

THE MORAL SUBJECT OF PROPERTY

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–I ain’t the woman in red, I ain’t the girl next door
But if somewhere in the middle’s what you’re lookin’ for
I’m that kind of girl...
– Matraca Berg/Ronnie Samoset, “That Kind of Girl,”
[sung by Patty Loveless in On Down the Line (2001)]

I. INTRODUCTION: THAT KIND OF GIRL

Utopians do not like private property. In one of the most notorious incidents of the Reformation era, militant Anabaptist preachers called for a Kingdom of the Saints in the town of Muenster in western Germany, gathering supporters in the early 1530s and finally taking over the town in 1534 from the ruling Prince-Bishop.¹ The Kingdom followed, in which a key element—though not an uncontroversial one—was the abolition of private property.² According to these Anabaptist leaders, their new converts were without sin, and for these earthly saints, the self-regarding payoffs of “mine” and the discipline of “thine” were, as one leader said, an “abomination.” Love and the spirit of community would induce the Saints to work and share selflessly, and thus they did not need property with all its grubby hoarding, hawking, and wage-counting.³ As a matter of fact, they were not supposed to need conventional marriage either, a doctrine that worked out quite conveniently for at least one of the Anabaptist leaders, Jan

¹Norman Cohn, *The Pursuit of the Millennium: Revolutionary Millenarians and Mystical Anarchists of the Middle Ages* 255-56, 260-63 (rev. ed. 1970).

²Id. [Cohn] at 265-66.

³Id. [Cohn] at 266 [including reference to abomination]

Bockelson, who ditched an old wife and acquired fifteen new ones.⁴ But the community of property (and the almost-community of spouses) was not to last. The Prince-Bishop returned with an army, assisted by a number of other alarmed German princes as well as by the townspeople themselves, who had become dismayed at their increasingly tyrannical leaders. The besiegers turned out the Anabaptists in mid-1535, executing Bockelson and a number of others with the exquisitely painful means and public drama reserved for sixteenth century revolutionaries.⁵ Along with the bishop's restoration came laws, marriage, and property--constraining institutions that were more compatible with the human state of fallenness--while the Anabaptists eventually retreated into the quietist versions that now reside in Pennsylvania and other places as Moravians and Hutterites.⁶

More modern Utopians have not been quite so confident about their own salvation as Bockelson and his followers, but they too have tended to find private property distasteful. Nineteenth century American utopian communities typically restrained private ownership in various ways, in the expectation that the community members would share at least with one another, if perhaps not with the world at large.⁷ Property, it seems, concedes too much to self-interest, or perhaps just old-fashioned sinfulness, to have a good reputation among perfectionists.

On the other hand, property presents some problems as well to those who believe too completely in the ascendancy of human self-interest (or sinfulness). Blackstone famously noted

⁴Id [Cohn] at 269-70.

⁵Id. [Cohn] at 277-80.

⁶Id. [Cohn] at 280.

⁷Fourier, Oneida

how the imagination and affections of mankind are stirred by the right of property – that “dominion” over things that “one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.” (II,2). But what is so special about that? What is to wonder that self-interested persons might claim to exclude all others from something they want? Hoggishness is to be expected from sinners, is it not? No, what should truly strike the imagination is the fact that others—presumably equally hoggish others--pay the slightest attention to any such claims. Yet a right of property would be no dominion at all unless those others backed off – playing the “dove” role to the owner’s “hawk,” as the game theoretical language puts it⁸--relieving the owner of the enervating requirement to guard her property all the time, so that she can actually improve and use it. That is to say, claims to property only make sense in a social context where there is some level of cooperative behavior: if any given subject is to have control over any given object, others must understand the signals of ownership and acquiesce in them.

And of course they/we do, much of the time. They/we do not always succeed, but often they/we do, thanks in large part to human forbearance from the impulse to take the money and run. For those convinced of human depravity (otherwise known, by some, as “rationality”), that fact should be the true wonder of Blackstonian claims of dominion. A property regime would be impossible, an unsolvable n-person Prisoner’s Dilemma, if everyone behaved in the presumptive piggish manner all the time. But instead we do have property regimes, resting on an underlying thread of cooperative behavior quite out of line with a presumption of total moral fallenness.

