the poor and middle-classes who depend upon the safety and civility of public spaces. They have fewer options about relocating, less options about schools, and less options about private recreational places." *id.* at 290-91.

42 *Id.* at 291.

bringing their behavior within the norms he wants to enforce. As a matter of justice, those who have the power to regulate public places must pay special attention to the difference between the impact of a given regulation on a person who has a home and its impact on someone who is homeless. In the case of a person who has a home, compliance with an ordinance prohibiting (for example) sleeping in public places is simply a matter of relocation. For someone who has no home, however, and — let's say — no access to a shelter, compliance with such an ordinance would mean that *he must not sleep* (for there is now *no place* where his sleeping is permissible).<sup>43</sup> It is not that his sleeping is, as such, prohibited. Rather, the accumulation of a number of different prohibitions of his sleeping in particular places adds up, in effect, to a comprehensive prohibition of sleeping. In our earlier paradigm, Z may not sleep on  $L_y$  or on  $L_x$  or on  $L_w$  or on any piece of private property (unless Y, X or W give him permission to do so; and our experience of the predicament of the homeless indicates that this is quite unlikely), and public regulations prohibit Z from sleeping on  $L_p$ , public property. If  $L_y$ ,  $L_x$ ,  $L_w$ , . . . and  $L_p$ , together, comprise all the land there is, then it follows that there is no place where Z is permitted to sleep. As I put it in an earlier piece:

The prohibition is comprehensive in effect because of the cumulation, in the case of the homeless, of a number of different bans, differently imposed. The rules of property prohibit the homeless person from doing any of these acts in private, since there is no private place that he has a right to be. And the rules governing public places prohibit him from doing any of these acts in public, since that is how we have decided to regulate the use of public places. . . . Since private places and public places between them exhaust all the places that there are, there is nowhere that these actions may be performed by the homeless person. And since freedom to perform a concrete action requires freedom to perform it at some place, it follows that the homeless person does not have the freedom to perform them. If sleeping is prohibited in public places, then sleeping is comprehensively prohibited to the homeless.

This may not be what any particular person intends — and it may be not what W and X and Y intend when each of them says, "Not in my backyard" — but it is the easily foreseeable result of the enforcement of these various prohibitions.<sup>44</sup>

Now, I doubt that there is any prospect of our changing the laws about

---

<sup>43</sup> Waldron, *supra* note 27, at 315.

<sup>44</sup> I return to this at the very end of the Article, *infra* text accompanying note 80.

private owners' rights to exclude people from their property, or that we will ever set up a billeting system for the homeless (though in wartime and natural disasters this has sometimes been done). That would involve a radical change in the logic of private property, making its most important constituent right — the right to exclude — sensitive to distributional issues.<sup>45</sup> Moreover, the exclusion of the homeless person by a private owner in each case is on a par with that owner's exclusion of *everyone* else, rich and poor alike, from his property. To *everyone* else (not just the homeless), he is entitled to say: this land is for me, but not for you.<sup>46</sup> But we may not be entitled to treat public places this way, inasmuch as public places are conceived of as being available for everyone's use. True, we are in principle entitled to regulate these places by placing restrictions on what *anyone* does there: we can say that *no one* is allowed to build a fire in the park. But when we regulate basic life-activities like sleeping, the impact of this regulation is so qualitatively different in the case of the homeless from its impact on the person who has a home to return to, that it amounts almost to the application of a quite different set of laws. Certainly, the ordinance if enforced would have an impact on the homeless the cruelty of which (the denial of sleep, *period*) is out of all proportion to the minor inconvenience that would be suffered by a person who has somewhere else to sleep.

I have presented this part of my argument in the language of liberty rather than the language of need. The question has been "Where is the homeless person free to sleep?" rather than "How is the homeless person's need for sleep to be satisfied?" I have done this for three reasons.

First, the discussion is initially framed in juridical terms, in terms of rights and duties. Schemes of regulation involve arrays of rights and duties and these are, in the first instance, the objects of our justificatory discourse

---

45 I am grateful to James Penner for this point. See also Jeremy Waldron, *Why Indigence Is Not a Justification*, in FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF THE CRIMINAL LAW 98, 106-10 (William C. Heffernan & John Kleinig eds., 2000).

46 We might hesitate to say this in the case of privately-owned land that is made available to the public, like shopping malls and department stores. If, to vary the example, the owners of these pieces of land routinely make their lavatories available to members of the public, but deny them to those who appear to be homeless — i.e., *to those who appear to have no other lavatory to use!* — then we might well want to do something about it. Also, for American constitutional doctrine about the exercise of non-owners' rights in privately-owned but quasi-public places, see *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (holding that individuals may not be denied the exercise of free speech rights in privately-owned shopping malls, or at least in those parts of them that are regularly open to the public).

on legal discussion. Asking whether a person has a duty to refrain from  $\phi$  is another way of asking whether he is legally at liberty to  $\phi$ . So this is just legalistic talk; it need not be conceived of as carrying or expressing any particular libertarian message.

Secondly, however, it is important, I think, to be able to address libertarian defenders of (unequal) private property on their own terms. It is important to show that the case that can be made for the homeless, or for ameliorating the predicament of the homeless, is liberty-based, not one that invokes values that are necessarily opposed to liberty. It is sometimes said that the poor and the propertyless are no less free than the rest of us, but they have fewer means for the exercise of their freedom.<sup>47</sup> It is important to expose the fallacy in this, and to show that propertylessness *is* just that: lack of freedom.<sup>48</sup> I think it is also important to insist that the liberty that is at stake in my characterization of the homeless person's predicament is plain old *negative* liberty — liberty in the sense of not being stopped from doing  $\phi$  — not any fancy philosophical or newfangled positive liberty.<sup>49</sup> Conceptions of positive freedom can too readily be criticized as begging the question in this context, whereas the negative liberty critique accepts — but promises to follow through more consistently with — exactly the same libertarian principles as those adopted by its opponents.

Thirdly, the liberty-based account credits the homeless with powers of action rather than presenting them simply as passive victims of deprivation. The question is, in the first instance, not "Why are these people not receiving the help they need?" but rather "Why do we think we are justified in stopping them from acting in these ways?" Liberty-talk, like rights-talk, is more respectful of human agency than talk of needs;<sup>50</sup> talk of needs is the talk of experts about people, but not necessarily in a way that credits their own

---

47 See, e.g., KEITH JOSEPH & JONATHAN SUMPTION, EQUALITY 48-49 (1979) ("Poverty is one kind of personal incapacity. But it is not coercion. The possession of the money one would like is not the same thing as liberty, simply because both of them are desirable. How much money we have is one of the factors which determines the choices open to us. Liberty means that we, not others, choose between alternatives.")

48 For an excellent discussion of this point, see G.A. Cohen, *Capitalism, Freedom and the Proletariat*, in THE IDEA OF FREEDOM: ESSAYS IN HONOR OF ISALIAH BERLIN 9, 11-12 (1979); see also Jeremy Waldron, *Mr. Morgan's Yacht*, in THE EGALITARIAN CONSCIENCE: ESSAYS IN HONOUR OF G.A. COHEN 154 (Christine Sypnowich ed., 2006).

49 The classic account is ISALIAH BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118 (1969). For a conception of positive liberty oriented specifically to the plight of the poor, see AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

50 PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 151-53 (1991); see also Jeremy Waldron, *Rights and Needs: The Myth of Disjunction*, in LEGAL RIGHTS:

view of themselves or what they propose to do, or are capable of doing (if the law would only leave them alone), to help themselves.<sup>51</sup>

Still it would be quite wrong to ignore the dimension of need altogether. The analysis that I have given of the predicament of the homeless person is significant mainly because the denial of liberty which is involved in the enforcement of the laws of public and private property is not just any old liberty, but liberty to take care of one's basic needs.<sup>52</sup> Prohibiting someone from sleeping is not just stopping them from doing something they want to do, it is stopping them from doing something they *need* to do, and eventually, if sustained, it will become physiologically impossible to comply with. As I have argued elsewhere,

any restriction on the performance of these basic acts has the feature of being not only uncomfortable and degrading, but more or less literally unbearable for the people concerned. People need sleep, for example, not just in the sense that sleep is necessary for health, but also in the sense that they will eventually fall asleep or drop from exhaustion if it is denied them. People simply cannot bear a lack of sleep, and they will do themselves a great deal of damage trying to bear it. The same, obviously, is true of bodily functions like urinating and defecating. These are things that people simply have to do; any attempt voluntarily to refrain from doing them is at once painful, dangerous, and finally impossible.<sup>53</sup>