Thus one may understand the basic moral subject of property regimes as the practitioner

⁸Zerbe & Anderson

of a kind of second-best morality, a morality not presuming saintliness but not made for total sinners either; she is neither the girl next door nor the woman in red.⁹ The common law of property details the second-best morality expected of “that kind of girl,” both as owner and as non-owner: as non-owner, she is expected to ask permission of an owner and not just take things without consent, even when the owner’s refusal seems unreasonable;¹⁰ she usually cannot foist an improvement on the owner unless the owner consents.¹¹ In her role as owner, on the other hand, while she has a wide latitude, she cannot use her property in ways that annoy her neighbors in unusual ways.¹² More particularly, she cannot use her property maliciously, just to spite another;¹³ spite only escalates wasteful retaliation, in which each side expends resources just to ruin someone else’s things, a double loss for the society at large. Moreover, property regimes require that on some occasions the owner must yield to the non-owner who encroaches on her property, e.g. in emergency situations.¹⁴

Like the common law itself, the theoretical names for property practices reflect the second-best character of the morality expected in property regimes, encapsulated in phrases like

⁹In an earlier work I called her “Mom,” to designate a person interested in the well-being of others but not a fool about her own interests either.

¹⁰Jacques case; criminal law of larceny.

¹¹ameliorative waste cases; squeegee guys in NYC

¹²Middlesex nuisance case – ordinary behavior

¹³spite fence cases

¹⁴ Ploof; roadway deviation cases

“self-interest rightly understood,”¹⁵ “tit for tat,”¹⁶ or “Everyday Kantianism.”¹⁷ Aside from the fact that some people do not abide even by this second-best morality, however, the trouble with this moral middle ground is that it is a large and sometimes ambiguous space. Take the issue of spite or malice, for example: was the owner really acting maliciously toward the neighbor when she totally blocked the view from his basement window and then poured water into it? or was she merely putting up a wall on which to grow her vines?¹⁸ Or emergency: is a potentially dangerous twelve-mile detour enough of a necessity to permit a trucker to drive across a lot in spite of the landowners’s objection?¹⁹ Then too, just how wide is the owner’s latitude to carry out her preferences? Can she join with her neighbors, for example, in a set of agreements to exclude minorities or the disabled from the neighborhood?²⁰

These particular issues were all decided against the owners, but perhaps because of their ambiguities, and perhaps also because we deal with property virtually constantly, property as an institution raises an unusually large number of moral complaints. Why should anyone recognize and acquiesce in the claims of others? This is a question that need not derive from hoggish self-

¹⁵Federalist papers

¹⁶Axelrod

¹⁷Jon Elster, *Cement of Society*. [Tort law presumes much the same subject: “reasonable,” not saintly; not required to stop for an accident but sometimes does anyway. But not such a constant presence as property.]

¹⁸spite fence case

¹⁹Jacques case; check miles.

²⁰*Shelley v. Kraemer* (racially restrictive covenants not legally enforceable, though not illegal if purely voluntary); *Clebourne case*

interest—that is to say, especially not from the intruder or the thief who wants to take the goodies and run—but rather from the opposite direction, that of the perfectionist. The perfectionist might ask: Is the institution of property morally worthy enough to command the respect and forbearance upon which it depends?

The remainder of this paper explores that question, pursuing it in several areas where moral objections to property arise frequently, and exploring as well the explanations that property proponents give. The argument of this paper is that the moral objections to property are generally drawn from the sense that property concedes too much to human self-interest; the answers are generally that the institution does so for some larger good. Indeed, even when conventional understandings of property require the property owner to cede, as in the spite cases, they do so from the perspective of that larger public good at least as much as from the perspective of individual morality. And that is the point: These arguments and responses in certain ways do not meet each other: they pit concerns for private morality against justifications based on public welfare. At the same time, however, there is a humaneness in the second-best position that in some ways allows it to call the first-best position into question.

II. MORAL OBJECTIONS TO PROPERTY

Where, then, does property come under moral attack? This occurs in many places, but this paper will concentrate on three somewhat overlapping loci: acquisition (where it is argued that property is based on wrongful acts of acquisition), distribution (... that property is unequally and unfairly distributed), and commodification (... that treating things as property undermines their true meaning). There are others that might have been raised, e.g. externality (... that

property rights cause uncompensated harm to others), or even exclusivity itself (... that exclusive rights throw up barriers between people). I leave these to one side, however, for slightly different reasons—externality, because this issue is already so widely discussed in other literature, e.g. on regulation; and exclusivity, since many of the moral questions about exclusivity come up in the three issues under discussion here.