I think this dimension of the matter affords an additional reason for giving priority to the duty-imposing aspect of the property regime we are considering. It is an old rule-of-law point: no matter what benefits accrue from it, no legal arrangement should be upheld if people are literally incapable of complying with the duties it imposes.<sup>54</sup>

---

HISTORICAL AND PHILOSOPHICAL PERSPECTIVES 87, 96-97 (A. Sarat & T.R. Kearns eds., 1996).

51 I have emphasized this theme of self-help, negative liberty, and legal constraint in much of my writing about property and poverty. See particularly Jeremy Waldron, *Welfare and the Images of Charity*, 36 PHIL. Q. 463 (1986).

52 Again, I am grateful to Neta Ziv for pressing this point in her discussion of this Article. As she points out, "we are troubled by the consequences of the current property regime because of its detrimental impact on people in those human life spheres which we consider most basic to our existence — existential to human survival in a physical and dignified manner." Ziv, *supra* note 12, at 2.

53 Waldron, *supra* note 27, at 320.

54 Compare the emphasis on practicability of legal rules as part of the "internal morality of law" in LON L. FULLER, *THE MORALITY OF LAW* 39, 70-79 (rev. ed. 1969).

The implication of my argument is that we need to rethink the regulation of public spaces in a community where there are homeless persons. We must abandon what I called earlier the Complementarity Thesis as a background assumption, and assume instead, as we design and argue for public-property regulations, that there will be some people in our society who have to lead the whole of their lives in public places, because they have no private place to resort to.

Notice, this does not mean that all regulation of public places must be suspended until provision has been made for the needs of the homeless. From what I have said here, nothing follows about the enforcement in public places of those rules of conduct that apply everywhere: murder and assault will remain illegal in public as well as in private, and if the use and supply of narcotics continues to be banned, then they too will be banned in public places.

The arguments I have made primarily concern necessary life-activities — like sleeping and urinating — which would be perfectly legal if performed in private. So far as these actions are concerned, it is quite unfair to ban them in public — to say to the homeless person in a public street or square, "This is not the place for *that* activity" — if we have not at the same time taken steps to ensure that everyone has access to a private place in which to perform them. So long as we have not taken those steps,<sup>55</sup> then banning such activities in public is like enforcing a curfew against the homeless when there is nowhere for them to go. It fails to take proper account of the fact that, as things stand, public places are the only places they are allowed to be.

I said earlier that we should assume for the sake of argument that the homeless have no publicly provided shelter to go to.<sup>56</sup> In fact, for many of the homeless this is false,<sup>57</sup> though it is true during daylight hours and importantly

---

55 I consider the provision of public shelters *infra* text accompanying note 57.

56 *Supra* text accompanying note 43.

57 For example, New York City guarantees a bed in a shelter to any person who seeks it (subject to some work and conduct requirements). See Peter T. Kilborn, *Gimme Shelter: Same Song, New Tune*, N.Y. TIMES, Dec. 5, 1999, at 5. But New York is exceptional among American cities in this regard. See also Donna Wilson Kirchheimer, *Sheltering the Homeless in New York City: Expansion in an Era of Government Contraction*, 104 POL. SCI. Q. 607 (1989). A report commissioned by the United States Conference of Mayors between 1986 and 1995 in twenty-nine major cities indicates that in 1995, for example, 24% of shelter requests went unmet and that emergency shelters in 79% of the surveyed cities turned away homeless families due to a lack of resources. See Christina Victoria Tusan, *Homeless Families from 1980-1996: Casualties of Declining Support for the War on Poverty*, 70 S. CAL. L. REV. 1141, 1144 (1997).

true so far as publicly provided bathrooms are concerned. I suggested this assumption — artificial as it is — in order to emphasize the extent to which the fairness of public-place regulations depends on other aspects of provision for the homeless. Robert Teir of AARR believes the two issues are separable. He cites a comment by columnist George Will to the effect that "[t]he question of what society owes in compassionate help to street people is, surely, severable from the question of what right the community has to protect a minimally civilized ambience in public spaces."<sup>58</sup> The analysis I have given shows why the questions are not severable: the less society provides in the way of public assistance, the more unfair is its enforcement of norms for public places that depend on a complementarity that simply doesn't apply to a considerable number of citizens.