A. ACQUISITION.

People who read Blackstone's famous sentence about property's marvelous claims of exclusive dominion seldom go on to read the rest of the paragraph. In the following sentences Blackstone sharply qualifies his own statement, expressing great uneasiness about whether people really do have ground to respect the ownership claims of others. The reason for this unease is the uncertainty involved in the acquisition: where did those ownership claims come from? As Blackstone observed, people do not like to think about this question too much, since it could cast doubt on the justice of their own claims.

Blackstone had several answers for worries of this kind. First, he basically admonished everyone to forget about them and let sleeping dogs lie (advice that would soon be rejected by Prudhomme, who described property as theft, and Marx, who did much the same in his acid comments on original acquisition). Second, he told a little narrative illustrating the much greater argument that property rights do a lot of good, however they may originate and however they may be passed down. Then, and third, he launched into an exquisitely detailed description of property rights as they then existed, perhaps in an effort to effectuate the first admonition and to help people forget to ask these troubling questions.

The second of these answers is the relevant one, the little story to show property's larger

benefits. The tale begins in the mists of time past, when supposedly with all things were held in common; property then emerged as the world grew more populous and resources grew scarcer, and as people wanted to do things now for the sake of rewards in the future. As Blackstone rhetorically asked, who would sew today if he could not reap later? And so, property emerged, apparently because people needed it. This story is quite lacking as a historical explanation for property's origins and development, and it has some problems on the analytic front (since it assumes both self-interest and the cooperativeness that underlies forbearance about other people's rights).

But the story is more interesting as a moral justification for property, and indeed one of the most important and prevalent moral justifications for property: property is the foundation stone of economic well-being. Blackstone's story presumes the basic moral subject so common in property: the person who is self-interested enough to need property as an inducement to labor, but who is also cooperative enough to eschew grabbing other peoples' claimed rights. Given that subject, property as an institution makes a lot of sense. In biblical language, property provides the link between sinful human beings and the Biblical injunction to labor. The basic gist of a property regime is to let people take the payoffs from their work and investment, and at the same time to identify owners so that everyone can trade instead of fighting, encouraging specialization and further gains from trade. All those things—work, investment, trade—make everyone better off.

The moral issue is whether this larger social good outweighs whatever injustices may have accompanied the original acquisition of property rights. Putting the utopian thinkers to one side, seventeenth- and eighteenth-century property theorists were much fixed on the issue

whether all humankind had to agree to any one person's removal of private property from the great commons that God had provided (Filmer said yes, Locke said no, Blackstone said, "A questions that sounds too much of the schools!"). But the acquisition question is still relevant, though in somewhat different arenas.

Property as an institution requires stability in people's expectations about their own and other peoples' claims, and property law is full of claims-clearing devices that substitute Owner #2 for Owner #1 when Owner #1 has not sufficiently publicized her claims so that everyone thinks Owner #2 is the true owner. Adverse possession is a classic example of a claims-clearing device, and all property regimes have them. Unfortunately, Owner #2's claims may have arisen in dubious circumstances or even through force and fraud, and that fact can undermine people's confidence in the entire institution.²¹ Contemporary Russia is a case in point, where major capitalist figures are widely regarded as the beneficiaries of insider favoritism and horrifically shady practices. Should their great wealth be recognized, simply for the sake of getting on with things and letting a modern economy unroll? Or would some kind of redistribution actually lead to greater stability?

Historic injustices create another source of unease: Palestinians vis-a-vis Israelis, former East European landowners vis-a-vis the newcomers under Soviet rule, numerous indigenous groups vis-a-vis the settler societies that displaced them, descendants of slaves vis-a-vis the descendants of slave-owners. Settling all those scores could be hugely disruptive, and the passage of time itself makes proposed settlements morally ambiguous, since the original victims and perpetrators are often no longer on the scene. Why charge A in favor of B, when neither A

²¹Cincinnati ad. poss. case – Ewing v. Barnett – very unequal

nor B were personally involved in the past injustice? Moreover, settlements could leave open the origins of the displaced persons' own prior claims, as in the case of former aristocrats' plantations in East Europe. What peoples did their ancestors displace, far back in early Middle Ages? And so on back in time.