The public provision of shelters makes some difference to my argument, by breaking up the accumulation of prohibitions that I talked about earlier. With regard to sleep, for example, if shelters are provided then it is not the case that the homeless person is prohibited from sleeping everywhere. He is prohibited from sleeping on private land (unless, improbably, he can get the consent of some private owner) and he is prohibited from sleeping in streets and parks; but he is not prohibited from sleeping in shelters, at least during the times that most people sleep.

With regard to other life-sustaining activities, such as eating or the elimination of bodily wastes, the existence of shelters — at least those run on the principles adopted in American cities — is less consequential. Homeless shelters are normally unavailable from quite early in the morning until around sunset, yet these are activities that may have to be performed throughout the day. Obviously the provision of public lavatories is immensely important here. One reason why this has been such a matter of concern in the United States is the meager level of public provision in this regard.<sup>59</sup>

In a well-known article by Robert Ellickson entitled *Controlling Chronic Misconduct in City Spaces*, the suggestion is made that public spaces should

---

58 George F. Will, *Beggars and Judicial Imperialism*, WASH. POST, Feb. 1, 1990, at A21, quoted in Teir, *supra* note 37, at 337.

59 See ELLEN BAXTER & KIM HOPPER, PRIVATE LIVES/PUBLIC SPACES: HOMELESS ADULTS ON THE STREETS OF NEW YORK CITY 80 (1981); see also Baron, *supra* note 39, at 284-85 (2004); Teddy Ky-Nam Miller, *The Unmet Promises of Care Not Cash*, 5 HASTINGS RACE & POVERTY L.J. 171, 191 (2008); and Tami Iwamoto, *Adding Insult to Injury: Criminalization of Homelessness in Los Angeles*, 29 WHITTIER L. REV. 515, 525-26 (2007).

be divided into zones, depending on the level of regulation.<sup>60</sup> Conduct of the sort that I have been discussing — sleeping, urinating, cooking, etc. — might be permitted at any time in what Ellickson calls "Red Zones," permitted only on an intermittent but not chronic basis in other areas that he calls "Yellow Zones," and forbidden altogether in those public places that he refers to as "Green Zones."<sup>61</sup>

Ellickson's proposal is based, he says, on an understanding that "demands on public spaces are highly diverse" and that "[a] constitutional doctrine that compels a monolithic law of public spaces is as silly as one that would compel a monolithic speed limit for all streets."<sup>62</sup> The suggestion is that Green Zones might be governed by the aforementioned Complementarity Thesis and would be available for the uses extolled by Robert Teir and other communitarians.<sup>63</sup> The liberty and the needs of the propertyless would be served by the provision of Red Zones, to which they could have resort, presumably out of sight of more sensitive or more prosperous citizens, who would not expect to be confronted with these activities outside the private confines of a home.

Would this be sufficient to satisfy the concerns raised in this Article?<sup>64</sup> In a literal sense, the answer is yes. Like the provision of public shelters or public lavatories, the provision of Red-Zone public spaces breaks up the accumulative logic of prohibition that I have described. There might be other objections to Ellickson's proposal based on justice in the allocation of public spaces, or objections that the provision of Red Zones, along the lines envisaged by Ellickson, is not enough to ameliorate the injustice of the allocation of property generally.<sup>65</sup> But in principle Ellickson's proposal answers the immediate concern.

It does so, however, at a very considerable cost in terms of the relation of various groups to a common sense of community. That may sound odd, since it is the idea of community that underlies the original concern about the misuse of public spaces. One might think that whatever other

---

60 Robert Ellickson, *Controlling Chronic Misconduct in Public Spaces: Of Panhandlers, Skid Rows, and Public Space Zoning*, 105 YALE L.J. 1165 (1996).

61 *Id.* at 1220-26.

62 *Id.* at 1247.