The age-old acquisition problem is not very salient to most property regimes, even though it bubbles hotly at the center in some locales. But generally, this set of issues takes on a peripheral character because we basically follow Blackstone's advice: we forget about them the questionable origins of title. The common law of property encourages this forgetting process, e.g. by creating the legal fiction of the "lost grant" for some moderately aggressive but uncontested resource use, or by treating the period of roughly twenty years as a time period for which "the memory of man runneth not to the contrary."²² By forgetting about origins, we can keep on acquiring, investing, trading, and generally making ourselves wealthier. The larger public good of stable claims normally outweighs the private lapses that were entailed in some of those claims.

But it should be no surprise that on occasion, the situation is reversed: unjust acquisitions may seem so gross as to eat away even the middle-ground morality that makes property regimes possible. If you think that all those who succeed are thieves, why not be a thief yourself? That rhetorical question turns Everyday Kantians turn into larcenists. Under such circumstances, public morality—in quest of stability for property—could require some kind of restitutionary gesture, or at least acknowledgment or restitutionary gesture.²³ MATERIALLY

²²cites re prescription

²³something re compensation? measure? "enough & as good of what?"

II. DISTRIBUTION

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

But is it morally right that wealth be unequally allocated? One answer is, of course it is: As John Locke put it, God intended that the world be put to use by "the Industrious and Rational" and not frittered away by the "Fancy or Covetousness of the Quarrelsome [sic] and Contentious."²⁴ That is to say, inequalities in wealth reflect differences in talents and effort, and hence rewards to merit entail inequality of wealth. There is a problem with this answer, though, even supposing that rewards to merit are an appropriate measure of morality, and even putting to one side the inexactness of the merit/reward equation—particularly when the rewards go to heirs rather than original earner. The problem is that this answer only kicks the question upstairs, as Rawls famously argued: inequalities in abilities and energy are themselves a matter of luck, and

²⁴Locke, 2d Treatise, ch 5, par 34

on a reward-to-merit argument, luck gives no moral claim even to the original earners, much less to their even luckier heirs. Hence for the sake of justice in the allocation of resources, those with greater talents and more energy might well be thought obligated to share the results with the less-well-endowed.

There are several responses to this position. One is the libertarian claim that things that are justly acquired and justly transferred belong to the owner as a matter of right, and as such they are not subject to redistribution without the owner's consent.²⁵ This assertion has considerable appeal, though it is subject to the issue that Blackstone identified about acquisition: how to show the justice of the original acquisition?

Perhaps even better-known, however, is the standard Utilitarian riposte that redistribution will kill the goose that lays the golden eggs. Once again, property's moral subject is That Kind of Girl, and not a saint. She minds the store and improves the things that are hers so that she can enjoy the rewards, including the enjoyment that she gets from giving things away to persons and causes of her own choosing – rather than the choosing of others. Her efforts, taken together with those of others like her, make the proverbial Pie bigger for all,²⁶ and they feed into the Rising Tide that Lifts All Boats, as another proverbial phrase puts it.²⁷ And wherever her talents and energy may have come from, she is a lot less likely to exercise them if no rewards are forthcoming. Even Rawls conceded something to the incentive structure implicit in property: in his blindfolded “Original Position,” where participants do not know where they personally will

²⁵Nozick

²⁶Epstein

²⁷note, “rising tide”

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

It is certainly arguable that many in the Original Position might opt for an even riskier strategy than Rawls suggested—i.e., no giveaways of Golden Eggs or pieces of the Pie at all— in the hopes that the no-give-away strategy will result in an even bigger Pie. Someone in the Original Position might think that the probabilities for a slice of that bigger pie outweigh the chance of coming up short.²⁸

But whatever their wishes, there is another practical reason for redistribution within a property regime. This reason revolves around envy and resentment. Great disparities may arouse jealousies among those at the bottom of the heap, and since by definition the have-nots do not have much to lose, they can make a credible threat to disrupt the institutions that protect the wealth of the haves. That reasoning yields what Frank Michelman has called the “big-bribe” theory of redistribution: give away something in order to alleviate the threat.²⁹ Bruce Johnsen’s investigations of Indian fishing communities in the Pacific Northwest suggests a big-bribe motivation behind the potlatch, and Mark Roe’s observations on “Backlash” suggest a similar motivation might be at work in more complex economies as well.

Envy and resentment may not be the only practical redistributive motivations at work

²⁸Rose, Enough & as good of what?