63 See *supra* text accompanying notes 37-38.

64 This question was pressed on me by Issi Rosen-Zvi in discussion at the Community and Property conference in Tel Aviv.

65 Ziv, *supra* note 12, at 6, has drawn my attention to objections raised by Stephen R. Munzer, *Ellickson on "Chronic Misconduct" in Urban Spaces: of Panhandlers, Bench Squatters, and Day Laborers*, 32 HARV. C.R.-C.L. L. REV. 1 (1997).



costs are associated with Ellickson's proposal (costs in terms of distributive justice, etc.), at least communitarian values are served, for now members of the community will not be driven out of *all* public spaces as a result of their colonization by the homeless. The Ellickson proposal is calculated to realize, at least in limited form, the attractive vision purveyed by Robert Teir of the AARR of parks, squares, and boulevards as a locus for the public life of a community, a place where members of the community can come out of their homes to spend some of their leisure time in "interaction, integration, relaxation, and reflection."<sup>66</sup> Members of the community will be able to enter and interact in the Green Zones without having their experience of public interaction spoiled by homeless encampments or by evidence of public urination, cooking, sleeping, etc. by individuals of unpleasant and perhaps dangerous appearance.

If one rereads the previous paragraph, however — alert to the question "Who counts as a member of the community?" — one will pick up an unpleasant resonance of "us" and "them," and a not inconsiderable hint of segregation. There is a contrast in the presentation of Ellickson's proposal between members of the community, on the one hand, who want to use the boulevards for interaction, etc., and, on the other hand, members of what seems to be regarded as an *alien* group — the homeless — who have intruded their presence into the public places in a way that makes public places uncomfortable for members of the community. But the distinction is puzzling. Are not the homeless members of the very same community that prosperous boulevardiers belong to? Maybe there are some undocumented aliens among them, but on the streets of most major cities in the developed countries, most homeless persons are citizens of the countries where those cities are located. They may move from city to city from time to time, but we live in a mobile world anyway, and the well-to-do banker who complains about not being able to walk with his children in a public place without being made uncomfortable by the presence of homeless encampments may be, in his way, as mobile in his city of residence as those we call "transients."

The sharing of common citizenship, then, and a common place of residence — this city is the place where members of both groups, in their different ways, live — would normally be the basis for ascribing membership of the same community, at least in a politically relevant sense of community. The homeless and the prosperous may not belong to the same clubs or interact in the same professional milieus; they may not like each other or understand

---

<sup>66</sup> AARR brief in *Joyce*, *supra* note 30, at 2; *see also supra* text accompanying notes 32 and 35-38.

each other; but if community is to be used in a civic or national context, and if we concede that a community can comprise large numbers of people who are strangers to one another, then it is hard to see why we should be opposing the interests of community to the presence of the homeless.

To be sure, it is possible for some members of a given community to make certain communal actions impossible. And the presence of the homeless in public places might be thought to be an instance of that. But their segregation into Red Zones from which other members of the community are largely self-excluded is also a way of diminishing opportunities for communal interaction. I mentioned earlier the parts of the AARR brief that extolled the way in which public places facilitate the interaction of those members of a given community who would not otherwise come across one another.<sup>67</sup> The brief spoke of them as "community meeting places," places where there would be meetings and sightings among "[t]hose with Armani suits, and those with nose rings; elderly people and gay couples; residents and visitors; rich, middle, and struggling classes,"<sup>68</sup> places for the "mixture of social classes, and a counterweight to the increasing fragmentation of society."<sup>69</sup> But it is less clear how serious the communitarians are about this. They want some edginess, some surprises, some unexpected encounters in public places, no doubt; but anything seriously disturbing, anything that might upset the pleasure one takes in the *mélange* of prosperous lifestyles is to be hidden from view. In other words, to the extent that the Ellickson proposal promotes communal values, it promotes an inauthentic sense of community because it makes it easier for people to maintain their illusions about the nature and character of the community in which they live.

In another article, I criticized the detail of Ellickson's cost-benefit approach towards the regulation of public places for its simpleminded conception of what should count as a harm or a cost when one is considering various regulatory regimes.<sup>70</sup> According to Ellickson, if people are distressed at the public spectacle of great poverty, then their distress should count, *pro tanto*, as a harm to them and be registered as a cost in the ledger in which we keep track of costs and benefits.<sup>71</sup> No doubt one way of alleviating this harm would be to put an end to poverty. But Ellickson's proposal suggests other ways of alleviating the harm: if we put the poor people somewhere out of sight, then we have alleviated the distress to the prosperous; if we manipulate the sources of

---

<sup>67</sup> See *supra* text accompanying notes 34-38.

<sup>68</sup> Teir, *supra* note 28, at 290.

<sup>69</sup> Teir, *supra* note 37, at 289.

<sup>70</sup> See Waldron, *supra* note 24, at 376-85.

<sup>71</sup> Ellickson, *supra* note 60, at 1182-83.

public knowledge so that prosperous people do not know how poor the poor people are, then we have alleviated this distress. Of course, on Ellickson's model, the distress suffered by the poor in the midst of their poverty remains, but at least we have done *something* for the public good: we have relieved the distress of the rich, by sheltering them from this disturbing spectacle.

To my mind, this way of approaching the task of public justification is so misconceived it comes close to being corrupt. That a prosperous person's distress at learning about poverty should be counted as a harm presupposes an extraordinarily shallow account of human interests. For one thing, it utterly ignores our interest as rational beings in the truth, however distressing; for another, it works at the crudest level of hedonism, in its assumption that anything which feels bad *is* bad. I put the point this way in the earlier article:

Imagine that in a country where homelessness has only recently become a problem, a citizen previously unaware of [it] comes across a person living on the streets in filth and squalor. He is likely to be distressed by the spectacle, but his distress may have the following flavor: "This is awful. I am glad I have found out about this," and he may be moved by his horror to try and do something about it. Is this distress a harm to the citizen, something that in a utilitarian calculus should count *pro tanto* against his finding out about poverty and in favour of his being sheltered from his knowledge? I think we should say not — not even that it is a slight harm out-balanced perhaps by greater benefits associated with his knowledge. On the contrary, there is a clear sense in which distress occasioned by the spectacle of another's suffering is a good rather than an evil (just as pleasure occasioned by another's suffering is an evil, not a good). If there is first-order suffering of this sort around, then it is better that it be seen and that people be distressed by it than that it remain invisible to all but the immediate sufferers. A world that differed from our own only in that the spectators of such suffering were not moved to any sort of distress by the spectacle of poverty would be *pro tanto* a worse world.<sup>72</sup>

I guess one could talk about this endlessly in the context of value theory — the definition of cost, the definition of benefit.<sup>73</sup> The point for present purposes,

---

<sup>72</sup> Waldron, *supra* note 24, at 379-80.

<sup>73</sup> I have pursued the point in terms of John Stuart Mill's account of happiness and distress, *id.* at 380-84, and in terms of Ronald Dworkin's distinction between personal and external preferences, *id.* at 389-93.

however, is to emphasize the problematic relation between the Ellickson proposal and anything like true community. The sense of community that Ellickson's proposal serves is a sort of fake or cosmetic community, in which people band together to sustain collective illusions, even when this involves establishing legal regimes which will, in effect, remove other members of their true community from their sight.

### III. EXCLUSIONARY COMMUNITY

I wish I felt more confident about the conception of "true" community that I appealed to in the closing paragraphs of the previous Part. That we might want to distinguish between true community and fake or inauthentic community has been a recurrent, albeit minor theme in some recent communitarian literature.<sup>74</sup> To the extent that liberal thinkers have adopted some elements of communitarian rhetoric, they have often wanted to insist that respect for every individual is a condition of true community, for example.<sup>75</sup>

On the other hand, there is also a sense of "true community" that is designed to shake off our illusions about what communitarian social movements really favor. "True community" in the sense of "actually-existing community" — a real entity actually structured by a communitarian — is not always as nice as it looks. Actually-existing communities are often exclusionary and inauthentic in exactly the way I was criticizing at the end of the previous Part. Moreover I fear that this is not an aberration, but that these aspects of community — its exclusiveness and its ability to sustain collective illusions about the quality of social life — are precisely what is valued when self-styled "communitarian" claims are put forward in law and politics. It has come to the point where further objections to this tendency in the name of "true" community may be futile, and where "inclusive community" might have to be regarded as an oxymoron.