²⁹Michelman. Note that if prop. theorists are right, even have-nots have more than they would have in state of nature, since their labor is a more valuable asset in a property regime.

in a property regime, however. Thomas Haskell argues that modern philanthropy began with the vast expansion of commercial activity in the late eighteenth century.³⁰ On this account, through trade, entrepreneurs came to know and care something about people very different from themselves; and newly-convinced of their own efficacy in the world, they shucked off passive acceptance of “things as they are” and started to take action to relieve the plight of others. That is to say, trade excited the Moral Sentiments, along with action based on those sentiments.³¹ Philanthropy is not so far removed from involuntary redistribution, either, at least for That Kind of Girl, the Everyday Kantian, the practitioner of a Middling Morality. She would like to give away something to alleviate the troubles of the less fortunate, but she does not want to be a sucker about it and be the only one. If others feel the same way, a requirement of mandated redistribution is an entirely plausible outcome in a regime that protects private property.

Perhaps in keeping with the middle-ground morality expected in property regimes, property law takes a middling approach to redistribution. Involuntary individual redistributions—i.e. theft, robbery, fraud—are everywhere sharply discouraged, at least with respect to members of the in-group. Voluntary individual redistributions in the form of gifts are more or less unproblematic. The common law contains certain presumptions against gifts (perhaps because gift-giving is not normally expected in a second-best morality, or perhaps because what seems a voluntary gift might be a larceny in disguise), but they are allowable if they jump through the requisite hoops to prove their genuineness.³² Publicly-mandated

³⁰Haskell

³¹Economic Sentiments

³²Rose, Gifts

redistribution has a long history—as in the potlatch—and no doubt serves in some measure as insurance, though in modern economies the insurance idea may be less convincing (does Donald Trump really need welfare as insurance?). Modern economies generally put one constraint on publicly-mandated redistribution: it generally takes the form of taxation – that is to say, the payors are a large-ish group. “Takings” law and similar doctrines constrain the degree to which particular individuals can be forced to disgorge wealth for transfer to the less fortunate, even though these doctrines differ from country to country, and even though there may be slight redistributive elements in takings law itself.³³ This would comport with the second-best moral approach to mandated redistribution: it is all right and perhaps even desirable so long as a lot of people are involved, and no one person is the sucker.

In sum, then, property law is not entirely hostile to redistribution, even mandatory redistribution, despite moral critiques to the contrary. Spreading the burden is an important consideration, as is the potential cost to productivity. But if a property regime really succeeds in harnessing self-interest to labor, and if labor and effort really do contribute to social greater wealth, then greater generosity may follow too. Aristotle commented that one cannot be generous if one is too poor, a view that is reflected more modernly in the idea of the diminishing marginal utility of wealth. Interest in the environment famously follows a Kuznetz curve, as people get more interested when they have higher disposable incomes.³⁴ Even crows are generous with their neighbors when there is a lot of suitable nesting space around.³⁵ There

³³Hanoch Dagan (takings doctrine has redistributive element, e.g. sub-doctrines taking into account the percentage of the property lost through a regulatory action).

³⁴Dan Esty

³⁵NYT Science sec.

certainly is great generosity among the very poor, and sharing can act as insurance in a very risky setting.³⁶ But there where there is more wealth there is also apt to be more generosity, and if property regimes succeed in producing wealthier societies, they may be adding to the sum total of generosity and motivation to redistribute.

3. COMMODIFICATION.

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

The commodification issue is basically an objection not to property in general, but to a particular feature of property rights, that is, alienability, and especially alienability through sale.³⁷ Some things, it is said, should not be treated as marketable property, available for purchase by the highest bidder.

As an aside, however, it should be observed that a considerable amount of property in the world is not alienable, not because of moral objections but because the distribution of property rights make alienation impracticable. The reason is complexity: large numbers of overlapping rights in any given thing generally mean that this thing is unlikely ever to be traded. The reason