I said at the beginning of this Article that private property is an exclusionary concept. It privileges the owner of a resource and it imposes exclusionary burdens on others. It would be a mistake to say that this is just an aspect of how people choose to exercise their property rights<sup>76</sup>: the right to exclude others from one's property seems essential

---

<sup>74</sup> See, e.g., AMITAI ETZIONI, *RIGHTS AND THE COMMON GOOD: THE COMMUNITARIAN PERSPECTIVE* 122 (1995).

<sup>75</sup> See RONALD DWORKIN, *LAW'S EMPIRE* 195-206 (1986), and Ronald Dworkin, *Liberal Community*, 77 *CAL. L. REV.* 479 (1989).

<sup>76</sup> Aristotle, however, comes close to saying this in *ARISTOTLE, THE POLITICS* 26-27

to the ownership idea.<sup>77</sup> In the modern world, community is like that too. Although "community" can sound like a warm, inclusive word, real-world communities (be they nations, municipalities, neighborhoods, or clusters of condominiums) characteristically define themselves by reference to an array of excluded "others" and erect fences and patrol borders to keep these others out.

In both cases, enthusiasm for these exclusions is made to seem legitimate by the thought that those excluded from *my* property probably have somewhere else of their own to go to, and that those excluded from *our* community probably also have a community of their own to live in. In fact neither proposition is justified. We have seen how, in the case of property, patterns of ownership may emerge which have the result that some people bear all of the duties and none of the rights of property: there is no significant privately-owned resource which they are entitled to use; no piece of privately-owned land from which they are not at any time liable to be excluded. And the same is true of community. As to national communities, there is the troubling prospect of statelessness, which we try to avoid by insisting that everyone must have some nationality and some country he can be returned to which is prepared to accept him.<sup>78</sup> But internal communities are often subject to no such requirement. As to local community, we know that in every country there are large numbers of people who live as transients and are not welcome or rooted in any community. Many such people are formally homeless: there is no piece of private property where they are welcome or from which they are not at all times liable to be evicted. Their only places of refuge are the substantial patches of public property (like parks and sidewalks) which every society maintains for everyone's use. And these too, as we have seen, are increasingly being made unavailable.

Many concerned citizens deplore the impact of the market economy and its attendant inequality on the wellbeing of those who are poor, deprived, despised, and displaced, and they often say that what is needed is a greater sense of community.<sup>79</sup> As I hope I have been able to convey in this Article,

---

(Stephen Everson ed., Cambridge Univ. Press 1988), when he suggests that property should be allocated to private owners for common use.

<sup>77</sup> *Supra* text accompanying note 9.

<sup>78</sup> On statelessness, see HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 275-90 (new ed. 1973). This issue was recently explored in Audrey Macklin, *Who Is the Citizen's Other? Considering the Heft of Citizenship*, 8 *THEORETICAL INQUIRIES* L. 333 (2007). See also *Trop v. Dulles*, 356 U.S. 86 (1958), in which the Supreme Court ruled that depriving an individual of his citizenship was an impermissible punishment.

<sup>79</sup> See GEORGE RUPP, *GLOBALIZATION CHALLENGED: CONVICTION, CONFLICT,*

I have my doubts about "community" as an adequate response. Too often the problem for those who are poor and marginalized is not that there has been insufficient assertion of the claims of community in the face of (say) market individualism. The problem is, rather, one of exclusion or expulsion *from community*. For there are in fact forms of community which are perfectly at home with market individualism and which involve the repudiation of any responsibility for deprived people in their vicinity. If there is anything to the reflections with which I began this Part, those forms may well have become the dominant mode of communitarian thought (certainly in the United States).

I do not mean to deny that exclusionary community exhibits many of the attractive attributes of communal connectedness. These are cozy forms of community in which those who are privileged as members enjoy one another's company, take responsibility for their neighborhood, get to know newcomers, are loyal to one another and to a shared way of life, look out for the interests of their neighbors, cherish the same values, support the establishment of public goods, pursue communal ends and activities — all the activities and concerns that we are supposed to most admire about thick communal solidarity. They do all that, yet still they recoil (as a community) from the presence of (say) homeless people in their midst, and they will do everything in their power — including, as we have seen, mobilizing the ideology of "community" itself — to ensure that those who are naked, shivering, filthy, unemployed, sick, foreign, and destitute come nowhere near their gates, nowhere near the public places where they walk their prams or hold their barbecues.

Many of these campaigns against the poor, the outcast, the homeless and the transient are not just motivated by the impulse to protect a given form of community, but also directed against the establishment of any alternative form of community on the part of the disadvantaged. It is not so much *individual* homeless persons that prosperous communities are worried about but encampments or semi-permanent gatherings of homeless people — areas where there are large numbers of transients, scores or hundreds of impoverished men and women who are trying to find, in the desperate proximity of their physical predicaments, a degree of solidarity among themselves. That — it seems — is to be stifled at all costs. If we can only keep the homeless individuals on the move, we will be able to prevent, in the name of community, the establishment of anything like community on their

---

COMMUNITY (2006). This paragraph is adapted from my reply to Rupp — Jeremy Waldron, *Secularism and the Limits of Community*, in *id.* at 52.

part. And the same is true of the hostility of the prosperous to institutions that might shelter the outcast or provide for them the infrastructure of a sociable life. They campaign against the establishment of homeless shelters in their vicinity; they protest low-income housing if it is likely to impact their property values; they wrap their children in a cocoon of protective outrage at any attempt to settle sex offenders in their municipality after they have served their sentences; they campaign to deny state and municipal services to illegal immigrants; they look askance at those who question their traditions; and so on. And they do all this together, *as a community*, with great sensitivity, solidarity, loyalty, and mutual concern.

I know that many communitarians are honorable people, who think of community as inherently inclusive. But, as I said at the beginning of this Part, I fear that we can no longer take the phrase "inclusive community" for granted or expect it to mean much more than "We are inclusive towards those who are already included." In the real world, certainly in the United States, the word "community" is found most commonly in the company of terms like "gated." And this is not surprising. Communitarianism has an inherent "us"/"them" logic, a tendency to define itself by contrast with an "other."

The examples I have given are mostly small-scale neighborhood examples, or examples that operate at the level of municipal administration. But they have their counterparts at a national level too. Here I have in mind people who bind themselves together in a political community to defend their own jobs and industries, no matter what the cost to poor people beyond their borders, who embrace a fortress-mentality to deny the benefits of their economy to those they regard as outsiders, and who treat refugees and would-be migrants with suspicion rather than compassion. This is a form of community which, on the one hand, is made possible by the prosperity that a market economy can secure, but which operates from that base to defend its prosperity against any attempt by outsiders to participate in it. It is a form of community that circles the wagons of solidarity to defend those who are privileged as its members against any concerns beyond the community itself that might threaten the basis of its prosperity. This sort of community is incapable of mitigating the tendency of a private property economy to neglect a whole range of interests.

*That* I am afraid is the real logic of community in the modern West, and it is a logic that *reinforces* the exclusionary aspect of private ownership as the dominant mode of access to and use of resources. I hope this Article has been able to illuminate the process by which this happens. It is a process that takes advantage of the exclusions inherent to any given property right to establish a regime of *net* or *overall* exclusion — the exclusion of people

from the means of life and the elementary bases of social interaction as a result of the cumulative impact of the rules of private and public ownership. It would be nice to think that this result — like that of many cumulative processes — is not the subject of anyone's intention. As I said in Part I, no particular property-owner intends that there be nowhere for a poor person to sleep or urinate;<sup>80</sup> he intends only that it not happen on his property. The overall result reflects the impact of thousands of such narrowly motivated prohibitions. And perhaps even the regulator of public places does not intend this overall result: he too is focused on a narrow issue, keeping the streets and squares clean and safe.

However, the role of communitarian rhetoric and communitarian action of the kind I have described belies this appearance of an unintended result. Communities in the modern world do not wake up surprised to find that some fellow-citizens are excluded in various and accumulating ways from their suburbs, their neighborhoods, their sidewalks and their parks; they are not shocked to find that poor people, individually and collectively, are unable to own property in their vicinity that would undermine the property-values of the prosperous. On the contrary, they campaign day and night for these results. And they do everything in their power to obstruct measures which, either at the level of private ownership or at the level of public regulation, would make the world a more accommodating place for those who are not as fortunate as they are.

I doubt that there is anything much to be done about this. But if we persevere with the logic of property and the logic of community, it is probably as well that we understand the ways in which they work together to secure this result.

---

80 *See supra* text accompanying note 44.