³⁶Ellickson, Property in Land

³⁷note that Margaret Radin, a leading scholar in area, describes issue as accruing to “market alienability,”

is because the costs of finding all the owners and getting their consent precludes trade. Overlapping rights can be a curse, as in the “tragedy of the anticommons,” where the number and complexity of rights precludes commercial development of assets that are plainly adapted to commercial uses, like storefronts in post-Soviet Moscow,³⁸ or where overly complex property rights impede socially beneficial free availability, as in the intellectual “proptertization” of scientific research or artistic productions.³⁹ On the other hand, complex rights can also have some uses. They are prevalent in many small-scale subsistence or community-resource-based economies, e.g. in pre-colonial New Zealand agriculture⁴⁰ or in the medieval common fields regimes.⁴¹ In those close-knit groups, complexity may be favored by the participants because it acts as a guarantor of regime stability: it is hard for outsiders to buy in, and for insiders to sell out, and any exchanges that occur will be limited to exchanges among insiders.⁴²

But modern economies—and their laws—tend to treat alienability as one of the aspects of property, and alienability necessarily much reduces complexity. Trade is a matter of immense importance in modern economies, since trade tends to move resources to those who value them most highly, and since it encourages specialization on an every-wider scale, which vastly increases the total quantity of goods and services available. Hence when something comes to be treated as property, tradability is presumed, at least in modern economies. But in order to be

³⁸Heller

³⁹Heller & Eisenberg; Arti Rai; Lessig; Barbie cases in TM.

⁴⁰Banner

⁴¹Smith, Semi-Commons

⁴²note re Smith: medieval farmers contracted into scattered field systems.

tradeable over wide circles of potential buyers, property must be fairly simple as a legal matter, so that complete strangers have some idea what they are getting. Thus there are many legal doctrines that simplify property rights, even overriding the wishes of the current owners for more delicate arrangements, so that property will indeed be available for alienation--including alienation to total strangers.⁴³ In a wide and commercialized property market, property law acts as an ax that purposely chops out nuances and niceties in the things traded. Too many complications spoil the market.

The formulaic, simplified legal patterns of alienable commercial property are quite distinct from the exchange relations that occur in more close-knit societies. In the latter, everyone knows in detail whatever there is to know about who owns what in the community. Exchanges may indeed be frequent, but they generally take the form of reciprocal gifts; the relative values of these gifts go unstated, but they are implicitly understood by all the participants.⁴⁴ Gift exchange cements community bonds—from a community of two on up—keeping all the participants in a vague but nevertheless socially and emotionally charged condition of mutual give-and-take.

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

⁴³Rose, *Govt & prop. rts*; Smith & Merrill, *Numerus Clausus*.

⁴⁴Ellickson *re Shasta*; Mauss *re “interest” on gifts*.

commodification subjects are often those in which we commonly find a high level of personal or emotional content. For example, according to some common anticommodification claims, you might give your mother's wedding ring to your daughter, but it is a horrible loss to have to sell it to a pawnbroker, who might re-sell it to anyone at all. You might give your kidney to your brother, but you would only sell a kidney to a stranger under the direst threat of poverty; moreover, your doing so might de-value and discourage the altruistic donation of a kidney by a third party. You freely exchange sexual favors with your lover, but it is a violation of human dignity to sell sexual services, and doing so cheapens sexuality more generally. So goes the argument: commodification coarsens subjects where intimacy and generosity are important, and it reduces our ability even to understand their value. In that sense, property—at least alienable property—corrupts the moral subject.

The philosopher Michael Sandel has been particularly adamant about the dangers of commodification, and particularly about the way that commodification can corrupt the moral subject, who comes to misjudge and devalue things that should at most be exchanged as gifts.⁴⁵ He has also raised a related corruption issue about the burgeoning use of property-like institutions in public regulation, arguing that these undermine civic consciousness. For example, he has opposed emission trades in connection with air pollution control, trades that allow high-cost polluters to meet their cleanup obligations by paying someone else (presumably someone with low prevention costs) to do the cleanup instead. The intuition behind emission trading is to reduce overall pollution at the lowest cost, without respect to exactly where the pollution reduction occurs and who actually does the reduction. But in Sandel's view, this market

⁴⁵Sandel, AAAS piece.

arrangement corrupts the purchaser, because it permits her to do something that is wrong simply because she buys the right. This corruption spreads to other people as well: the purchase of a “right to pollute” sends the wrong message about the wrongfulness of pollution, and undermines those who would try to do the right thing by reducing pollution as much as possible.⁴⁶

There are several responses to these anticommodification arguments, however. To begin with the more intimate subjects, there is a certain prissiness about the claim, say, that sexuality is best experienced in a situation of love and caring. Perhaps that is true for some people (even most people), but there are some out there who like their sex a whole lot edgier, and the desired edginess might well include domination, humiliation, and yes, buying and selling.⁴⁷ Even putting to one side kinky preferences of this sort, however, there are others who strongly resent public interference their choices about intimate matters, e.g. acquiring reproductive materials. Gays and lesbians, long shut out by the tsk-tsk mother-hen regulations of adoption and surrogacy, may well find the market a refreshing and liberating alternative.⁴⁸

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

⁴⁶Sandel, editorial.

⁴⁷Franke

⁴⁸Ertman

solution would be to take these frailties into account and try to make the best of them. What would that mean? It would mean taking seriously the prostitute's property in her body and her contractual interests of dealing with it. That is to say, it would make sure that her contracts are enforceable and (most important) that she gets paid. Otherwise she may have to use a pimp for enforcement, and/or pay off corrupt cops, and she may find it a whole lot more difficult and more time-consuming to get out of "the trade," supposing that she wishes to do so. Illegalizing the sale of sexual services makes her much more vulnerable to these kinds of individuals, encouraging their overreaching and her dependency, hardly a scenario for moral uplift. Illegality has of course been the choice of many jurisdictions, though one might well doubt its humanness, and one might certainly doubt whether such choices lead to enhanced welfare for any of the concerned parties. Even Thomas Aquinas thought legality the better route, largely for second-best reasons.⁴⁹

It is at this juncture that the usual second-best considerations—doing well in the long run, even at the cost of some concession to human frailty—begin to raise a moral claim of their own vis-a-vis the first-besters. Where does the superior moral position really lie? Pushing even further, and really insisting on a first-best solution—that no sex should occur outside a loving relationship—could mean that the prostitute starves to death. The same may be said of those who sell kidneys and other body parts. How moral is this? That question, by the way, is no doubt one reason why one of the more sober anti-commodificationists, Margaret Radin, thinks that there can be no serious anticommodification position without a commitment to welfare.⁵⁰

⁴⁹Thomas Aquinas, *Essential Political Writings* GET CITE

⁵⁰Radin, M-I.

In a second-best moral universe, the welfare solution could have considerable appeal, since it at least it recognizes the prostitute or kidney-seller as a property-holding agent, who has to be paid off for doing something different with her property than what she had in mind. Of course, those who pay the tab might be concerned about the impact on incentives; too large transfer payments might even encourage some to threaten sales for the sake of the expected payoff. Donors could well give generously to these laudable ends, but they do not want to be suckers. As usual, the second-best moral subjects presumed by property are capable of thoughtful and cooperative activity, but they respond to incentives; what is more, they know that others do as well, and they think it is asking for trouble to forget it. Sale of intimate goods thus take on a rather different hue when seen through the lens of property as a second-best morality: considerably more sympathy for those who trade in these goods, considerably less sympathy for the effort to suppress them, and some interest in the welfare-buy-out option along with some scepticism about its efficacy.

Although the context is very different, there are some similar second-best considerations about the anticommodification position when the issue comes to the use of finite resources, as in clean air. No doubt the moral stricture against polluting would be a good thing if it were costless to halt pollution. But as with the curtailment of prostitution or kidney sales, there are costs, even though they may not be so searingly personal. Where the no-pollution option has real costs – e.g. making electricity prohibitively expensive or even impossible – it is questionable whether a strictly “moral” anti-pollution position is very sensible. Polluting activities do damage social welfare, but it would be impossible to have some good things without them – electricity for refrigeration for foods and medicines, lights for libraries, and many, many

other good things. Considered only from the perspective of pollution vel non, the first best moral ideal would presumably be no pollution at all; but from a wider perspective, no pollution would cost a great deal. Left to herself, That Kind of Girl just isn't that good.

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

What is really under discussion here, then, is the kind of entitlement that will most efficaciously keep a necessary evil within some kind of boundaries. There are certainly property regimes that insist that actors behave in the ways that Sandel suggests. In nuisance law or riparian law, everyone is supposed to behave "reasonably," which generally means that each can act in a way that is compatible with like activities of everyone else. But regimes of this sort are often associated with high transactions costs among the participants. Where transactions become less costly, the parties start to cut deals.⁵¹ Why? because there are gains from trade: the low value water user can trade his "reasonable" diversion rights to the higher value user, and both are better off. Tradeable emission permits lower the cost of trades by defining property rights, and once that is done, it certainly appears that there can be gains from trade here too, with lower-cost pollution preventers selling permits to higher-cost preventers, while the rest of us come out with less pollution and at a lower total social cost.

OK, OK, maybe pollution trading can reduce more pollution for less money, but is that

⁵¹ cite trading in water diversions among riparians.

good enough to justify the moral degradation of the participants? An important question here, however, is whether there really is much of a moral loss. Undoubtedly there is some loss, under some circumstances--or at least the claim is arguable. In a much-cited study of an Israeli daycare center, it appeared that parents were leaving their children too late, much to the distress of the staff, who wanted to get home on time themselves. When the staff instituted a fine for laggards, however, the parents began to regard the arrangement as a fee for service, and they left the kids late even more often.⁵²

That Kind of Girl, however, might see a different opportunity here: why not take the money from fines (or fees), hire an baby sitter to stay late with the kids, and make everybody happy while creating a new job for someone? Would it be better if all the parents did the right thing? Well, maybe. But if they don't, enlightened self-interest might be able to come up with satisfactory solutions. First-best actors could enjoy their halos, but they would miss out on some opportunities, e.g. providing a job for somebody else.

But there is a more important point: it is not altogether clear that people do in fact respond worse to fees-for-service than they do to expectations of what might be thought to be "good" behavior. Industries have long griped and moaned under the requirements of command-and-control environmental legislation, a variant on the stricture that everyone should do the right thing. Even putting to one side the expense and misdirection of some command-and-control regulations,⁵³ industrialists' evasions and prevarications about these controls are not a thing of moral beauty. Using an example from the express "diamond" lanes of a California highway,

⁵²Dan Kahan, get original from his "social meaning."

⁵³cite Amoco study

Lior Strahelivitz has interestingly described the normative response of motorists a change from command-and-control to market mechanisms. When the rules permitted only multiple-passenger vehicles to use the express lanes, cheating and resentment was rampant among motorists. But cheating dropped precipitously when the system changed, and when drivers were simply charged extra to use the fast lane. Apparently both those who paid and those who did not thought that the allocation was fair: you pays your money and you gets your lane. And by the way, the money could be used for transportation improvement, or even environmental protection. Is this immoral? perhaps for the Utopian, but not necessarily for That Kind of Girl.

Conclusion

The California highway experience suggests a more general point about anti-commodification and anti-property claims: even though for the sake of getting on with things, property regimes may overlook some lacunae in the justification of entitlements, nevertheless, in many or perhaps most instances, people think property arrangements and markets are fair. Indeed, the Christian tradition of the “fair price” used the market price as a normal gauge.⁵⁴ Most people do not behave with their property, or in markets, in the cold, calculating and utterly self-serving ways that anticommodificationists and more general anti-property theorists suggest. If they did, markets would not last very long, and property probably would not either. People have to accept property for it to work in any meaningful way. And very often, they do, relieving owners of the onerous necessity to guard their things all the time. Whatever the lapses, property regimes generally mediate issues of resource use and discourage feuds while encouraging trades

⁵⁴Gordley, *Equality in Exchange*.

instead. As to trade, people meet others in market relationships; they learn to trust one another and to behave in trustworthy ways, and out of those relationships of trust they can develop general habits of civility and more specific friendships, sometimes quite remarkable ones.⁵⁵

Property accepts people as they generally are—self-interested, to be sure, but capable of cooperation—and of course it leverages both traits into productive activity.

By contrast, it is the Utopian, first-best demand—for an insistence on sharing and concomitantly severe limitations on property-- that puts inordinate strains on That Kind of Girl. As a result, while there are some utopian successes (like monasteries), the history of utopian experiments is littered with moral failure and sometimes great cruelty. Shops in socialist regimes are renowned for the rudeness and indifference of their personnel. Why should they care? They get nothing from good behavior. The Anabaptists at Muenster fell into mutual recriminations, and they ultimately betrayed and killed one another. Perhaps the greatest of all utopian experiments was the old Soviet Union, and according to one eminent Soviet historian, Richard Pipes, the experiment led to unprecedented listlessness, arbitrariness, corruption, and moral slackness.⁵⁶

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

⁵⁵Kollock article re market experiments

⁵⁶Pipes

Prisoners' Dilemmas, but generous enough to get herself out of them when dealing with a similarly generous counterpart.

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